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CASES

ON

THE LAW OF EVIDENCE

SELECTED FROM DECISIONS OF

ENGLISH AND AMERICAN COURTS

BY EDWARD W. HINTON

PROFESSOR OF LAW IN THE UNIVERSITY OF CHICAGO

AMERICAN CASEBOOK SERIES

WILLIAM R. VANCE
GENERAL EDITOR

ST. PAUL
WEST PUBLISHING COMPANY
1919

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THE AMERICAN CASEBOOK SERIES

THE first of the American Casebook Series, Mikell's Cases on Criminal Law, issued in December, 1908, contained in its preface an able argument by Mr. James Brown Scott, the General Editor of the Series, in favor of the case method of law teaching. Until 1915 this preface appeared in each of the volumes published in the series. But the teachers of law have moved onward, and the argument that was necessary in 1908 has now become needless. That such is the case becomes strikingly manifest to one examining three important documents that fittingly mark the progress of legal education in America. In 1893 the United States Bureau of Education published a report on Legal Education prepared by the American Bar Association's Committee on Legal Education, and manifestly the work of that Committee's accomplished chairman, William G. Hammond, in which the three methods of teaching law then in vogue—that is, by lectures, by text-book, and by selected cases—were described and commented upon, but without indication of preference. The next report of the Bureau of Education dealing with legal education, published in 1914, contains these unequivocal statements:

"To-day the case method forms the principal, if not the exclusive, method of teaching in nearly all of the stronger law schools of the country. Lectures on special subjects are of course still delivered in all law schools, and this doubtless always will be the case. But for staple instruction in the important branches of common law the case has proved itself as the best available material for use practically everywhere. * * * The case method is to-day the principal method of instruction in the great majority of the schools of this country."

But the most striking evidence of the present stage of development of legal instruction in American Law Schools is to be found in the special report, made by Professor Redlich to the Carnegie Foundation for the Advancement of Teaching, on "The Case Method in American Law Schools." Professor Redlich, of the Faculty of Law in the University of Vienna, was brought to this country to make a special study of methods of legal instruction in the United States from the standpoint of one free from those prejudices necessarily engendered in American teachers through their relation to the struggle for supremacy so long, and at one time so vehemently, waged among the rival systems. From this masterly report, so replete with brilliant analysis and discriminating comment, the following brief extracts are taken. Speaking of the text-book method Professor Redlich says:

"The principles are laid down in the text-book and in the professor's lectures, ready made and neatly rounded, the predigested essence

of many judicial decisions. The pupil has simply to accept them and to inscribe them so far as possible in his memory. In this way the scientific element of instruction is apparently excluded from the very first. Even though the representatives of this instruction certainly do regard law as a science—that is to say, as a system of thought, a grouping of concepts to be satisfactorily explained by historical research and logical deduction—they are not willing to teach this science, but only its results. The inevitable danger which appears to accompany this method of teaching is that of developing a mechanical, superficial instruction in abstract maxims, instead of a genuine intellectual probing of the subject-matter of the law, fulfilling the requirements of a science."

Turning to the case method Professor Redlich comments as follows:

"It emphasizes the scientific character of legal thought; it goes now a step further, however, and demands that law, just because it is a science, must also be taught scientifically. From this point of view it very properly rejects the elementary school type of existing legal education as inadequate to develop the specific legal mode of thinking, as inadequate to make the basis, the logical foundation, of the separate legal principles really intelligible to the students. Consequently, as the method was developed, it laid the main emphasis upon precisely that aspect of the training which the older text-book school entirely neglected—the training of the student in intellectual independence, in individual thinking, in digging out the principles through penetrating analysis of the material found within separate cases; material which contains, all mixed in with one another, both the facts, as life creates them, which generate the law, and at the same time rules of the law itself, component parts of the general system. In the fact that, as has been said before, it has actually accomplished this purpose, lies the great success of the case method. For it really teaches the pupil to think in the way that any practical lawyer—whether dealing with written or with unwritten law—ought to and has to think. It prepares the student in precisely the way which, in a country of case law, leads to full powers of legal understanding and legal acumen; that is to say, by making the law pupil familiar with the law through incessant practice in the analysis of law cases, where the concepts, principles, and rules of Anglo-American law are recorded, not as dry abstractions, but as cardinal realities in the inexhaustibly rich, ceaselessly fluctuating, social and economic life of man. Thus in the modern American law school professional practice is preceded by a genuine course of study, the methods of which are perfectly adapted to the nature of the common law."

The general purpose and scope of this series were clearly stated in the original announcement:

"The General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limi-

tations of the classroom, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest. The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

"The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject. * * * If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief. * * *

"The following subjects are deemed essential in that a knowledge of them (with the exception of International Law and General Jurisprudence) is almost universally required for admission to the bar:

Administrative Law.	Equity Pleading.
Agency.	Evidence.
Bailments.	Insurance.
Bills and Notes.	International Law.
Carriers.	Jurisprudence.
Code Pleading.	Legal Ethics.
Common-Law Pleading.	Partnership.
Conflict of Laws.	Personal Property.
Constitutional Law.	Public Corporations.
Contracts.	Quasi Contracts.
Corporations.	Real Property.
Criminal Law.	Sales.
Criminal Procedure.	Suretyship.
Damages.	Torts.
Domestic Relations.	Trusts.
Equity.	Wills and Administration.

"International Law is included in the list of essentials from its intrinsic importance in our system of law. As its principles are simple in comparison with municipal law, as their application is less technical,

and as the cases are generally interesting, it is thought that the book may be larger than otherwise would be the case.

"The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the classroom and the needs of the students will furnish a sound basis of selection."

Since this announcement of the Series was first made there have been published books on the following subjects:

Administrative Law. By Ernst Freund, Professor of Law in the University of Chicago.

Agency. By Edwin C. Goddard, Professor of Law in the University of Michigan.

Bills and Notes. By Howard L. Smith, Professor of Law in the University of Wisconsin, and William U. Moore, Professor of Law in the Columbia University.

Carriers. By Frederick Green, Professor of Law in the University of Illinois.

Conflict of Laws. By Ernest G. Lorenzen, Professor of Law in Yale University.

Constitutional Law. By James Parker Hall, Dean of the Faculty of Law in the University of Chicago.

Corporations. By Harry S. Richards, Dean of the Faculty of Law in the University of Wisconsin.

Criminal Law. By William E. Mikell, Dean of the Faculty of Law in the University of Pennsylvania.

Criminal Procedure. By William E. Mikell, Dean of the Faculty of Law in the University of Pennsylvania.

Damages. By Floyd R. Mechem, Professor of Law in the University of Chicago, and Barry Gilbert, of the Chicago Bar.

Equity. By George H. Boke, formerly Professor of Law in the University of California.

Evidence. By Edward W. Hinton, Professor of Law in the University of Chicago.

Insurance. By W. R. Vance, Dean of the Faculty of Law in the University of Minnesota.

Legal Ethics, Cases and Other Authorities on. By George P. Costigan, Jr., Professor of Law in Northwestern University.

Partnership. By Eugene A. Gilmore, Professor of Law in the University of Wisconsin.

Persons (including *Marriage and Divorce*). By Albert M. Kales, of the Chicago Bar, and Chester G. Vernier, Professor of Law in the University of Illinois.

Pleading (Common Law). By Clarke B. Whittier, Professor of Law in Stanford University, and Edmund M. Morgan, Professor of Law in Yale University.

Property (Titles to Real Property). By Ralph W. Aigler, Professor of Law in the University of Michigan.

Property (Personal). By Harry A. Bigelow, Professor of Law in the University of Chicago.

Property (Rights in Land). By Harry A. Bigelow, Professor of Law in the University of Chicago.

Property (Wills, Descent, and Administration). By George P. Costigan, Jr., Professor of Law in Northwestern University.

Property (Future Interests). By Albert M. Kales, of the Chicago Bar.

Quasi Contracts. By Edward S. Thurston, Professor of Law in the University of Minnesota.

Sales. By Frederic C. Woodward, Professor of Law in the University of Chicago.

Suretyship. By Crawford D. Hening, formerly Professor of Law in the University of Pennsylvania.

Torts. By Charles M. Hepburn, Dean of the Faculty of Law in the University of Indiana.

Trusts. By Thaddeus D. Kenneson, Professor of Law in the University of New York.

It is earnestly hoped and believed that the books thus far published in this series, with the sincere purpose of furthering scientific training in the law, have not been without their influence in bringing about a fuller understanding and a wider use of the case method.

The following well-known teachers of law are at present actively engaged in the preparation of casebooks on the subjects indicated below:

Arthur L. Corbin, Professor of Law in Yale University. Subject, *Contracts.*

James Brown Scott, Professor of International Law in Johns Hopkins University. Subject, *International Law.*

A. M. Cathcart, Professor of Law in Stanford University. Subject, *Code Pleading.*

WILLIAM R. VANCE,
General Editor.

OCTOBER, 1919.

AUTHOR'S PREFATORY NOTE

POSSIBLY a brief explanation of the general plan of this collection of cases may be of assistance to students and others who may have occasion to use it.

The topics covered fall into four groups:

First. The respective functions of the judge and jury, and the development of various methods for controlling the action of the jury.

Second. The rules prescribing the qualifications of witnesses and governing their examination when testifying.

Third. Various rules of policy excluding a great deal of evidential material from consideration by the jury.

Fourth. Certain substantive rules, governing the construction and legal effect of contracts, conveyances, and other operative writings, which have long been expressed in terms of evidence.

The first group does not belong to the law of evidence proper, but needs to be understood in order to deal intelligently with the real problems of evidence. It would seem that this furnishes a sufficient reason for including the topics covered in the first chapter, and explains the purpose of placing them at the beginning rather than elsewhere. In this branch of the subject the historical development of the jury trial has had an important bearing on the present state of the law, and for that reason the cases have been selected with a view of tracing in some detail the transition from the older to the modern trial.

In the second group, the rules governing the competency of witnesses have lost much of their practical importance because of modern statutes largely abolishing the common-law disqualifications resulting from lack of religious belief, conviction of crime, interest in the result of the suit, or marital relationship to an interested person. The legislation in question, however, has rarely abolished all of the old law on these points, and in a surprising number of recent cases the court is found applying rules of disqualifications which were developed in the seventeenth and eighteenth centuries.

On this account it appeared advisable to work out the common law on this subject at some length. On the other hand, it was impracticable to treat the statutory modifications in detail because of the lack of uniformity.

Since the rules for witnesses developed and became settled at an earlier period than most of the law of evidence, it appeared desirable to include a number of the earlier cases when the matter was in the process of evolution.

The subject of witnesses has been treated at this place in the work because many of the rules throw a good deal of light on other subjects; e. g., on the hearsay rule.

The third group embraces the various rules of exclusion based on reasons of policy and expediency.

Here it is well to bear in mind two fundamental conceptions worked out by the late Professor James Bradley Thayer: (1) That whatever is offered as evidence must be logically relevant in order to be admissible; e. g., must have a logical bearing on the proposition sought to be established. (2) That whatever is thus logically relevant will be received unless excluded by some rule of policy or precedent.

Professor Thayer was careful to note, however, that what, according to his analysis, are really qualifications or exceptions to the general rule of admissibility, have ordinarily been developed and treated as general rules of exclusion, to which there are many specific exceptions. Thus the hearsay rule has always been thought of as generally excluding that sort of evidence, subject to certain well-defined exceptions. For convenience the subject has been treated from the latter standpoint.

In the field of the excluding rules a compiler finds himself embarrassed by the vast amount of material. Time and space preclude any attempt to treat the various topics exhaustively. It has been found impracticable to do more than select the more important problems arising under the various rules. Here there is much room for difference of opinion, and probably no two instructors would agree in all particulars on what should be selected as more important.

The present compiler has been guided in part by the scope of existing casebooks on the subject, and in part by his own experience during some twenty years of a fairly active general practice. It is hoped that the result may prove reasonably satisfactory.

The last group of subjects involves little that belongs to the law of evidence, but the accepted tradition seems to require that they should be treated in connection with that branch of the law.

Existing casebooks on Contracts, Conveyances, and Wills largely ignore certain difficult problems of construction, and for the lack of suitable collections in these fields the teacher of evidence must continue to deal with them as best he can for the present.

In the preparation of this work it did not appear worth while to incumber it with any extensive citations of cases accord and contra, where it appeared sufficiently important reference has been made to various works and compilations in which the cases have been collected. In conclusion, the compiler of this collection wishes to acknowledge his great indebtedness to the work of Professor James Bradley Thayer and of Professor John H. Wigmore.

E. W. HINTON.

UNIVERSITY OF CHICAGO,
Sept. 1, 1919.

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CASES ON EVIDENCE

CHAPTER I

THE COURT AND THE JURY [1]

SECTION 1.—THE BURDEN OF PROOF

I. The Two Burdens

ALLEN v. HILL.

(Court of Queen's Bench, 1591. Cro. Eliz. 238.)

Ejectione firmæ, for a house in Cornhill, London. Upon a special verdict the case was, Fr. Benson being seised of the house in fee, 4 Eliz., devised it to Agnes his wife for life; and after to the heirs of his body, the remainder to Th. Benson his brother in fee: "Proviso, that if the said Agnes clearly departs out of London, and dwell in the country, that then she shall have a rent out of the said house, etc." And found further, that Francis died without issue, and that Th. Benson, died and that R. is his heir; and that afterwards, 15 Eliz., Agnes totaliter departed from London, and went to Milton in Suffolk. And after the said R. before entry made by him and the executor of Francis released to Agnes; and afterwards entered, and let to the plaintiff; and that Agnes married one Huggins; and the defendant entered by his commandment. The substance of the matter was, If this Proviso does determine the estate before entry? for if so, she was tenant at sufferance, and the release could not inure to her es-

[1] The subject-matter of this chapter is not strictly a part of the law of evidence, but belongs rather to the larger topic of trial procedure. The law of evidence proper consists of a body of rules prescribing what matter may, or may not, be received to establish any given proposition of fact. It is not directly concerned with the procedural steps to bring such material before the tribunal, or with determining which party has the burden of producing it, or how the various questions may be apportioned between the judge and the jury.

The law of evidence, in the main, is made up of excluding rules which prevent the use of much relevant material, largely because it is thought to be inadvisable to trust a jury with it.

This analysis would seem to require that a course on evidence should be confined to a study of these excluding rules, leaving the various introductory matters to some course on procedure. In the opinion of the editor, however, such a restriction would not be desirable because of the difficulty of understanding this body of excluding rules out of their natural setting, and without considering the machinery which gave rise to them.

tate: for it was agreed, it was a good Proviso to make her estate to determine; although there be no words "to cease," or "that it shall be void"; but being in a will, it is implied in the words, "that then she shall have a rent"; which cannot be if her estate be not determined.

The Justices said, she is but tenant at sufferance; for if the devise had been express, that if she doth such an act her estate shall cease; and after such a act done, though she continue in possession, and dieth, this is no freehold in her; and here is as much in substance. And Wray said, it was held at an assembly of all the Justices, that if tenant pur auter vie continue in possession after the death of cestui a que vie, he is but tenant at sufferance, and his discent shall not take away an entry; which Gawdy agreed, and that 18 Edw. 4, pl. 25, is not law.

But there was a default in their verdict; for it was found that she totaliter departed from London, and went to Milton in Suffolk; but it was not found that she dwelt out of London; and this is part of the condition: and this not being found, it is not found that the condition is broken; and then, notwithstanding any matter found, the entry of the defendant is lawful. And it was moved, that as to it a venire facias de novo should issue to examine this point better, if she dwelt in the country; for it is said in this point, the verdict was not well examined. But the Court held, that the verdict is full, upon which a judgment might be given, and then no venire facias de novo is to be awarded; for it is found for the defendant, when it is not [2] found that the condition is broken; and for this cause only it was adjudged for the defendant.

But then it was objected, that the life of Agnes was not found, and then the defendant cannot enter. Fenner said, it shall be intended she is living; for the jury did not doubt of it; for they find, that if his entry upon the matter found is lawful, that he is not guilty: so they doubted nothing on that point; and so it was adjudged in 28 Eliz. in this court. And judgment was, quod querens nihil capiat per billam.

[2] Willes, L. C. J., in Mayor v. Lambert, Willes, 111 (1738): "It was said indeed in the present case that it is not found that there was no consideration, but only that there was no consideration proved: but 'de non apparentibus et de non existentibus eadem est ratio.' Besides this negative need not have been found at all; for though of late years such negatives have been sometimes found, no such negatives were ever found in old special verdicts, except where it was necessary to shew that the person or thing did not come within a particular exception; as in the present case it was proper to find that the defendant was not a burgess or freeman; otherwise what was not found was always taken not to be proved." See, also, Marten v. Jenkin, 2 Strange, 1145 (1741), where the special verdict failed to find a fact necessary to the defense; Hook v. Pagee, 2 Munf. (Va.) 379 (1811).

GRAVES v. SHORT.

(Court of Queen's Bench, 1598. Cro. Eliz. 616.)[3]

Error of a judgment in the Common Pleas in a formedon. The errors assigned were, first, in fait. That the parties being at issue, whether a feoffment were made, &c. and the jurors at the Nisi Prius being gone together to confer, &c. William Malevory, one of the jurors, showed to the residue of the jurors an escrow in writing pro petentibus quod non fuit dat, in evidence per partes prædictas, per quod they found the verdict for the demandant. Upon this error assigned it was demurred in law. And, after argument at the Bar, the Court resolved, that it was not any error, nor could be alledged for error; for it doth not appear, that it was evidence given to the juror by any of the parties, or by any other in behalf of the plaintiff; but it shall be intended, that he showed it of himself; and that it was a piece of evidence which he had about him before, and showed it to inform himself and his fellows. And as he might declare it as a witness, that he knew it to be true, so he might show any thing which he knew:[4] and therefore it is not like to 11 Hen. 4, pl. 33, and 35 Hen. 6, title "Examination." * * *

Judgment affirmed.

WATTS v. BRAINS.

(Court of Queen's Bench, 1600. Cro. Eliz. 778.)

The plaintiff brought an appeal of murder for the death of her husband; to which the defendant pleaded not guilty. Upon evidence at the Bar it appeared, that two days before her husband's death, he and the defendant fighting, upon a quarrel then betwixt them, the defendant was hurt in that fray; and the third day after, the plaintiff's husband passing by the defendant's shop, the defendant pursued him suddenly, and the husband's back being towards him, so as he perceived him not, the defendant struck him upon the calf of his leg, whereof he instantly died. The defendant to excuse himself affirmed, that he who was slain, when he came by his shop, smiled upon him, and wryed his mouth at him, and therefore, for this mocking of him, he pursued him. It was much inforced by the defendant's counsel, that

[3] Part of the case is omitted.

[4] Holt, C. J., in Wright v. Crump, 7 Mod. 1 (1702): "If a jury give a verdict upon their own knowledge, they ought to tell the court so; but the fair way has been, for such of the jury as had knowledge of the matter, before they are sworn, to tell the thing to the court, and be sworn as a witness." For the practice of swearing a juror as a witness, see Dunbar v. Parks, post, 207. That the jury could not receive information privately from mere witnesses, see Metcalfe v. Deane, Cro. Eliz. 189 (1590), post, 205, where a new trial was awarded because of such misconduct.

it was a new cause of quarrel; and so the stroke is not upon any precedent malice, and therefore it is not murder. But all the Court severally delivered their opinions, that if one make a wry or distorted mouth, or the like countenance upon another, and the other immediately pursues and kills him, it is murder: for it shall be presumed to be malice precedent; and that such a slight provocation was not sufficient ground or pretence for a quarrel; and so delivered the law to the jury, that it was murder, although what the defendant pretended had been true.

Whereupon the jury going from the Bar, notwithstanding the evidence was pregnant against the defendant, eight of them agreed to find him not guilty; but the other four withstood them, and would not find it but to be murder. On the next day morning, two of the four agreed with the eight, to find him not guilty; and afterwards the other two consented in this manner, that they should bring in and offer their verdict not guilty; and if the Court disliked thereof, that then they all should change the verdict, and find him guilty. Upon this agreement they came to the Bar, and the foreman pronounced the verdict, that the defendant was not guilty. The Court much misliking thereof, being contrary to their direction, examined every one of them by the poll, whether that was his verdict? and ten of the first part of the pannel severally affirmed their verdict, that the defendant was not guilty; but the two last affirmed how they agreed, and discovered the whole manner of their agreement: whereupon they were sent back again, and returned, and found the defendant guilty.

For this practice, Harris, the foreman, was afterwards fined 100 marks; and the other seven, who agreed with him at the first, every of them was fined £40. The other two, who agreed with the eight, although they affirmed that it was because they could not endure or hold out any longer, yet because they did not discover the practice, being examined by poll, but affirmed the verdict, they were fined each of them at £20. and all of them imprisoned. The other two were dismissed, yet blamed for such a manner of consenting in abuse of the Court. And afterwards the defendant was adjudged to be hanged.

SLADE'S CASE.

(Court of King's Bench, 1648. Style, 138.)

The Court was moved for judgment formerly stayed upon a certificate made by Baron Atkins, that the verdict passed against his opinion. BACON, Justice, said, judgments have been arrested in the Common Pleas, upon such certificates. Hales, of counsel with the defendant, prayed, that this judgment might be arrested, and that there might be a new trial, for that it hath been done heretofore in like cases. But ROLL, Justice, held, it ought not to be stayed, though it

have been done in the Common Pleas, for it was too arbitrary for them to do it, and you may have your attaint [5] against the jury, and there is no other remedy in law for you; but it were good to advise the party

[5] "A Writ of Attaint: which lieth to inquire whether a jury of twelve men gave a false verdict; that so the judgment following thereupon may be reversed: and this must be brought in the lifetime of him for whom the verdict was given, and of two at least of the jurors who gave it. This lay, at the common law, only upon writs of assise; and seems to have been coeval with that institution by king Henry II at the instance of his chief justice Glanvil: being probably meant as a check upon the vast power then reposed in the recognitors of assise, of finding a verdict according to their own personal knowledge, without the examination of witnesses. And even here it extended no farther than to such instances, where the issue was joined upon the very point of assise (the heirship, disseisin, etc.) and not on any collateral matter; as villenage, bastardy, or any other disputed fact. In these cases the assise was said to be turned into an inquest or jury, (assisa vertitur in juratem) or that the assise should be taken in modum juratæ et non in modum assisæ; that is, that the issue should be tried by a common jury or inquest, and not by recognitors of assise: and then I apprehend that no attaint lay against the inquest or jury that determined such collateral issue. Neither do I find any mention made by our ancient writers, of such a process obtaining after the trial by inquest or jury, in the old Norman or feodal actions prosecuted by writ of entry. Nor indeed did any attaint lie in trespass, debt, or other action personal, by the old common law: because those were always determined by common inquests or juries. At length the statute of Westm. I, 3 Edw. I, c. 38, allowed an attaint to be sued upon inquests, as well as assises, which were taken upon any plea of land or of freehold. But this was at the king's discretion, and is so understood by the author of Fleta, a writer contemporary with the statute; though Sir Edward Coke seems to hold a different opinion. Other subsequent statutes introduced the same remedy in all pleas of trespass, and the statute 34 Edw. III, c. 7, extended it to all pleas whatsoever, personal as well as real; except only the writ of right, in such cases where the mise or issue is joined on the mere right, and not on any collateral question. For, though the attaint seems to have been generally allowed in the reign of Henry the Second, at the first introduction of the grand assise (which at that time might consist of only twelve recognitors), yet subsequent authorities have holden, that no attaint lies on a false verdict given upon the mere right, either at common law or by statute; because that is determined by the grand assise, appealed to by the party himself, and now consisting of sixteen jurors.

The jury who are to try this false verdict must be twenty-four, and are called the grand jury; for the law wills not that the oath of one jury of twelve men should be attainted or set aside by an equal number, nor by less indeed than double the former. * * * And he that brings the attaint can give no other evidence to the grand jury, than what was originally given to the petit. For as their verdict is now trying, and the question is whether or no they did right upon the evidence that appeared to them, the law adjudged it the highest absurdity to produce any subsequent proof upon such trial, and to condemn the prior jurisdiction for not believing evidence which they never knew. But those against whom it is brought are allowed, in affirmance of the first verdict, to produce new matter; because the petit jury may have formed their verdict upon evidence of their own knowledge, which never appeared in court. If the grand jury found the verdict a false one, the judgment by the common law was, that the jurors should lose their liberam legem and become forever infamous; should forfeit their goods and the profits of their lands; should themselves be imprisoned, and their wives and children thrown out of doors; should have their houses razed, their trees extirpated, and their meadows ploughed; and that the plaintiff should be restored to all that he lost by reason of the unjust verdict. But as the severity of this punishment had it's usual effect, in preventing the law from being executed, therefore by the statute 11 Hen. VII, c. 24, revived by 23

to suffer a new trial for better satisfaction. And let the defendant take four days from hence to speak in arrest of judgment if the postea be brought in, if not, then four days from the time it shall be brought in.

FITZ-HARRIS v. BOIUN.

(Court of King's Bench, 1662. 1 Lev. 87.)

Error of a judgment in the Palace Court in assumpsit, where to prove the consideration, an arrest was to be proved by the plaintiff; and for that he did not produce the writ, the defendant demurred on the evidence; and thereupon judgment was given for the plaintiff; and now to reverse the judgment it was said for the plaintiff in error, that the King's writs are matters of record, and are not to be proved but by themselves; and it was agreed by the Court that the writ ought to have been produced in evidence, but by the demurrer it is confessed, the arrest being matter of fact, though it be to be proved by a matter of record, and the jury might of their own knowledge know that there was a writ, Dyer 239. Plowd. Com. Scholastica's case. And by the demurrer on the evidence, all matters of fact are confessed that the jury could know of their own conusance; and the judgment was affirmed.

ANONYMOUS.

(Court of King's Bench, 1665. 1 Keb. 864.)

Ex motione recordatoris Wild, the Court on certificate of a Judge, that verdict was given contrary to evidence, would not allow the sheriff should bring in the book of freeholders to the Secondary, for the ill example; but ordered the sheriff should retorn a good jury in the new trial. HYDE, Chief Justice, conceived jurors ought to be fined if

Hen. VIII, c. 3, and made perpetual by 13 Eliz. c. 25, an attaint is allowed to be brought after the death of the party, and a more moderate punishment was inflicted upon attainted jurors; viz. perpetual infamy, and, if the cause of action were above £40. value, a forfeiture of £20. apiece by the jurors; or, if under £40., then £5. apiece; to be divided between the king and the party injured. So that a man may now bring an attaint either upon the statute or at common law, at his election; and in both of them may reverse the former judgment. But the practise of setting aside verdicts upon motion, and granting new trials, has so superseded the use of both sorts of attaints, that I have not observed any instance of an attaint in our books, much later than the sixteenth century. By the old Gothic constitution indeed, no certificate of a judge was allowed in matters of evidence; to countervail the oath of the jury: but their verdict, however erroneous, was absolutely final and conclusive. Yet there was a proceeding, from whence our attaint may be derived. If, upon a lawful trial before a superior tribunal, they were found to have given a false verdict, they were fined, and rendered infamous for the future." 3 Blackstone's Commentaries, 402.

they would go against the hare and direction, take bit in mouth and go headstrong against the Court; and said, that by the grace of God he would have it tried, seeing the attaint is now fruitless.[6]

BUSHELL'S CASE.

(Court of Common Pleas, 1670. Vaughan, 135.)

To a writ of habeas corpus the sheriff returned that the prisoners were held under an order fining and committing them as members of a jury for acquitting Penn and Mead on a charge of unlawful assembly, against the manifest evidence and contrary to the direction of the court in matter of law.[7]

The CHIEF JUSTICE [VAUGHAN]: We come now to the next part of the retorn, viz. That the jury acquitted those indicted against the direction of the court in matter of law, openly given and declared to them in court.

1. The words, That the jury did acquit against the direction of the court in matter of law, literally taken, and de plano, are insignificant, and not intelligible; for no issue can be joined of matter in law, no jury can be charged with the trial of matter in law barely, no evidence ever was, or can be given to a jury of what is law or not; nor no such oath can be given to, or taken by a jury, to try matter in law, nor no attaint can lie for such a false oath.

Therefore we must take off this veil and color of words, which make a show of being something, and in truth are nothing.

If the meaning of these words, finding against the direction of the court in matter of law, be, that if the judge, having heard the evidence given in court, (for he knows no other) shall tell the jury upon this evidence. The law is for the plaintiff, or for the defendant, and you are under the pain of fine and imprisonment to find accordingly, then the jury ought of duty so to do: Every man sees that the jury is but a troublesome delay, great charge, and of no use in determining right and wrong, and therefore the trials by them may be better abolished than continued; which were a strange new-found conclusion, after a trial so celebrated for many hundreds of years.

For if the judge, from the evidence, shall by his own judgment first resolve upon any trial what the fact is, and so knowing the fact, shall

[6] This practice of granting a new trial did not become well established until somewhat later. Martyn v. Jackson, 3 Keb. 398 (1675): "Ex motione Sytherfield for a new trial on parol affirmation of Hale, Chief Justice, to Rainsford, Justice, that the trial was against evidence. Twisden and Wild refused to grant it, the jury being judges of the fact, though verdict be against evidence, it's not to be set aside without a new law; contra by Rainsford, 2 Bulstr. 222, 224 (1614). Juries are wilful enough, and denying new trial here, will but send parties into the chancery, yet new trial was denied." For an application to the Court of Chancery, see Mill v. Wharton, 2 Vern. 378 (1700).

[7] Statement condensed and parts of opinion omitted.

then resolve what the law is, and order the jury penally to find accordingly: what either necessary or convenient use can be fancied of juries, or to continue trials by them at all: * * *

But no case can be offered, either before attaints granted in general, or after, that ever a jury was punished by fine and imprisonment by the judge, for not finding according to their evidence and his direction, until Popham's time; nor is there clear proof that he ever fined them for that reason, separated from other misdemeanor. If juries might be fined in such case before attaints granted, why not since? For no statute hath taken that power from the judge. But since attaints granted, the judges resolved they cannot fine where the attaint lies, therefore they could not fine before. Sure this latter age did not first discover that the verdicts of juries were many times not according to the judges opinion and liking.

But the reasons are, I conceive, most clear, that the judge could not, nor can, fine and imprison the jury in such cases.

Without a fact agreed, it is as impossible for a judge or any other to know the law relating to that fact, or direct concerning it, as to know an accident that hath no subject.

Hence it follows, that the judge can never direct what the law is in any matter controverted, without first knowing the fact; and then it follows, that without his previous knowledge of the fact, the jury cannot go against his direction in law, for he could not direct.

But the judge, qua judge, cannot know the fact possibly, but from the evidence which the jury have, but (as will appear) he can never know what evidence the jury have, and consequently he cannot know the matter of fact, nor punish the jury for going against their evidence, when he cannot know what their evidence is.

It is true, if the jury were to have no other evidence for the fact, but what is deposed in court, the judge might know their evidence, and the fact from it, equally as they, and so direct what the law were in the case, though even then the judge and jury might honestly differ in the result from the evidence, as well as two judges may, which often happens.

But the evidence which the jury have of the fact is much other than that: for,

1. Being returned of the vicinage whence the cause of action ariseth, the law supposeth them thence to have sufficient knowledge to try the matter in issue (and so they must), though no evidence were given on either side in court; but to this evidence the judge is a stranger.

2. They may have evidence from their own personal knowledge, by which they may be assured, and sometimes are, that what is deposed in court is absolutely false; but to this the judge is a stranger, and he knows no more of the fact than he hath learned in court, and perhaps by false depositions, and consequently knows nothing.

3. The jury may know the witnesses to be stigmatised and infamous, which may be unknown to the parties, and consequently to the court.

4. In many cases the jury are to have view necessarily, in many by consent, for their better information; to this evidence likewise the judge is a stranger.

5. If they do follow his direction, they may be attainted, and the judgment reversed, for doing of that which if they had not done they should have been fined and imprisoned by the judge, which is unreasonable.

6. If they do not follow his direction, and be therefore fined, yet they may be attainted, and so doubly punished by distinct judicatures for the same offence, which the common law admits not. * * *

7. To what end is the jury to be returned out of the vicinage whence the cause of action ariseth? To what end must hundredors, be of the jury, whom the law supposeth to have nearer knowledge of the fact than those of the vicinage in general? To what end are they challenged so scrupulously to the array and poll? To what end must they have such a certain freehold, and be probi et legales homines, and not of affinity with the parties concerned? To what end must they have in many cases the view, for their exacter information chiefly? To what end must they undergo the heavy punishment of the villanous judgment, if after all this they implicitly must give a verdict by the dictates and authority of another man, under pain of fines and imprisonment, when sworn to do it according to the best of their own knowledge?

A man cannot see by another's eye, nor hear by another's ear, no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning; and though the verdict be right the jury give, yet they being not assured it is so from their own understanding, are foresworn, at least in foro conscientiæ.

9. It is absurd a jury should be fined by the judge for going against their evidence, when he who fineth knows not what it is, as where a jury find without evidence in court of either side, so if the jury find upon their own knowledge; as the course is if the defendant plead solvit ad diem to a bond proved, and offers no proof, the jury is directed to find for the plaintiff, unless they know payment was made of their own knowledge, according to the plea.

And it is as absurd to fine a jury for finding against their evidence, when the judge knows but part of it; for the better and greater part of the evidence may be wholly unknown to him; and this may happen in most cases, and often doth, as in Graves and Short's Case. * * *

That decantatum in our books, "Ad quæstionem facti non respondent judices, ad quæstionem legis non respondent juratores," literally taken, is true: For if it be demanded, What is the fact? the judge

cannot answer it; if it be asked, What is the law in the case? the jury cannot answer it.

Therefore the parties agree the fact by their pleading upon demurrer, and ask the judgment of the court for the law.

In special verdicts the jury inform the naked fact, and the court deliver the law; and so is it in demurrers upon evidence, in arrest of judgments upon challenges; and often upon the judges opinion of the evidence given in court, the plaintiff becomes nonsuit, when if the matter had been left to the jury, they might well have found for the plaintiff. * * *

The prisoners were discharged.[8]

ASH v. ASH.

(Court of King's Bench, 1697. Comb. 357.)

Assault, battery, and false imprisonment. The Lady Ash pretended, that her daughter the plaintiff was troubled in mind, and brought an apothecary to give her physick, and they bound her, and would have compelled her to take physick. She was confined but about two or three hours, and the jury gave her £2000. damages.

Sir Barth. Shower moved for a new trial for the excessiveness of the damages.

HOLT, C. J. The jury were very shy of giving a reason of their verdict, thinking they have an absolute despotick power, but I did rectify that mistake, for the jury are to try causes with the assist-

[8] The jury may still make use of a good deal of information not derived from witnesses at the trial. In Com. v. Peckham, 2 Gray (Mass.) 514 (1854), it was announced that "no juror can be supposed to be so ignorant as not to know what gin is." In Lillibridge v. McCann, 117 Mich. 84, 75 N. W. 288, 41 L. R. A. 381, 72 Am. St. Rep. 553 (1898), the court thought no evidence was needed to enable a jury to say that it was dangerous to smoke a pipe in a barn filled with hay. In Graham v. Pennsylvania Co., 139 Pa. 149, 21 Atl. 151, 12 L. R. A. 293 (1891), a case involving what was claimed to be a dangerous station platform, it was said that "every juryman who ever got in or out of a car, or went up or down a flight of steps, was as capable of judging the alleged danger as the witnesses." In Head v. Hargrave, 105 U. S. 45, 26 L. Ed. 1028 (1881), it was said: "So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed; and it was only in that way that they could arrive at a just conclusion. While they cannot act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and to act intelligently, they must, judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry." In Barr v. Kansas City, 105 Mo. 550, 16 S. W. 483 (1891), it was said to be the peculiar province of the jury, in viewing the acts and circumstances, "to measure them by a standard of prudence and care derived from their own experience of what an ordinarily prudent person would have done. * * *"

ance of the Judges, and ought to give reasons when required, that, if they go upon any mistake, they may be set right, and a new trial was granted.[9]

RICH dem. LORD CULLEN et al. v. JOHNSON et al.

(Court of King's Bench, 1740. 2 Strange, 1142.)

In ejectment for mines the plaintiff proved himself lord of the manor, and that he was in possession thereof. But the same witness proving, that the defendants had had possession of the mines above twenty years; the court upon a trial at bar held this no evidence to avoid the statute of limitatjons, there being no entry within twenty years upon the mines, which are a distinct possession, and may be different inheritances: and therefore directed[10] the jury to find for the defendants.

[9] In Smith dem. Dormer v. Parkhurst, Andrews, 315 (1738), it was said by counsel, supporting a rule nisi for a new trial: "As to the objection, that the jury might perhaps go on their own knowledge; this, if allowed, will put an end to the granting a new trial in any case whatsoever, because on such a supposition no verdict can be said to be found against evidence. A jury are by their oaths obliged to go according to evidence, i. e. the evidence given in court: And if a juryman be prepossessed, it is a good cause of challenge; which seems to be proof that a juror ought not to go by his own knowledge. If a juror does indeed know anything material in the cause, he ought to acquaint the court therewith, and be sworn as a witness, that he may be cross-examined. [Anonymous], Far. 2. 1 Salk. 405 [1703]. And otherwise he may go upon insufficient and improper evidence. [Metcalfe v. Deane] Cro. El. 189 [1590]; 2 Hale's Hist. P. C. 306, 307. Supposing therefore that here any of the jury went on their own knowledge, without acquainting the court therewith, it is such a misbehavior as is a sufficient foundation for granting a new trial. In Kitchen and Manwaring (Pas. 12 G. I, in K. B.) a new trial was prayed, because, after the withdrawing of the jury, one of them offered evidence to the others; but it was refused, because Powell, Just., who tried the cause, reported that the verdict was according to evidence; otherwise a new trial would have been granted. It cannot be said with reason (as hath been objected) that the granting a new trial is an imputation of perjury to the jury; for they may well be mistaken as to matter of fact, as the judges (who are sworn as well as jurors) may err in point of law; and their judgments are reversible by writs of error. And as to what has been said, that the granting a new trial may occasion perjury; this is no solid objection, for that the court ought to do right whatever may be the consequence."

[10] In Chichester v. Philips, T. Raymond, 404 (1680), a bill of exceptions was taken to the refusal of the judge to direct that a record was conclusive, but it was held that the party should have demurred to the evidence. In Wilkinson v. Kitchin, 1 Ld. Raymond, 89 (B. R. 1697), the following statement appears: "And afterwards it being proved in this case that the defendant confessed that he had disposed of this money in bribes, the jury by direction (of Lord Holt) gave a verdict for the plaintiff." The same year (1697) in Ash v. Ash, Comb. 357, Lord Holt denied the "despotic power" of a jury, and granted a new trial. But it seems rather improbable that he gave a peremptory direction in the Wilkinson Case to find for the plaintiff on oral proof of an admission by the defendant, though at that period peculiar notions prevailed as to the binding effect of confessions. Five years later, in Wright v. Crump, 7 Mod. 1, he apparently concedes the power of the

COCKSEDGE v. FANSHAW.

(Court of King's Bench, 1779. 1 Doug. 118.)

This was an action for money had and received. The plaintiff's claim was based on an alleged custom. There had been two previous trials in which the plaintiff had obtained the verdict. On the last trial the defendant demurred to the plaintiff's evidence, and the case was heard in banc on this demurrer.[11]

LORD MANSFIELD. The foundation, upon which the plaintiff rests his title, is this; that, by immemorial usage, to which there has been no interruption since the time of Richard I. freemen-factors have a right to take, to their own use, that part of the farthing duty which is paid for corn consigned to them. The defendant denies the fact, and says, there is no such usage or custom. I speak to the fact now; the legal objection I will consider by and by. But this is the fact upon which the parties are at issue; and this is to be tried by the jury. Nobody else can try it; because it is a conclusion of fact from the evidence. Almost all the objections that have been made, are such as were very proper to be stated to a jury, to induce them to doubt of the fact of such immemorial usage; to induce them to conclude that it began in fraud, or mistake; that it could not begin in the way in which it is claimed; that such an usage could not possibly be immemorial: and, on the second trial, all this was strongly put to the jury. But, what is now brought before the court on this demurrer? Not a question, whether the evidence was sufficient to satisfy the jury of the fact of the custom, for, by the demurrer, the defendant admits every fact which the jury could have found upon the evidence. The only question before the court, is, Whether, supposing the fact to be as the plaintiff contends, and that, immemorially, without any exception since the time of Richard I. the usage has been for the freemen-factors to receive the farthings, such usage could, by any possibility, have a legal commencement? * * *

ASHHURST, Justice. I am of the same opinion. The question now before us, is precisely what was decided on the last motion for a new trial. The opinion of the court then was, that the custom might have a legal commencement. As to the evidence, there is certainly enough to have warranted the jury in inferring, that the usage had existed as far back as the time of memory. There was sufficient to be left to a jury, and that is all that is requisite.

jury to act on private knowledge. In 1701, in College v. Levett, 1 Ld. Raymond, 472, the same judge apparently directed a verdict for plaintiff on the ground that the defense attempted to be proved under the general issue was not sufficient in law. In 1725, in Syderbottom v. Smith, 1 Strange, 649, Chief Justice Eyre appears to have directed a verdict for defendant on failure of proof.

[11] Statement condensed and part of opinion of Mansfield, J., and all of opinion of Willes, J., omitted.

BULLER, Justice. Though Mr. Davenport divided his argument into five parts, it seems to me, that there are but two questions in the cause. The first, What is the nature of a demurrer to evidence? the second, Whether the custom set forth in this demurrer-book, as stated by the plaintiff's counsel, be, or be not, good in law? With respect to the first, I think Mr. Davenport has gone a great way too far. It is the province of a jury, alone, to judge of the truth of facts, and the credibility of witnesses; and the party cannot, by a demurrer to evidence, or any other means, take that province from them, and draw such question ad aliud examen. I think the plain and certain rule is this: The demurrer admits the truth of all facts, which, upon the evidence stated, might be found by the jury in favour of the party offering the evidence. Mr. Davenport puts the case of a special verdict, and says, the reason for a demurrer to evidence is, that the party demurring does not chuse to trust the jury. In a certain degree that is true; but the reason of not trusting the jury is, because they may, if they please, refuse to find a special verdict, and then the facts never appear on the record. But whether the case comes before the court on a demurrer to evidence, or on a special verdict, the law is the same. Now, if this cause had been put into the shape of a special verdict, what must have been stated on the record? The jury could not find all the evidence set forth in the demurrer, but must have pronounced upon the fact, whether or not such an immemorial custom had existed, and then it would have been for the court to decide, whether such a custom was good in law. I agree with Mr. Wood in his definition of a demurrer to evidence; and I am clear that there was sufficient to be left to a jury, and, therefore, on the first question, there seems to me to be no doubt at all. As to the second, though I have no doubt in my own mind, yet I have known so much of the cause before, that I purposely avoid giving any opinion upon it.

Judgment for the plaintiff.[12]

COMPANY OF CARPENTERS, BRICKMAKERS, BRICKLAYERS, TYLERS, AND PLAISTERERS, ETC., OF SHREWSBURY v. HAYWARD.

(Court of King's Bench, 1780. 1 Doug. 374.)

This was an action on the case, against a carpenter, for the breach of a custom, which was laid to be, That none but members of the company, (being a corporation by prescription,) or their apprentices,

[12]After the ruling in Gibson v. Hunter, 2 H. Blackstone, 187 (1793), that where the evidence was not direct and certain the party demurring must expressly admit the facts which the evidence tended to prove, demurrers to the evidence largely fell into disuse, and motions to direct the verdict or to enter a nonsuit took their place. Finally it was ruled in Bulkeley v. Butler, 2 B. & C. 434 (1824), that the refusal to direct a verdict might be reviewed on bill of exceptions.

or journeymen, should exercise, in Shrewsbury, or within a certain district round that town, any of the trades mentioned in the title of the company. The cause was tried at the last assizes for Shropshire, before Heath, Serjeant, and a verdict found for the plaintiffs. On Thursday, the 13th of April, Howorth obtained a rule to shew cause, why a nonsuit should not be entered, or a new trial granted; and the case came on to be argued, this day, by Bearcroft, for the plaintiffs, and Howorth, for the defendant.

1. The ground for the nonsuit was, that the plaintiffs had not proved the existence of such a company as that described on the record. The evidence on this head consisted of entries of admissions, (some as far back as the reign of Henry 8.) of persons, some into the carpenters' company, some into the bricklayers' company, some into the plaisterers' company, etc.; of instances of fines paid for having worked in those trades, without being free of the carpenters' company, of the bricklayers' company, etc.; and of the testimony of one witness (who was only twenty-four years of age) who said, he had been employed to call meetings of the company, and that they were called by the aggregate name stated in the declaration. The Judge told the jury, that the companies might be distinct corporations for some purposes, and yet form but integral parts of one great corporate body; that such a corporate body might legally exist; and whether, in fact, it did exist, was a question for their decision. For the defendant it was objected at the trial, and now, that the evidence given was only proof, at most, of separate incorporated companies, there being no instances of admissions into the aggregate body; no common seal; nor any proof of any corporate parole act done by them. The evidence of the witness was said to be of so recent a nature, that it ought not to have had any weight.

LORD MANSFIELD.[18] 1. It was properly left to the jury to consider, whether the evidence produced was sufficient to shew, that there was such a company; for that was a mere question of fact; and they were to decide on its existence, and whether it was originally created by a charter from the crown, or was only a voluntary society. There was evidence of its existence as a corporation. 2. The witnesses rejected were clearly interested in the question. If the company had failed in establishing the custom, they would have been discharged from actions to which they are liable for the breach of it.

WILLES, and ASHHURST, Justices, of the same opinion.

BULLER, Justice. 1. Whether there be any evidence, is a question for the Judge. Whether sufficient evidence, is for the jury. 2. The objection to the witness produced for the defendant was certainly decisive: nor is it true, that he could have had no other sort of witnesses. The employers might have been witnesses.

The rule discharged.

[18] Statement condensed.

REX v. ALMON.

(Court of King's Bench, 1770. 5 Burrows. 2686.)

The defendant having been convicted of publishing a libel, (Junius's letter,) in one of the magazines called the London Museum; which was bought at his shop, and even professed to be "Printed for him."

His counsel moved, on Tuesday, 19th June, 1770, for a new trial; upon the foot of the evidence being insufficient to prove any criminal intention in Mr. Almon, or even the least knowledge of their being sold at his shop.

On Wednesday, 27th June, 1770, it came on again; and

Serjeant Glynn argued that the proof against Mr. Almon appeared therefore to be defective: there was nothing to constitute criminality, or induce punishment.

That after the jury had been out about two hours, one of them (Mr. Mackworth) proposed a doubt "Whether the bare proof of the sale in Mr. Almon's shop, without any proof of privity, knowledge, consent, approbation, or malus animus, in Mr. Almon himself, was sufficient in law to convict him criminally of publishing a libel."

Mr. Mackworth understood his lordship's answer to this doubt to be this—"That this was conclusive evidence." Otherwise, Mr. Mackworth was convinced in his own mind, that the defendant ought not to be found guilty upon this evidence; nor would he have found him guilty. He certainly gave his verdict under a mistake. If he had apprehended that the jury were at liberty to exercise their own judgment, he would have acquitted the defendant. The serjeant prayed that Mr. Mackworth's affidavit might be read.

LORD MANSFIELD. You know, it can't be read.

Mr. Justice ASTON. A juryman's affidavit with regard to his sentiments in point of law, at the trial, ought not to be admitted; whatever may be the case of his affidavit tending to rectify a mistake in fact.[14]

THE COURT were of opinion, that none of the matters urged on behalf of the defendant, nor all of them added together, were reasons for granting a new trial; whatever weight they might have in extenuation of his offence, and in consequence lessening his punishment. For, they were exceedingly clear and unanimous in opinion, that this pamphlet being bought in the shop of a common known bookseller and publisher, importing by its title-page to be printed for him, is a sufficient prima facie evidence of its being published by him: not indeed conclusive, because he might have contradicted it, if the facts would have borne it, by contrary evidence. But as he did not offer any evidence to repel it, it must (if believed to be true) stand good till answered, and be considered as conclusive, till contradicted.

[14] Statement condensed, and concurring opinions of Aston, Willes, and Ashhurst, JJ., omitted.

LORD MANSFIELD said and repeated that Mr. Mackworth had understood him perfectly right: and he was very glad to find that there was no doubt of what he had said. The substance of it was, that in point of law, the buying the pamphlet in the public open shop of a known professed bookseller and publisher of pamphlets, of a person acting in the shop, prima facie is evidence of a publication by the master himself: but that it is liable to be contradicted, where the fact will bear it, by contrary evidence tending to exculpate the master, and to shew that he was not privy nor assenting to it nor encouraging it. That this being prima facie evidence of a publication by the master himself, it stands good till answered by him: and if not answered at all, it thereby becomes conclusive so far as to be sufficient to convict him. That proof of a public exposing to sale and selling, at his shop by his servant, was prima facie sufficient; and must stand till contradicted or explained or exculpated by some other evidence; and if not contradicted explained or exculpated, would be in point of evidence sufficient or tantamount to conclusive. Mr. Mackworth's doubt seemed to be "Whether the evidence was sufficient to convict the defendant, in case he believed it to be true." And in this sense I answered it. Prima facie, 'tis good; and remains so, till answered. If it is believed, and remains unanswered, it becomes conclusive. If it be sufficient in point of law, and the juryman believes it, he is bound in conscience to give his verdict according to it.

In practice, in experience, in history, in the memory of all persons living, this is (I believe) the first time that it was ever doubted "That this is good evidence against a bookseller or publisher of pamphlets." The constant practice is, to read the libel, as soon as ever it has been proved to be bought at the defendant's shop. This practice shews that it is considered as already proved upon the defendant: for, it could not be read against him, before it had been proved[15] upon him.

If I am mistaken, I am entirely open to alter my opinion, upon being convinced that it is a wrong one: but, at present, I take this point to be as much established, as that an eldest son is, (in general) heir to his father. And being evidence prima facie, it stands (if believed) till contrary proof is brought to repel it.

Rule discharged.

DAVIS v. HARDY.

(Court of King's Bench, 1827. 6 Barn. & C. 225.)

Case for malicious prosecution of the plaintiff on a charge of embezzlement.

At the close of the plaintiff's case, the defendant's counsel objected that as Davis had received the amount of the chaise-hire, and had not paid it either to the proprietor or to Hardy, and had not

[15] But see The King v. Stone, 6 Term Rep. 527 (1796) post, 108.

mentioned to the latter that he had received it, there was probable cause for preferring the indictment, and that the plaintiff must therefore be nonsuited. The learned judge thought that there was sufficient proof of want of probable cause; and the defendant then proceeded with his case, and called as a witness Stainer, the proprietor of the chaise. He stated, that in 1823 Hardy was his customer, and that Davis, on the 25th of May, 1823, ordered the chaise in his (Hardy's) name to go to Taunton: he did not see Davis for a month or two afterwards, but when he did see him, he asked him when he meant to pay him the money he owed him. Davis said he owed him for some post-chaise hire of his own; to which Stainer replied, "If you cannot pay me for what you owe me yourself, pay me for the job to Taunton, or I will tell Mr. Hardy." Davis then requested Stainer not to tell Mr. Hardy, for it would do him a great deal of injury. Stainer saw Davis again in about a month, when Davis promised to pay him; he stated further, that he did not tell Hardy that the chaise had been ordered in his name until he heard that Davis had been suspended upon some charges that had been presented against him, and on cross-examination as to the time when he had been paid by Hardy, he said first it was a week or two after the examination, then a very short time before the indictment, then a day or two before the investigation. Gaselee, J., said, that as it then appeared that Davis had desired Stainer not to communicate to Hardy that the chaise-hire had not been paid, he was of opinion that that circumstance, coupled with the fact of Davis's not having mentioned to Hardy his having received it from the assignee, (though not sufficient to support the indictment,) afforded a probable cause for preferring it. The counsel for the plaintiff then insisted that it ought to be left to the jury to find whether they believed Stainer's evidence. The learned judge said that there was no contradictory evidence, as to the fact of Davis having desired Stainer to conceal from Hardy that the chaise-hire had not been paid; and he refused to leave any question to the jury, and nonsuited the plaintiff. A rule nisi for setting aside the nonsuit had been obtained in last Easter term, upon the ground that it ought to have been left to the jury to decide whether they believed Stainer's evidence or not.[16]

ABBOTT, C. J.[1] I think that the nonsuit in this case was proper, and that the rule for setting it aside must be discharged. The question for our consideration is not, whether Davis was guilty of the charge preferred against him, nor whether the indictment was preferred from an improper motive; but the question is, whether Hardy the prosecutor had a reasonable or probable cause for preferring the charge against Davis; and I am of opinion, upon the evidence given at the trial, that there was probable cause for his making that charge. The

[16] Statement condensed.

facts are these: Davis hired the chaise in the name of Hardy, and received from the assignee of the bankrupt the amount of the chaise-hire; he did not pay it to the innkeeper who let the chaise, nor to Hardy, in whose name it was hired, nor did he ever mention to the latter that he had received the amount. Upon a charge being preferred against him, he was examined before the magistrates, and one of the magistrates was called as a witness on the part of the plaintiff, and proved that he admitted most of the facts above stated. That being the case upon the part of the plaintiff, the learned Judge was of opinion that there was sufficient prima facie evidence[17] of the want of probable cause for preferring the indictment, and he refused to nonsuit the plaintiff. Stainer the innkeeper, who was the proprietor of the chaise, was then called as a witness on the part of the defendant He proved that the chaise-hire was not paid to him; that he applied to Davis twice for it; and that upon his threatening, that unless he was paid he would tell Mr. Hardy, Davis requested him not to tell Mr. Hardy that it was not paid, as it would do him a great injury. Now, if that fact, which was proved by Stainer, had been proved in the course of the plaintiff's case, there can be no doubt that it would have been evidence of a probable cause for preferring the charge: but it is said, that it ought to have been submitted to the jury as a question of fact, whether Davis ever did request Stainer not to inform Hardy that he, Davis, had received the money. But where a witness is unimpeached in his general character, and uncontradicted by testimony on the other side, and there is no want of probability in the facts which he relates, I think that a judge is not bound to leave his credit to the jury, but to consider the facts he states as proved, and to act upon them accordingly. I think, therefore, that the Judge was well warranted in coming to the conclusion in this case, that there was a probable cause for preferring the indictment, and this rule must therefore be discharged.

BAILEY, J. I think that in this case there was sufficient evidence of probable cause, and such evidence, too, as a jury ought to be directed to proceed upon. If there is nothing in the demeanor of a witness, or in the story he tells, to impeach his credit, and he is not contradicted by testimony on the other side, it is not a case for a jury to deliberate upon. If the case had been submitted to the jury, and they had disbelieved this witness, I think that we should have been bound to send the case down to a new trial.

Rule discharged.[18]

[17] When the question of probable cause is submitted to the jury, the plaintiff has the burden of convincing them of the want of probable cause. Abrath v. North Eastern Ry. Co., L. R. 11 Q. B. D. 440 (1883). In an action for false imprisonment, the right to arrest on reasonable suspicion is treated as an affirmative defense. Ocean Steamship Co. v. Williams, 69 Ga. 251 (1882).

[18] See same result in McCormack v. Standard Oil Co., 60 N. J. Law, 243, 37 Atl. 617 (1897); Menominee River Sash & Door Co. v. Milwaukee & N.

MITCHELL v. JENKINS.

(Court of King's Bench, 1833. 5 Barn. & Adol. 588.)

Case for malicious prosecution of a civil action in which the defendant had caused the plaintiff to be arrested on a demand for £45., though he was aware of a set-off to the amount of £16.

The learned judge was of opinion that, as there existed a set-off, which reduced Jenkins' demand, Mitchell ought not to have been arrested for more than the balance; and that Jenkins therefore had no reasonable or probable cause for arresting him for the sum of £45. As to the question of malice, he said there were two kinds of malice—malice in law and malice in fact; and that in this case there was malice in law, inasmuch as the act of causing Mitchell to be arrested for a larger sum than was due was wrongful; and that the only question for the consideration of the jury was the amount of damages. The jury found a verdict for the plaintiff, damages £20. A rule nisi having been obtained for a new trial, on the ground that the question whether Jenkins acted maliciously ought to have been left to the jury, Follett now shewed cause.[19]

DENMAN, C. J. Every arrest by a creditor for more than is due is, in some sense, a wrongful act. By statute, if it be made without reasonable or probable cause, though with an entire absence of malice, the party arresting may be deprived of his costs, and at common law, if the party arrested has suffered damage to a greater extent than those costs, he may, if the arrest was also made maliciously, bring his action on the case. In that action, however, it is still incumbent on the plaintiff to allege and to prove malice as an independent fact; though it may in some instances be fairly inferred by the jury from the arrest itself, and the circumstances under which it is made, without any other proof. They, however, are to decide, as a matter of fact, whether there be malice or not. I have always understood the question of reasonable or probable cause on the facts found to be a question for the opinion of the Court, and malice to be altogether a question for the jury. Here, the question of malice having been wholly withdrawn from the consideration of the jury, there ought to be a new trial.

PARKE, J. I am also of opinion that there ought to be a new trial, on the ground that the learned Judge withdrew altogether from the consideration of the jury the question of malice. I have always understood, since the case of Johnstone v. Sutton, 1 T. R. 510, which

Ry., 91 Wis. 447, 65 N. W. 176 (1895); Woodstock v. Canton, 91 Me. 62, 39 Atl. 281 (1897). In some cases a verdict cannot be directed on uncontradicted testimony, because there may be a question of credibility, where the witness is interested or biased. Koehler v. Adler, 78 N. Y. 287 (1879). In a few jurisdictions it appears to be held that there is a question of credibility in all cases of oral testimony. Giles v. Giles, 204 Mass. 383, 90 N. E. 595 (1910).

[19] Statement condensed and concurring opinion of Taunton, J., omitted.

was decided long before I was in the profession, that no point of law was more clearly settled than that in every action for a malicious prosecution or arrest, the plaintiff must prove what is averred in the declaration, viz., that the prosecution or arrest was malicious and without reasonable or probable cause: if there be reasonable or probable cause, no malice, however distinctly proved, will make the defendant liable; but when there is no reasonable or probable cause, it is for the jury to infer malice from the facts proved. That is a question in all cases for their consideration, and it having in this instance been withdrawn from them, it is impossible to say whether they might or might not have come to the conclusion that the arrest was malicious. It was for them to decide it, and not for the Judge. I can conceive a case, where there are mutual accounts between parties, and where an arrest for the whole sum claimed by the plaintiff would not be malicious; for example, the plaintiff might know that the set-off was open to dispute, and that there was reasonable ground for disputing it. In that case, though it might afterwards appear that the set-off did exist, the arrest would not be malicious. The term "malice" in this form of action is not to be considered in the sense of spite or hatred against an individual, but of malus animus, and as denoting that the party is actuated by improper and indirect motives. That would not be the case where, there being an unsettled account, with items on both sides, one of the parties, believing bona fide that a certain sum was due to him, arrested his debtor for that sum, though it afterwards appeared that a less sum was due; nor where a party made such an arrest, acting bona fide under a wrong notion of the law and pursuant to legal advice. The question of malice having in this case been wholly withdrawn from the jury, I think the rule for a new trial must be made absolute.

PATTESON, J. The whole argument for the defendant may be shortly summed up thus: The question of malice ought to have been submitted to the jury, who might have inferred it from the want of probable cause; but they were not bound of necessity so to do. Here it was not left to the jury to infer malice: if the jury are to be told that where a want of probable cause is proved, malice must necessarily be inferred, it will, in future, be only necessary in every case to prove want of probable cause; whereas, it is essential for a plaintiff to prove facts from which the Judge may decide that there is want of probable cause, and the jury that there is malice.

Rule absolute.

TOOMEY v. LONDON, B. & S. C. RY. CO.

(Court of Common Pleas, 1857. 3 C. B. [N. S.] 146.)

This was an action on the case for damages on account of personal injuries alleged to have been caused by the negligence of the defendant in respect to the condition of its station.

The cause was tried before Cresswell, J., at the first sitting at Westminster in this term. The facts were as follows: The plaintiff, a poor and illiterate person who carried on the employment of a hawker, went to the Forest Hill station of the London, Brighton, and South Coast Railway, for the purpose of proceeding to London by the 10:30 p. m. train. Whilst waiting there, he inquired of a person on the platform, unconnected with the railway, where he should find a urinary: this person told him to go to the right: he did so, and found two doors, upon one of which was painted the words "For gentlemen," and upon the other the words "Lamp-room;" there being a light over the former, but none over the latter. The plaintiff, being in a hurry, and unable to read, opened the wrong door, stepped forward, and fell down some steps, breaking two of his ribs, and otherwise seriously hurting himself. There was no evidence as to the description of the steps down which the plaintiff fell, nor as to the state in which the door of the lamp-room was ordinarily kept: but the plaintiff's son stated, that, when he went some time after the accident to look at the place, he found the door locked.

On the part of the defendants, it was submitted that there was no evidence to go to the jury of negligence, and that the accident was attributable entirely to the plaintiff's own want of caution in going hastily and in the dark through a strange door.

The learned judge was of this opinion, and the plaintiff was nonsuited, with leave to move to enter a verdict for £35 (agreed damages), if the court should be of opinion that there was evidence which ought to have been submitted to the jury.[20]

WILLIAMS, J. I am of opinion that there should be no rule in this case. I think there was no evidence of negligence on the part of the company or their servants which ought to have been submitted to the jury. It is not enough to say that there was some evidence; for, every person who has had any experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury: there must be evidence upon which they might reasonably and properly conclude that there was negligence. All that appeared, was that the plaintiff inquired of a stranger the way to the urinal, and, being told to go in a particular direction where there were two doors, unfortunately opened the wrong one, and through his own carelessness fell down some steps. If there had been any evidence to show that these steps were more than ordinarily dangerous, that possibly might have led to a different conclusion. But all that appears, is, that the door in question led down some steps into a room which was used for the purposes of the company, and not for the convenience of the

[20] Statement condensed.

public. I cannot say that there was such evidence of negligence in the defendants as the learned judge was bound to leave to the jury.

WILLES, J. I am entirely of the same opinion. In order to establish a case of negligence against the defendants, it was incumbent on the plaintiff to prove some fact which was more consistent with negligence than with the absence of it. There was nothing of the sort proved here. There was nothing to show that the door and the steps beyond were more than ordinarily dangerous; and it was necessary and proper that something of the sort should be there for the convenient use of the station by the company. It would be difficult so to arrange every part of a station as to render it impossible for careless persons to meet with injury. I think the plaintiff failed to make out that he sustained the injury complained of through any negligence of the company or their servants.

Rule refused.[21]

WAKELIN v. LONDON & S. W. RY. CO.

(House of Lords, 1886. L. R. 12 App. Cas. 41.)

Appeal from a decision of the Court of Appeal.

The action was brought by the administratrix of Henry Wakelin on behalf of herself and her children under Lord Campbell's Act, 9 & 10 Vict. c. 93.

The statement of claim alleged that the defendant's line between Chiswick Station and Chiswick Junction crossed a public footway, and that on the 1st of May, 1882, the defendants so negligently and unskillfully drove a train on the line across the footpath and so neglected to take precautions in respect of the train and the crossing that the train struck and killed one Henry Wakelin the plaintiff's husband whilst lawfully on the footpath.

The statement of defence admitted that on that day the plaintiff's husband whilst on or near the footpath was struck by a train of the defendants, and so injured that he died, but denied the alleged negligence; did not admit that the deceased was lawfully crossing the line at the time in question; and alleged that his death was caused by his

[21] A few years before, the same court in Jewell v. Parr, 13 C. B. 909 (1853), stated the rule as follows: "Applying the maxim 'de minimis non curat lex,' when we say that there is no evidence to go to the jury, we do not mean that there is literally none, but that there is none which ought reasonably to satisfy a jury that the fact sought to be proved is established. There may be evidence upon which a jury may properly proceed, although the contrary is possible; for instance, when the question is whether a certain document is in the handwriting of A. B., and a witness conversant with the handwriting of that person states that he believes it was written by him, it is consistent with that evidence that the document may not be in the handwriting of A. B., and yet the jury would be well warranted in coming to the conclusion that it was, even though there might be witnesses on the other side to pledge their belief that it was not."

own negligence and that he might by the exercise of reasonable caution have seen the train approaching and avoided the accident.

At the trial before Manisty, J., and a special jury in Middlesex in December, 1883, the following evidence was given on behalf of the plaintiff. It appeared from the defendants' answers to interrogatories that the crossing was a level crossing open to all foot passengers; that the approaches to the crossing on each side of the line were guarded by hand gates; that there was a slight curve at the crossing; that assuming the deceased to have been crossing the line from the down side and standing inside the hand gates, but not on the line, he could have seen a train approaching on the down side at a distance of nearly if not quite half a mile, but that when standing in the centre of the line he could have seen a train approaching on the down side at a distance of more than one mile; that the body of the deceased was found on the down side of the line and that he was run upon and killed by a down train; that the engine carried the usual and proper head lights which were visible at the distances above mentioned; that the company did not give any special signal or take any extraordinary precautions while their trains were travelling over the crossing; that a watchman in the company's employ was on duty from 8 a. m. to 8 p. m. to take charge of the gates and crossing and amongst other duties to provide for the safety of foot passengers.

Oral evidence was given that from the cottage where the deceased lived it would take about ten minutes to walk to the crossing, that he left his cottage on the evening of the 1st of May after tea, and that he was never seen again till his body was found the same night on the down line near the crossing. There was no evidence as to the circumstances under which he got onto the line. Witnesses for the plaintiff gave evidence (not very intelligible) as to the limited number of yards at which an approaching train could be seen from the crossing, and as to obstructions to the view.

The defendants called no witnesses, and submitted that there was no case. Manisty, J., left the case to the jury, who returned a verdict for the plaintiff for £800. The Divisional Court (Grove, J., Huddleston, B., and Hawkins, J.) set aside the verdict and entered judgment for the defendants. The Court of Appeal (Brett, M. R., and Bowen and Fry, L. JJ.) on the 16th of May, 1884, affirmed this decision. In the course of his judgment, Brett, M. R., said that in his opinion the plaintiff in this case was not only bound to give evidence of negligence on the part of the defendants which was a cause of the death of the deceased, but was also bound to give prima facie evidence that the deceased was not guilty of negligence contributing to the accident, and that by reason of the plaintiff having been unable to give any evidence of the circumstances of the accident she had failed in giving evidence of that necessary part of her prima facie case.[22]

[22]According to the Law Times Report, Brett, M. R., had said in the Court of Appeal: "According to the English law the cause of action in such a

From this decision the plaintiff appealed.

LORD HALSBURY, L. C.[22] My Lords, it is incumbent upon the plaintiff in this case to establish by proof that her husband's death has been caused by some negligence of the defendants, some negligent act, or some negligent omission, to which the injury complained of in this case, the death of the husband, is attributable. That is the fact to be proved. If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition. "Ei qui affirmat non ei qui negat incumbit probatio." I am not certain that it will not be found that the question of onus of proof and of what onus of proof the plaintiff undertook, with which the Court of Appeal has dealt so much at large, is not rather a question of subtlety of language than a question of law.

If the simple proposition with which I started is accurate, it is manifest that the plaintiff, who gives evidence of a state of facts which is equally consistent with the wrong of which she complains having been caused by—in this sense that it could not have occurred without—her husband's own negligence as by the negligence of the defendants, does not prove that it was caused by the defendants' negligence. She may indeed establish that the event has occurred through the joint negligence of both, but if that is the state of the evidence the plaintiff fails, because "in pari delicto potior est conditio defendentis." It is true that the onus of proof may shift from time to time as matter of evidence, but still the question must ultimately arise whether the person who is bound to prove the affirmative of the issue, i. e., in this case the negligent act done, has discharged herself of that burden. I am of opinion that the plaintiff does not do this unless she proves that the defendants have caused the injury in the sense which I have explained.

In this case I am unable to see any evidence of how this unfortunate calamity occurred. One may surmise, and it is but surmise and not evidence, that the unfortunate man was knocked down by a passing train while on the level crossing; but assuming in the plaintiff's favour that fact to be established, is there anything to show that the

case was not that the accident was caused by the negligence of the defendant, for if the plaintiff was guilty of contributory negligence, there was no cause of action. The cause of action was that, as between the plaintiff and defendant, the accident was caused solely by the negligence of the defendant without any contributory negligence of the plaintiff. It was for the plaintiff to give prima facie evidence of his cause of action, and if he omitted to give evidence of any material part of it, he must be nonsuited. He must therefore negative contributory negligence on his part." Wakelin v. London & South Western Ry. Co., 55 L. T. R. 709 (1886).

[22] Part of the opinions of Lord Halsbury and Lord Fitzgerald and all of opinion of Lord Blackburn omitted.

train ran over the man rather than that the man ran against the train? * * *

The body of the deceased man was found in the neighborhood of the level crossing on the down line, but neither by direct evidence nor by reasonable inference can any conclusion be arrived at as to the circumstances causing his death.

It has been argued before your Lordships that we must take the facts as found by the jury. I do not know what facts the jury are supposed to have found, nor is it, perhaps, very material to inquire, because if they have found that the defendants' negligence caused the death of the plaintiff's husband, they have found it without a fragment of evidence to justify such a finding.

Under these circumstances, I move that the judgment appealed from be affirmed, and the appeal dismissed.

LORD WATSON. My Lords, in the view which I take of the evidence adduced at the trial before Manisty, J., it may not be absolutely necessary to say anything in regard to the onus which attaches to the plaintiff in this and similar cases. I shall neverthless express my opinion upon the point, because it was discussed in the judgments delivered in the Court of Appeal, and has been fully and ably argued at your Lordships' bar.

It appears to me that in all such cases the liability of the defendant company must rest upon these facts—in the first place that there was some negligent act or omission on the part of the company or their servants which materially contributed to the injury or death complained of, and, in the second place, that there was no contributory negligence on the part of the injured or deceased person. But it does not, in my opinion, necessarily follow that the whole burden of proof is cast upon the plaintiff. That it lies with the plaintiff to prove the first of these propositions does not admit of dispute. Mere allegation or proof that the company were guilty of negligence is altogether irrelevant; they might be guilty of many negligent acts or omissions, which might possibly have occasioned injury to somebody, but had no connection whatever with the injury for which redress is sought, and therefore the plaintiff must allege and prove, not merely that they were negligent, but that their negligence caused or materially contributed to the injury.

I am of opinion that the onus of proving affirmatively that there was contributory negligence on the part of the person injured rests, in the first instance, upon the defendants, and that in the absence of evidence tending to that conclusion, the plaintiff is not bound to prove the negative in order to entitle her to a verdict in her favour. That opinion was expressed by Lord Hatherley and Lord Penzance in the Dublin, Wicklow & Wexford Railway Company v. Slattery, 3 App. Cas. 1169, 1180. I agree with these noble Lords in thinking that, whether the question of such contributory negligence arises on a plea of "not guilty," or is made the subject of a counter issue, it is sub-

stantially a matter of defence, and I do not find that the other noble Lords, who took part in the decision of Slattery's Case, said anything to the contrary. In expressing my own opinion, I have added the words "in the first instance," because in the course of the trial the onus may be shifted to the plaintiff so as to justify a finding in the defendants' favour to which they would not otherwise have been entitled.

The difficulty of dealing with the question of onus in cases like the present arises from the fact that in most cases it is well nigh impossible for the plaintiff to lay his evidence before a jury or the Court without disclosing circumstances which either point to or tend to rebut the conclusion that the injured party was guilty of contributory negligence. If the plaintiff's evidence were sufficient to show that the negligence of the defendants did materially contribute to the injury, and threw no light upon the question of the injured party's negligence, then I should be of opinion that, in the absence of any counter-evidence from the defendants, it ought to be presumed that, in point of fact, there was no such contributory negligence. Even if the plaintiff's evidence did disclose facts and circumstances bearing upon that question, which were neither sufficient per se to prove such contributory negligence, nor to cast the onus of disproving it on the plaintiff, I should remain of the same opinion. Of course a plaintiff who comes into Court with an unfounded action may have to submit to the inconvenience of having his adversary's defence proved by his own witnesses; but that cannot affect the question upon whom the onus lies in the first instance. As Lord Hatherly said in Dublin, Wicklow & Wexford Railway Company v. Slattery, 3 App. Cas. 1169: "If such contributory negligence be admitted by the plaintiff, or be proved by the plaintiff's witnesses while establishing negligence against the defendants, I do not think there is anything left for the jury to decide, there being no contest of fact."

In the present case, I think the appellant must fail, because no attempt has been made to bring evidence in support of her allegations up to the point at which the question of contributory negligence becomes material. The evidence appears to me to show that the injuries which caused the death of Henry Wakelin were occasioned by contact with an engine or a train belonging to the respondents, and I am willing to assume, although I am by no means satisfied, that it has also been proved that they were in certain respects negligent. The evidence goes no further. It affords ample materials for conjecturing that the death may possibly have been occasioned by that negligence, but it furnishes no data from which an inference can be reasonably drawn that as a matter of fact it was so occasioned.

I am accordingly of opinion that the order appealed from must be affirmed.

LORD FITZGERALD. * * * It is not necessary for me to add another word, and I would refrain from doing so if there had not

been some reasons given both in the Divisional Court and in the Court of Appeal which I am not prepared to assent to without further consideration. I understand the Master of the Rolls to have laid down that the plaintiff in such a case is bound to establish, first, negligence on the part of the defendants; second, that such negligence caused the injury of which the plaintiff complains; and further, if not involved in number 2, that the plaintiff was bound on his case to give affirmative evidence of the negative proposition that he did not negligently contribute to the accident. The latter proposition was not very much pressed in argument before us. It is not necessary for your Lordships to come to any decision on it, but I desire to guard myself against being supposed now to assent to it. * * *

Before the passing of Lord Campbell's Act, 9 & 10 Vict. c. 93, in a common law action for an injury alleged to have been caused by the negligence of the defendant, and when that most convenient plea "not guilty" was permitted, I always understood that if the defendant relied as a defence on contributory negligence, though he was permitted to establish it under "not guilty," yet the issue lay on him, and I am not aware that any different rule has been established since the passing of that statute, or since the practice has been adopted of putting in special defences, whether the action was at common law for a personal injury or under the statute for a wrongful act causing the death. The plaintiff does not in the statement of claim allege in terms the absence of contributory negligence, and the defendant if he relies on it does so affirmatively by special defence, as in the case now before us: "The defendants further say that the death of the said Henry Wakelin was caused by his own negligence, and that he might and could by the exercise of reasonable care and caution have seen the train approaching and avoided the accident."

It has been truly said that the propositions of negligence and contributory negligence are in such cases as that now before your Lordships so interwoven as that contributory negligence, if any, is generally brought out and established on the evidence of the plaintiffs' witnesses. In such a case, if there is no conflict on the facts in proof, the judge may withdraw the question from the jury and direct a verdict for the defendant, or if there is conflict or doubt as to the proper inference to be deduced from the facts in proof, then it is for the jury to decide. But if the plaintiff can establish his case in proof without disclosing any matters amounting to contributory negligence or from which it can be reasonably inferred, then the defendant is left to give such evidence as he can to sustain that issue.

It may be that the practice of the law has in this respect been altered, or ought to be established on the basis pointed out by the Master of the Rolls, but as yet that has not been shown to our satisfaction.

There is another proposition in the judgment of the Master of the Rolls relating to the same subject-matter expressed thus: "But although the plaintiff had given in the first instance prima facie evi-

dence of an absence of negligence on his part, if the defendant brought forward evidence which was contradictory of that, then you came again with the burden of proof upon the plaintiff, because, if upon the conflict of that evidence, part of which was given by the plaintiff and part by the defendant, the jury or the tribunal which had to try the fact is left in doubt whether the plaintiff was or was not negligent, contributing to the accident, the verdict and judgment must be for the defendant, because the burden of proof lies wholly on the plaintiff." If the noble and learned Master of the Rolls means that if the evidence is such that the jury might reasonably come to a conclusion in favour of the plaintiff or might reasonably draw a contrary inference the case is to be withdrawn from the decision of the jury and a verdict and judgment go for the defendant, I desire to say that I am not to be taken as acquiescing in that proposition.

I am of opinion that the order of the Court of Appeal should be affirmed.

Appeal dismissed.[24]

[24] For the various conflicting views on this subject in England, see Davey v. Railway, 12 Q. B. 70 (1883); Bridges v. Railway, L. R. 7 H. L. C. 213 (1873); Railway v. Slattery, 3 App. Cas. 1155 (1878).

In the United States there is the same conflict. Lamar, J., in Central Vermont Ry. Co. v. White, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252 (1915), says: "But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure. For, in Vermont, and in a few other states, proof of plaintiff's freedom from fault is a part of the very substance of his case. He must not only satisfy the jury (1) that he was injured by the negligence of the defendant, but he must go further and, as a condition of his right to recover, must also show (2) that he was not guilty of contributory negligence. In those states the plaintiff is as much under the necessity of proving one of these facts as the other; and as to neither can it be said that the burden is imposed by a rule of procedure, since it arises out of the general obligation imposed upon every plaintiff, to establish all of the facts necessary to make out his cause of action. But the United States courts have uniformly held that as a matter of general law the burden of proving contributory negligence is on the defendant. The Federal courts have enforced that principle even in trials in states which hold that the burden in on the plaintiff. Washington & G. Railroad v. Gladmon, 15 Wall. 401 (1), 407, 408, 21 L. Ed. 114 (1872); Hough v. Texas & P. Railway Co., 100 U. S. 225, 25 L. Ed. 612 (1879); Inland & S. Coasting Co. v. Tolson, 139 U. S. 551 (4), 557, 11 Sup. Ct. 653, 35 L. Ed. 270 (1891); Washington & G. R. Co. v. Harmon, 147 U. S. 581, 13 Sup. Ct. 557, 37 L. Ed. 284 (1893); Hemingway v. Ill. Cent. R. R., 114 Fed. 843, 52 C. C. A. 477 (1902). Congress in passing the federal Employers' Liability Act evidently intended that the federal statute should be construed in the light of these and other decisions of federal courts. Such construction of the statute was, in effect, approved in Seaboard Air Line Ry. v. Moore, 228 U. S. 434, 33 Sup. Ct. 580, 57 L. Ed. 907 (1913). There was, therefore, no error in failing to enforce what the defendant calls the Vermont rule of procedure as to the burden of proof."

In Lane v. Crombie, 12 Pick. (Mass.) 177 (1831), it was held that the burden was on the plaintiff to establish freedom from contributory fault. In Illinois the same rule was adopted, on the authority of Lane v. Crombie, in Aurora Branch Ry. Co. v. Grimes, 13 Ill. 585 (1852). The same rule appears to prevail in New York. Wieland v. President, etc., of Delaware & H. Canal Co., 167 N. Y. 19, 60 N. E. 234, 82 Am. St. Rep. 707 (1901). But see section 841b, Code Civ. Proc. (Amended in 1913), placing the burden on

ELLIOTT v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of the United States, 1893. 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068.)

Mr. Justice BREWER.[25] The question in this case is as to the liability of the company for the death of John Elliott. The company made three defenses: (1) That it was guilty of no negligence; (2) that, if there were any negligence, it was that of a fellow servant; and (3) that Elliott was guilty of contributory negligence. The supreme court of the territory, in its opinion filed when the case was first in that court, considered the last two defenses as sustained, and, because thereof, reversed the judgment in favor of the plaintiff. All of them have been presented and fully argued in this court, but, as we consider the third sufficient, it is unnecessary to notice the first two. We are of opinion that the deceased was guilty of contributory[26] negligence, such as to bar any recovery. It is true that questions of negligence and contributory negligence are ordinarily questions of fact to be passed upon by a jury; yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury, and direct a verdict. Railroad Co. v. Houston, 95 U. S. 697, 24 L. Ed. 542; Schofield v. Railroad Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; Railroad Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; Aerkfetz v. Humphreys, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758.

What, then, are the facts concerning the accident? It took place at a station called "Meckling," a hamlet of two or three houses, and of so little importance that at the time the company had no station agent there. The main track of the defendant's road ran eastward and westward in a straight line, and the ground was level. On the north side of this track was a siding, 728 feet in length from switch to switch, and distant from the main track at the maximum 16 feet. This siding was the only extra track at the place. About 100 feet east from the west switch was the depot, on the south of the track, and some 10 feet therefrom. Two hundred feet east of that was a small car house, sixteen feet from the track. These were the only buildings on the

the defendant in actions for causing death. In Sackheim v. Pigueron, 215 N. Y. 62, 109 N. E. 109 (1915), this statute was applied to a cause of action which arose before the amendment.

[25] Statement and part of opinion omitted.

[26] In the federal courts the defendant has the burden of establishing contributory negligence when it becomes a question for the jury. Central Vermont Ry. Co. v. White, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252 (1915). In accordance with the ruling in the principal case, a verdict may be directed for defendant on any other affirmative defense. Oscanyan v. Winchester Repeating Arms Co., 103 U. S. 261, 26 L. Ed. 539 (1880), illegality; Wallner v. Chicago Consol. Traction Co., 245 Ill. 148, 91 N. E. 1053 (1910), accord and satisfaction.

depot grounds. No cars were standing on the track or siding. The day was clear, and there was nothing to prevent the deceased from seeing all that was going on. He was foreman of a section gang, and had been working on this track for 10 or more years. In expectation of a coming freight train, his men had placed their hand car on the siding. The train was due at 8:25 a. m., but was, perhaps, five or ten minutes late. It came from the west, and at this station made a double flying switch. This was accomplished by uncoupling the train at two places, thus breaking it into three sections. The first section, consisting of the engine and 18 cars, moved along the main track, but, before the balance of the train reached the switch, (its speed having been checked by brakes,) that was turned so that two cars (constituting the second section, and under the control of a brakeman) passed onto the siding. The rear section having been still further checked by brakes, the switch was reset, so that it passed onto the main track, following the first section. The rear section consisted of a flat car, a box car, a caboose, and an empty passenger coach, and was under the care of the conductor and one brakeman. As the second section was thrown by the flying switch onto the siding, two of the men started to push the hand car towards the east, so as not to be struck by the approaching freight cars. The deceased, at the time the first section passed the car house, was standing some sixteen feet west thereof, and four or five feet from the track, talking with one of his men. After a short conversation, the latter started towards the depot, while the deceased walked eastward along the track until he had passed a few feet beyond the car house, when he started hastily towards the siding. His attention had apparently been called by the approach of the two cars on the siding to the hand car, for he made some call to the men who were pushing that hand car. He crossed the main track diagonally, his face turned eastward. The rear section, coming along from the west, struck and crushed him. This rear section, when it passed the depot, was moving slowly, not faster than a walk, as one of the witnesses testified. That it was moving quite slowly is evident from the fact that it came to a stop after two cars and the caboose had passed over the body of the deceased, and this though no special effort was made to check them after the deceased had been struck, the conductor and brakeman on that section being unaware of the accident. When he started to cross the track this approaching section was not to exceed 25 or 30 feet from him.

It thus appears that the deceased, an experienced railroad man, on a bright morning, and with nothing to obstruct his vision, started along and across a railroad track, with which he was entirely familiar, with cars approaching and only 25 or 30 feet away, and, before he gets across that track, is overtaken by those cars and killed. But one explanation of his conduct is possible, and that is that he went upon the track without looking to see whether any train was coming. Such

omission has been again and again, both as to travelers on the highway and employés on the road, affirmed to be negligence. The track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom. It may be, as is urged, that his motive was to assist in getting the hand car out of the way of the section moving on the siding. But whatever his motive, the fact remains that he stepped onto the track in front of an approaching train, without looking or taking any precautions for his own safety.

This is not a case in which one, placed in a position of danger through the negligence of the company, confused by his surroundings, makes perhaps a mistake in choice as to the way of escape, and is caught in an accident, for here the deceased was in no danger. He was standing in a place of safety on the south of the main track. He went into a place of danger from a place of safety, and went in without taking the ordinary precautions imperatively required of all who place themselves in a similar position of danger.

The trial court was right in holding that he was guilty of contributory negligence. So, without considering the other questions presented in the record, the judgment will be affirmed. * * *[27]

[27] Chapman, J., in Denny v. Williams, 5 Allen (Mass.) 1 (1862): "The question whether the jury have found a verdict for the plaintiff against the weight of the evidence is not before us. That question could not be raised in any way except by a motion for a new trial. If there was any evidence which it was proper to submit to a jury, the judge was right in submitting it to them, and the exception must be overruled. It is only in a very limited class of cases that such a question can be brought to this court by exceptions. They are cases where the evidence is insufficient in law to support a verdict. Commonwealth v. Packard, 5 Gray (Mass.) 101 (1855); Chase v. Breed, 5 Gray (Mass.) 440 (1855); Commonwealth v. Merrill, 14 Gray (Mass.) 417, 77 Am. Dec. 336 (1860); Polley v. Lenox Iron Works, 4 Allen (Mass.) 329 (1862). In such cases, a refusal of the judge to instruct the jury that the evidence is insufficient is a good ground of exception. It is not necessary that there should be absolutely no evidence. The rule, as stated in Browne on the St. of Frauds, c. 15, § 321, is sustained by the authorities cited: 'Whether there has been a delivery and acceptance sufficient to satisfy the statute of frauds is a mixed question of law and fact. But it is for the court to withhold the facts from the jury, when they are not such as can afford any ground for finding an acceptance; and this includes cases where, though the court might admit that there was a scintilla of evidence tending to show an acceptance, they would still feel bound to set aside a verdict finding an acceptance upon that evidence.' What this scintilla is, needs to be stated a little more definitely; otherwise it may be understood to include all cases where, on a motion for a new trial, a verdict would be set aside, as against the weight of the evidence. It would be impossible to draw a line theoretically, because evidence in its very nature varies from the weakest to the strongest, by imperceptible degrees. But the practical line of distinction is, that if the evidence is such that the court would set aside any number of verdicts rendered upon it, toties quoties, then the cause should be taken from the jury, by instructing them to find a verdict for the defendant. On the other hand, if the evidence is such that, though one or two verdicts rendered upon it would be set aside on motion, yet a second or third verdict would be suffered to stand, the cause should not be taken from the

McDONALD v. METROPOLITAN ST. RY. CO.

(Court of Appeals of New York, 1901. 167 N. Y. 66, 60 N. E. 282.)

MARTIN, J. This action was for personal injuries resulting in the death of the plaintiff's intestate, and was based upon the alleged negligence of the defendant. An appeal was allowed to this court upon the ground of an existing conflict in the decisions of different departments of the appellate division as to when a verdict may be directed where there is an issue of fact, and because in this case an erroneous principle was asserted, which, if allowed to pass uncorrected, would be likely "to introduce confusion into the body of the law." Sciolina v. Preserving Co., 151 N. Y. 50, 45 N. E. 371. The court having directed a verdict, the appellant is entitled to the most favorable inferences deducible from the evidence, and all disputed facts are to be treated as established in her favor. Ladd v. Insurance Co., 147 N. Y. 478, 482, 42 N. E. 197; Higgins v. Eagleton, 155 N. Y. 466, 50 N. E. 287; Ten Eyck v. Whitbeck, 156 N. Y. 341, 349, 50 N. E. 963; Bank v. Weston, 159 N. Y. 201, 208, 54 N. E. 40, 45 L. R. A. 547. If believed, the testimony of the plaintiff's witnesses was sufficient to justify the jury in finding the defendant negligent, and the plaintiff's intestate free from contributory negligence. The evidence of the defendant was in many respects in direct conflict, and, if credited, would have sustained a verdict in its favor. Whether the defendant was negligent, the plaintiff's intestate free from contributory negligence, and the amount of damages, were submitted to the jury. It, however, having agreed upon a general verdict, and failed to answer the questions submitted, the trial judge withdrew them, and directed a verdict for the defendant. Upon the verdict so directed, a judgment was entered. Subsequently an appeal was taken to the appellate division, where it was affirmed, and the plaintiff has now appealed to this court.

Although there was a direct and somewhat severe conflict in the evidence, the questions of negligence and contributory negligence were clearly of fact, and were for the jury, and not for the court, unless the right of trial by jury has been partially, if not wholly, abolished. It was assumed below that the plaintiff's evidence established a case which, undisputed, was sufficient to warrant a verdict in her favor. But the court said that at the close of the defendant's evidence the plaintiff's case had been so far overcome that a verdict in her favor would have been set aside as against the weight of evidence. Upon that alleged condition of the proof it held that the trial court might

jury, but should be submitted to them under instructions. This rule throws upon the court a duty which may sometimes be very delicate; but it seems to be the only practicable rule which the nature of the case admits."

For the rule governing setting a verdict aside as against the evidence, see Metropolitan Ry. Co. v. Moore, 121 U. S. 558, 7 Sup. Ct. 1334, 30 L. Ed. 1022 (1887); Jones v. Spencer, 77 L. T. R. 536 (1897).

have properly submitted the case to the jury if it saw fit, but that it was not required to, as the verdict might have been thus set aside. The practical result of that decision, if sustained, is in every close case to vest in the trial court authority to determine questions of fact, although the parties have a right to a jury trial, if it thinks that the weight of evidence is in favor of one, and it directs a verdict in his favor. There have been statements by courts which seem to lend some justification to that theory, but we think no such broad principle has been intended, and that no such rule can be maintained either upon principle or authority. The rule that a verdict may be directed whenever the proof is such that a decision to the contrary might be set aside as against the weight of evidence would be both uncertain and delusive. There is no standard by which to determine when a verdict may be thus set aside. It depends upon the discretion of the court. The result of setting aside a verdict and the result of directing one are widely different, and should not be controlled by the same conditions or circumstances. In one case there is a retrial; in the other the judgment is final. One rests in discretion; the other upon legal right. One involves a mere matter of remedy or procedure; the other determines substantive and substantial rights. Such a rule would have no just principle upon which to rest.

While in many cases, even where the evidence is sufficient to sustain it, a verdict may be properly set aside, and a new trial ordered, yet that in every such case the trial court may, whenever it sees fit, direct a verdict, and thus forever conclude the parties, has no basis in the law, which confides to juries, and not to courts, the determination of the facts in this class of cases. We think it cannot be correctly said in any case where the right of trial by jury exists, and the evidence presents an actual issue of fact, that the court may properly direct a verdict. So long as a question of fact exists, it is for the jury, and not for the court. If the evidence is insufficient, or if that which has been introduced is conclusively answered, so that, as a matter of law, no question of credibility or issue of fact remains, then, the question being one of law, it is the duty of the court to determine it. But whenever a plaintiff has established facts or circumstances which would justify a finding in his favor, the right to have the issue of fact determined by a jury continues, and the case must ultimately be submitted to it. The credibility of witnesses, the effect and weight of conflicting and contradictory testimony, are all questions of fact, and not questions of law. If a court of review, having power to examine the facts, is dissatisfied with a verdict because against the weight or preponderance of evidence, it may be set aside; but a new trial must be granted before another jury, so that the issue of fact may be ultimately determined by the tribunal to which those questions are confided. If there is no evidence to sustain an opposite verdict, a trial court is justified in directing one, not because it would have authority

to set aside an opposite one, but because there was an actual defect of proof; and hence, as a matter of law, the party was not entitled to recover. Colt v. Railroad Co., 49 N. Y. 671; Bagley v. Bowe, 105 N. N. Y. 171, 179, 11 N. E. 386, 59 Am. Rep. 488.

We have recently considered the question involved in the case at bar, have practically reaffirmed the doctrine of the foregoing cases, and have reviewed the cases upon which the court below seems to have based its decision. Fealey v. Bull, 163 N. Y. 397, 57 N. E. 631. The learned judge who delivered the opinion in that case plainly demonstrated that the doctrine enunciated by the court below has no actual support in Linkauf v. Lombard, 137 N. Y. 417, 33 N. E. 472, 20 L. R. A. 48, 33 Am. St. Rep. 743, and Hemmens v. Nelson, 138 N. Y. 517, 34 N. E. 342, 20 L. R. A. 440. He shows that in those cases there was no sufficient evidence to sustain the verdicts, and that, if there had been, this court would have had no jurisdiction to reverse. His examination further discloses that the reversal in the Linkauf Case was upon the ground that the proof amounted at most to a mere surmise, and that in the Hemmens Case the principle that, if there is any evidence upon a question of fact, it should be submitted to the jury, was asserted. The clearness and ability with which the question was discussed by him render it unnecessary to further consider it at this time. We are of the opinion that a plain issue of fact was presented for the jury; that the court erred in directing a verdict; that the judgment and order should be reversed, and a new trial granted, with costs to abide the event.

PARKER, C. J., and BARTLETT, VANN, CULLEN, and WERNER, JJ., concur. GRAY, J., dissents.

Judgment reversed, etc.[28]

WINANS et al. v. ATTORNEY GENERAL.

(House of Lords. [1904] App. Cas. 287.)

William Louis Winans was born in the United States in 1823. In 1859 he came to England and lived there in various places until his death in 1897. By his will he bequeathed an annuity to a relative, and the question in this appeal was whether he was at his death domiciled in England. If he was, legacy duty was payable; otherwise not. The Attorney General having filed an information against the appellants (who were the executors) to recover the duty, Kennedy and Phillimore, JJ., held that the testator was at his decease domiciled in England and that the duty was payable. This decision was affirmed by the Court of Appeal (Collins, M. R., and Stirling and Mathew, L. JJ.)

[28]Accord: Dublin Ry. Co. v. Slattery, 3 App. Cas. (H. of L.) 1155 (1878); Phillips v. Phillips, 93 Iowa, 615, 61 N. W. 1071 (1895); Bailey v. Robison, 233 Ill. 614, 84 N. E. 660 (1908).

Compare Hite v. Metropolitan St. Ry. Co., 130 Mo. 132, 31 S. W. 262, 32 S. W. 33, 51 Am. St. Rep. 555 (1895).

Hence this appeal. The arguments turned entirely on the true inference of fact to be drawn from the evidence, which is fully stated in Lord Macnaghten's judgment.

EARL OF HALSBURY, L. C. My Lords, the short question here is whether Mr. Winans was at the time of his death domiciled in this country. So far as it is a question of law it is simple enough to state, but when the law has been stated a difficult and complex question of fact arises which it is almost always very hard to solve.

Now the law is plain, that where a domicil of origin is proved it lies upon the person who asserts a change of domicil to establish it, and it is necessary to prove that the person who is alleged to have changed his domicil had a fixed and determined purpose to make the place of his new domicil his permanent home. Although many varieties of expression have been used, I believe the idea of domicil may be quite adequately expressed by the phrase—Was the place intended to be the permanent home? Now Mr. Winans was an American citizen; he resided in Russia for some time; he had various residences in England, and great sporting leases in Scotland. He married in St. Petersburg a Guernsey lady. He had property in the United States, and he originally came to England upon the recommendation of his medical man. He lived a very long time in England, and if I were satisfied that he intended to make England his permanent home I do not think it would make any difference that he had arrived at the determination to make it so by reason of the state of his health, as to which he was very solicitous. It would be enough that for obvious reasons he had determined to make England his permanent home. But was that his determination? I confess I am not able very confidently to answer that question either way. I have been in considerable doubt, when I view his whole career, whether he ever intended finally to remain here. He had invented cigar-shaped boats, in which he took a deep interest as inventor, and also as one who meant to travel back to his own country when his boats succeeded.

It may be that your Lordships do not think that he was likely to succeed, but it may confidently be asserted that the inventor thoroughly believed that he would succeed. It is true that great reliance might not only be placed upon his great acquisition of sporting areas in Scotland, but, on the other hand, they were treated by him rather as profit-making investments than because he himself was devoted to sport; but even in this, as in some other parts of his conduct, it is difficult to say that a certain inference could be deduced from what he did. Being a man of enormous wealth, he never made such a home for himself or his family as one would have expected if he had really meant to remain permanently in England. Like all questions of fact dependent upon a variety of smaller facts, it is possible to treat this or that evidence as conclusive, and different minds will attribute different degrees of importance to the same facts.

I must admit that I have regarded the whole history of Mr. Winans' life differently at different stages of the argument, and the conclusion I have come to is that I cannot say that I can come to a satisfactory conclusion either way; but then the law relieves me from the embarrassment which would otherwise condemn me to the solution of an insoluble problem, because it directs me in my present state of mind to consider upon whom is the burden of proof. Undoubtedly it is upon the Crown, and, as I cannot bring myself to a conclusion, either way, whether Mr. Winans did or did not intend to change his domicil, his domicil of origin must remain, and I, therefore, am of opinion that the judgment of the Court of Appeal ought to be reversed.

Orders of the Court of Appeal and of the Queen's Bench Division reversed.[29]

PELITIER v. CHICAGO, ST. P., M. & O. RY. CO.

(Supreme Court of Wisconsin, 1894. 88 Wis. 521, 60 N. W. 250.)

WINSLOW, J.[30] * * * The instructions applicable to the fourth question and to which plaintiff excepted will be given at length. After instructing the jury that the burden of proof with reference to certain questions was on the plaintiff, the court said: "You are instructed that it is incumbent on the party upon whom the burden of proof rests, to establish the existence of a fact in controversy, to satisfy you by a preponderance of evidence that such fact does exist; otherwise, you should find to the contrary—that is to say, you should carefully weigh all the evidence produced by both parties bearing on any such controversy, and determine upon which side such evidence preponderates, if you can. If the same is so evenly balanced that you cannot determine on which side the same preponderates, or if you conclude that the preponderance of evidence is against the party on whom the burden of proof rests, or if, notwithstanding there is to your minds a preponderance of evidence tending to establish a fact in controversy, you are yet not satisfied of its existence, your finding should be against the party on whom the burden of proof rests. Such finding should be in favor of the side on which the burden of proof rests only when you are satisfied that the preponderance of evidence in respect to the controversy tends to establish the existence of the fact involved, and you are satisfied to a reasonable certainty that the fact does exist which such preponderance of evidence tends to establish. You are further instructed that the term 'preponderance of evidence,' as here used, does not necessarily mean the greatest number of witnesses. It frequently happens that there are more witnesses on one side of a controversy than on the other, yet the greatest weight of evi-

[29] Concurring opinion of Lord Macnaghten and dissenting opinion of Lord Lindley omitted.

[30] Statement and part of opinion omitted.

dence is on the side of the lesser number of witnesses; and in all such cases it is the weight of evidence that counts, and should govern the finding of a jury. Keep in mind what is here said in regard to the degree of certainty to which you should arrive in respect to the existence of a fact in controversy in order to warrant a finding in favor of the party on whom the burden of proof rests, and the explanation of the term 'preponderance of evidence,' and apply the same to each question submitted." * * *

The errors which appellant claims in these instructions will be considered in their order.

1. It is claimed that it was error to say that the jury must be satisfied by the preponderance of the evidence, to a reasonable certainty, that a fact existed before they could find such fact; and it is said that this expression means practically the same as the expression "satisfied beyond a reasonable doubt." The expression used by the court was criticised in Allen v. Murray, 87 Wis. 41, 57 N. W. 979, but it did not become necessary to pass upon it in that case. We have examined the question, and are satisfied that the instruction is not erroneous. In the case of Beery v. Railway Co., 73 Wis. 197, 40 N. W. 687, an instruction that the jury must feel "reasonably certain" of a fact on which plaintiff's case depended was held correct; and it was said that this did not mean that the proof must be clear and most satisfactory, but only that "the preponderance of the evidence must convince their judgment of the truth of the fact found." In Gores v. Graff, 77 Wis. 174, 46 N. W. 48, an instruction to the effect that there need only be "a fair preponderance of the evidence tending to show the existence of a fact" was distinctly disapproved; and it was held that the instruction should have been that, "if the jury were satisfied by a preponderance of the evidence that all the facts essential to a recovery were proved, they should find for the plaintiff."

The instruction in question here seems to be entirely justified by the doctrines laid down in these two cases. It is very pertinently said by Mr. Justice Lyon in the last-named case that "there may have been a preponderance of evidence tending to prove such facts, or some or all of them, and yet the evidence be quite insufficient to prove those facts." A verdict in favor of the party who has the burden of proof in any case is a solemn determination that certain facts exist. Should such a determination be made merely because the evidence upon one side is a trifle weightier than that upon the other, when the evidence is so unsatisfactory that the judgment of the jury is not satisfied, nor the reason convinced of the existence of the facts? We think not. The expression frequently used by the trial courts and frequently announced by appellate courts is that the minds of the jury must be satisfied or convinced by the preponderance of the evidence of the existence of a fact. Whitney v. Clifford, 57 Wis. 156, 14 N. W. 927.

When the mind is satisfied or convinced of the existence of a fact, is not the mind reasonably certain of the fact? It seems to us that

this question must be answered in the affirmative. Expressions may be found in text-books and decisions to the effect that a mere preponderance of the evidence is all that is required in civil cases, but it will be found that this principle is generally laid down in contradistinction with the rule of proof in criminal cases.[31] Whitney v. Clifford, supra. In a general way this statement of the rule is correct, but that does not make the amplification of the rule as given in this case incorrect. Telford v. Frost, 76 Wis. 172, 44 N. W. 835, was much relied on by appellant, but examination of the case clearly shows that the question here raised was not there presented. The only question there presented was as to the correctness of the general charge that the verdict must be in accord with the greater weight of evidence, and no request was made to charge the jury more specifically. Upon principle and authority, therefore, we hold that the charge of the court upon this subject, though expressed more strongly and emphatically than is usual or perhaps advisable, was not error. * * *

Judgment affirmed.[32]

BARFIELD v. BRITT.

(Supreme Court of North Carolina, 1854. 47 N. C. 41, 62 Am. Dec. 190.)

The declaration was for words spoken, charging the plaintiff with murder by secretly poisoning one Jacob Britt. The words were proved within time, and the case turned upon the plea of justification. The defendant offered the dying declarations of Jacob Britt, charging the plaintiff with the crime imputed to him by the words of the defendant, which were objected to by the plaintiff's counsel, but admitted by the Court. For this the plaintiff excepted.

The plaintiff's counsel asked the Court to instruct the jury that to establish the plea of justification, the jury should have the same cogency of proof as if the plaintiff were on trial for his life under the criminal charge of murder. This, the Court, however, refused; and

[31] At an early period a greater degree of certainty appears to have been required in some criminal cases than in civil cases generally. In Regina v. Muscot, 10 Modern, 192 (1714), Parker, Chief Justice, in summing up the evidence, said, inter alia: "There is this difference between a prosecution for perjury and a bare contest about property, that in the latter case the matter stands indifferent, and therefore a credible and probable witness shall turn the scale in favour of either party; but in the former, presumption is ever to be made in favour of innocence, and the oath of the party will have a regard paid to it, until disproved. Therefore to convict a man of perjury a probable, a credible witness is not enough; but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant; for else there is only oath against oath."

Somewhat later the rule requiring the jury to be satisfied beyond a reasonable doubt in order to convict came to be applied to all strictly criminal prosecutions.

[32] See, also, Haskins v. Haskins, 9 Gray (Mass.) 390 (1857).

instructed the jury that a preponderance of evidence, as in a civil case, was all that was necessary. For this, plaintiff further excepted.

Verdict for defendant. Judgment and appeal.

BATTLE, J.[88] Two questions are presented by the bill of exceptions: First. Whether in the issues joined, upon the plea of justification, the dying declarations of Jacob Britt could be given in evidence by the defendant, to prove the truth of the words for which the action was brought? Secondly. Whether his Honor was right in refusing to instruct the jury that the defendant must sustain his plea by the same cogency of proof as would be required against the plaintiff, were he on trial for his life, under a charge of murder; but on the contrary, saying to them that a preponderance of evidence, as in a civil case, was all that was necessary. * * *

As the plaintiff is entitled to a venire de novo for the error in admitting improper testimony, we might abstain from expressing an opinion upon the second question; but as that question may and probably will be raised upon the next trial, we will, for the guidance of the parties, state now the view which we have taken of it. We think his Honor was clearly right in declining to give the instruction prayed: "that to sustain the plea of justification, it was necessary that the jury should have the same cogency of proof they would require in case the plaintiff were on trial for his life." To such an instruction the case of Kincade v. Bradshaw, 10 N. C. 63, was directly opposed; it being held there, that in an action for slander, in charging a plaintiff with perjury, the defendant is not bound, in support of his plea of justification, to produce such evidence as would be requisite to convict the plaintiff, if he were on trial for the offence. Taylor, C. J., in delivering the opinion of the court, concludes the argument thus: "It cannot, therefore, be a correct rule that a jury should require the same strength of evidence to find the fact controverted in a civil case, which they would require to find a man guilty of a crime; but the crime of perjury stands upon peculiar grounds and requires more evidence to produce conviction than crimes in general: one witness is not sufficient, because then there would be only one oath against another. A man knowing another to have committed perjury, may forbear to prosecute him, for the very reason that there is but one witness by whom the crime can be proved: Shall he, therefore, be deprived of his justification if sued in an action of slander, although he might be furnished with convincing evidence of the truth of the words? Both reason and authority answer in the negative." The authority relied on was the case of the Queen v. Muscot, 10 Mod. Rep. 192, where the Chief Justice, Parker, expressed himself in similar terms.

After declining to give the instructions prayed, his Honor told the jury "that a preponderance of evidence, as in a civil case, was all that was necessary." If the very language used by his Honor is correctly

[88] Part of opinion omitted.

set forth, it must be confessed that it is not very perspicuous, and on that account not much calculated to enlighten the minds of the jury. The case on trial was a civil case, and it could afford the jury very little assistance to make it the standard of itself. But we suppose that the words "any other" were omitted by mistake in making out the transcript, and that a fair interpretation of the charge, taken in connection with the refusal to give that which was asked, is, that the party upon whom lay the onus probandi must produce such a preponderance of testimony as must satisfy the jury of the truth of his allegation, as he would have to do in any other civil case. If this be the meaning of the charge, it is directly sustained by the case of Neal v. Fesperman, decided at the last June Term, 46 N. C. 446. In that case the Court say in conclusion "how far in favorem vitæ this matter is to be extended so as to require the court in a capital case, when the evidence of guilt is direct, to charge the jury that they must be satisfied beyond a rational doubt, that is, that they should not have a rational doubt of the truth of the evidence, or the credibility of the witnesses, we are not now to say; suffice it, in civil cases, if the jury are satisfied from the evidence that an allegation is true in fact, it is their duty so to find, and they should be so instructed." It is unnecessary to pursue the discussion further, as we think we have said enough to prevent the recurrence of an error, if any was committed upon the second point made in the case. For the error committed in the admission of improper testimony, there must be a venire de novo.

PER CURIAM. Venire de novo.[34]

HOLT v. UNITED STATES.

(Supreme Court of the United States, 1910. 218 U. S. 245, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138.)

Mr. Justice HOLMES[35] delivered the opinion of the court:

The plaintiff in error was indicted in the circuit court for murder, alleged to have been committed "within the Fort Worden Military Reservation, a place under the exclusive jurisdiction of the United States." There was a trial and a verdict of guilty, without capital

[34] When the commission of a crime was involved in a civil case, it was formerly thought necessary to establish it with the same degree of certainty as required in a criminal prosecution. Thurtell v. Beaumont, 1 Bingham, 339 (1823). But the later cases are generally in accord with the principal case. Peoples v. Evening News, 51 Mich. 11, 16 N. W. 185, 691 (1883); Edwards v. George Knapp & Co., 97 Mo. 432, 10 S. W. 54 (1888); Bell v. McGinness, 40 Ohio St. 204, 48 Am. Rep. 673 (1883). For a class of civil cases in which a very strong showing appears to be required, see Bosvile v. Attorney General, L. R. 12 P. D. 177 (1887).

See Foster v. Graff, 287 Ill. 559, 122 N. E. 845 (1919), suggesting a possible difference between the certainty required to establish the commission of a crime by a third person and by a party to the action.

[35] Part of opinion omitted.

punishment, as allowed by statute. He was sentenced to imprisonment for life, and thereupon brought this writ of error. 168 Fed. 141. * * *

The remaining exceptions relate to the charge. One was to a refusal to embody an instruction requested as to reasonable doubt. The court, however, gave full and correct instructions on the matter, and indeed, rather anxiously repeated and impressed upon the jury the clearness of the belief they must entertain in order to convict. See Dunbar v. United States, 156 U. S. 185, 199, 39 L. Ed. 390, 395, 15 Sup. Ct. 325; 4 Wigmore, Ev. § 2497. Another exception was to the refusal to give an instruction that "the presumption of innocence starts with the charge at the beginning of the trial, and goes with [the accused] until the determination of the case. This presumption of innocence is evidence in the defendant's favor," etc. The judge said: "The law presumes innocence in all criminal prosecutions. We begin with a legal presumption that the defendant, although accused, is an innocent man. Not that we take that to be an absolute rule, but it is the principle upon which prosecutions must be conducted; that the evidence must overcome the legal presumption of innocence. And in order to overcome the legal presumption, as I have already stated, the evidence must be clear and convincing, and sufficiently strong to convince the jury beyond a reasonable doubt that the defendant is guilty," with more to the same effect. This was correct, and avoided a tendency in the closing sentence quoted from the request to mislead. Agnew v. United States, 165 U. S. 36, 51, 52, 41 L. Ed. 624, 629, 630, 17 Sup. Ct. 235. See also 4 Wigmore, Ev. § 2511.

After the jury had been sent out, they returned and asked the court what constituted a reasonable doubt.[36] The court replied: "A reasonable doubt is an actual doubt that you are conscious of after going over

[36] In Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711, (1850) Chief Justice Shaw gave the following definition which has figured so largely ever since: "Then, what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence, and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty, a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether."

in your minds the entire case, giving consideration to all the testimony and every part of it. If you then feel uncertain and not fully convinced that the defendant is guilty, and believe that you are acting in a reasonable manner, and if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt, of which the defendant is entitled to have the benefit." He denied the notion that any mere possibility was sufficient ground for such a doubt, and added that, in the performance of jury service, they should decide controversies as they would any important question in their own affairs. This was excepted to generally, and the court was asked to add that if the jury found one fact inconsistent [37] with the guilt of the defendant, they should acquit. The court already had given this instruction in the charge, and was not called upon to repeat it. As against a general exception, the instructions given were correct. Some other details in the trial are criticized, but we have dealt with all that seem to us to deserve mention, and find no sufficient reason why the judgment should not be affirmed.

Judgment affirmed.[38]

II. Apportionment of the Burdens

BERTY v. DORMER.

(Court of King's Bench, 1701. 12 Mod. 526.)

Issue directed out of Chancery was, whether land assigned for payment of a legacy were deficient in value; and issue was joined upon the deficiency, the one alledging that it was deficient, and the other that it was not.

Per Curiam. Though averring that it was deficient is such an affirmative as implies a negative, yet it is such an affirmative as turns the proof on those that plead it. If he had joined the issue that the

[37] In State v. Hawley, 63 Conn. 47, 27 Atl. 417 (1893), the defense relied on was that the homicide had been committed by a third person, Flora Hawley. Carpenter, J., in disapproving the instructions on this point, said: "It seems to us that the evidence tending to connect Flora Hawley with the commission of the crime was not submitted to the jury just as it ought to have been. The jury may have understood from the charge that, in order to have that evidence avail the accused, it was necessary that they should be satisfied beyond a reasonable doubt that she was guilty of the offense; whereas the true question we think is whether there is such evidence tending to connect her with the crime as will raise a reasonable doubt whether John Hawley was guilty. That, and not whether Flora Hawley was guilty, was the material question in this part of the case for the jury to determine."

[38] It seems that in a criminal case the court may direct a verdict for defendant on the ground that the evidence is not sufficient to establish guilt beyond a reasonable doubt, though it might have been sufficient in a civil case. People v. Gluck, 188 N. Y. 167, 80 N. E. 1022 (1907).

lands were not of value, and the other had averred that they were, the proof then had lain on the other side. If one plead infra ætatem, which is no more than that he is not of age, and issue is thereupon, he that pleads the infra ætatem must prove it.[39]

DICKSON et al. v. EVANS.

(Court of King's Bench, 1794. 6 Term R. 57.)

This was an action upon a promissory note of the defendant's payable to the bankrupt. The defendant gave notice of set off, that the bankrupt before and at the time of his bankruptcy was indebted to him to a greater amount upon certain cash notes issued by the bankrupt before his bankruptcy, payable to bearer.

At the trial before Rooke, J., at Monmouth, the defendant produced such notes as were mentioned in his set off, dated prior to the bankruptcy, but did not prove when they came into his hands; on which ground it was contended on behalf of the plaintiffs that the set off was not established, it being incumbent on the defendant to shew that his set off existed at the time of the bankruptcy, for that no debt accruing to him subsequently would avail. But Mr. Justice Rooke, being of opinion that the bearer of such notes was not called upon to prove when he took them, that prima facie they must be taken to be fairly obtained, and must have reference to the time of the date, which was before the bankruptcy, and that if they had got to the hands of the defendant subsequent to the bankruptcy, the onus probandi lay on the assignees, nonsuited the plaintiffs. A motion for a new trial was made in Easter term last, which came on to be argued in Trinity term following: but it stood over for further consideration, it being understood that there was a similar case depending in the Court of Exchequer. At the conclusion of the argument in Trinity term last Lawrence, J., observed, that if the notes had been made payable to the defendant himself, he should have thought it reasonable evidence of their having come to his hands at the time they bore date. And now the case was spoken to again by

Erskine and Lewis, who shewed cause against the rule.

LORD KENYON, C. J.[40] I am of opinion on the words of the act of parliament, on the reason of the thing, and on the authority of decided cases, that the rule should be made absolute for setting aside the nonsuit. The words of the stat. 5 Geo. 2, c. 30, § 28, are express, that if it shall appear to the commissioners that there has been mutual credit given by the bankrupt, or mutual debts between the bankrupt and any other person at any time before the bankruptcy, the commissioners

[39] Opinion of Holt, C. J., omitted.

[40] Opinion of Grose, J., omitted.

shall state the account &c. and what shall appear to be due &c. shall be claimed or paid. That act was founded on good sense; and it provides that the assignees shall not recover against a debtor of the bankrupt what was due to the bankrupt on one side of the account, without also taking into consideration the other side of the account, and seeing on which side the balance lies. That is the justice of the case. But it would be most unjust indeed if one person, who happens to be indebted to another at the time of the bankruptcy of the latter, were permitted by any intrigue between himself and a third person so to change his own situation as to diminish or totally destroy the debt due to the bankrupt by an act ex post facto. In cases of this sort the question must be considered in the same manner as if it had arisen at the time of the bankruptcy, and cannot be varied by any change of situation of one of the parties. It is said however that the rule by which we are to proceed in a Court of law under the statutes of set off is a different rule from that by which the commissioners proceed under the statute 5 Geo. 2, c. 30: but it must be remembered that that act proceeded on the law of the case, and applied the same rule to the commissioners of bankrupt. The cases, which have been decided on the statutes of set off, are uniform. In addition to the cases cited there is that of Lucas v. Marsh, Barnes, 453, 4to. edit., in which it was held that when an indorsed note is set off by the defendant, it must be proved that it was indorsed before the plea was pleaded. The whole of the present case is resolvable into this question, on whom did the onus probandi lie? That being settled, every thing else follows of course. Now the cases of set off are understood to be in the nature of cross actions; and if the defendant, instead of setting off these notes, had brought his cross action against the assignees, he must have proved every thing necessary to constitute his demand; and the time when the notes were indorsed would be one material ingredient in that case; then, under this set off he must prove the same things. If the commissioners had refused to allow this set off, and the defendant had applied to the Lord Chancellor by petition, he must have set forth in that petition that the notes were indorsed to him prior to the bankruptcy, and he must also have proved it. Therefore the words of the statute of bankrupts, the statutes of set off, the decisions on the different statutes, and the forms of proceeding, all lead to this conclusion, that the onus probandi lay on the defendant, who wished to avail himself of the debt arising from the possession of the notes, and consequently that the nonsuit must be set aside.

ASHHURST, J. Much fraud and great injustice would be introduced if any other rule than that laid down by Lord Kenyon were to prevail. It is a general rule of evidence that in every case the onus probandi lies on the person who wishes to support his case by a particular fact, and of which he is supposed to be cognizant; but it is said in this case that it was incumbent on the assignees to prove the

time when the defendant received these notes. But the assignees could have no means of knowing that fact, whereas it must have been known to the defendant; and as the latter relied upon it as the ground of his set off, and did not prove it, the assignees were entitled to recover.

PER CURIAM. Rule absolute.

WILSON et al. v. HODGES et al.

(Court of King's Bench, 1802. 2 East, 312.)

In debt on recognizance of bail, the breach assigned was, that Michell the principal had not paid the damages, nor rendered himself, &c. according to the form and effect of the said recognizance. Plea; that after the judgment, &c. and before the suing out the writs of scire facias, and before the return of the writ of capias ad satisfaciendum against Michell upon the judgment, he Michell died: concluding with a verification. Replication; that after the giving the judgment, and before the suing out of the said writs of scire facias, or either of them, the plaintiffs sued out a writ of capias ad satisfaciendum against Michell, returnable, &c. to which the sheriff returned non est inventus: and the plaintiffs further say, that Michell, at the said return of the said writ of capias ad satisfaciendum, and afterwards, was living, &c. which they are ready to verify. Rejoinder; that Michell was not at the said return of the said writ of ca. sa. living, as the plaintiffs had replied; concluding to the country: on which issue was joined.

At the trial before Le Blanc, J. at the sittings at Guildhall, the only question was, Whether the issue lay on the defendants to prove the death of Michell, or on the plaintiffs to prove that he was alive at the time mentioned? The learned Judge thought that the proof of the issue lay on the defendants, who averred the death of the party, and they not being prepared with any proof of the fact, the verdict passed for the plaintiffs on that ground. To set aside which Erskine obtained a rule nisi in the last term, on the ground of a misdirection, as well as on affidavit. Gibbs was now to have shewn cause. But

LORD ELLENBOROUGH, C. J., said, there was no doubt but that the direction of the learned Judge was proper in point of law. And he referred to the case of Throgmorton v. Walton [41] where it was decided, that where the issue is upon the life or death of a person once

[41] The following report of this case is given in 2 Rolle 461 (1625):

"The plaintiff derived his title as heir at law of a sister; the defendant proves that there were four sisters. And the question was who should prove the sisters Norton alive; and upon this they appealed to the Court.

"Chamberlain and Dodrige, Justices. He who would prove them dead: for if it is shown that they were once alive, it will be presumed that they are alive if the contrary should not be proved. ("Si montre que unfoits in vie, ils seront intend in vie, si le contrarie ne soit prove.")"

shewn to be living, the proof of the fact lies on the party who asserts the death; for that the presumption is, that the party continues alive until the contrary be shewn.

However, as the defendants swore that they had been misled by an opinion taken, which stated that the issue on these pleadings lay on the plaintiffs; and as circumstances were deposed to, which went to prove the death of the principal as stated;

THE COURT let the defendants in to a new trial on payment of costs. Rule absolute.

THE KING v. TURNER.

(Court of King's Bench, 1816. 5 Maule & S. 206.)

Certiorari to review a conviction of the defendant by two justices on a charge of having certain game in his possession, not being a person qualified, etc. After setting out the information, the order of the justices recited: "Whereupon the defendant being summoned on the 10th of February, in the 56th year aforesaid, &c., appeareth before us, the said J. M. and G. M., one other of the justices, &c., and having heard, &c., pleads not guilty. Neverthless, on the said 10th day of February, at &c., two credible witnesses, to wit, T. T. and W. S. upon their oath, affirm, in the presence of the said J. Turner, that within three months next before the said information, to wit, on the said 5th of February, in the 56th year aforesaid, at &c., the said J. Turner being a carrier, did have in his custody and possession, in his waggon, at the parish of Send and Ripley, in the county aforesaid, sixteen pheasants and five hares, the same not being sent up or placed in the hands of said J. Turner, by any person or persons qualified to kill game, contrary to the form of the statute, &c. Whereupon the said J. Turner, being asked what he hath to say or offer in his defense, produceth one witness, to wit, G. T., who, being duly sworn, deposeth, in the presence of the said J. Turner, and also of the said W. Taylor, that on the said 5th day of February, at the parish of The Holy Trinity, in Guildford aforesaid, he was present at, and did aid and assist in the packing and loading the said waggon of the said J. Turner; and that at the day and parish last aforesaid, when the said waggon of the said J. Turner left the warehouse of the said J. Turner, in the said parish last aforesaid, there was not in the custody and possession of the said J. Turner, in his said waggon, in the parish last aforesaid, any such quantity of game as is above laid to his charge, or any game whatever; and forasmuch as upon hearing the matters, &c., it appears to us, the said justices, that the said J. Turner is guilty of the premises, it is therefore adjudged by us the said justices, upon the testimony of the said T. T. and W. S., that the said J. Turner, on the said 5th day of February, at the parish of Send and Ripley aforesaid, within three months next before the said information was made before

me the said J. M. by the said W. T. as aforesaid, unlawfully had in his custody and possession, sixteen pheasants and five hares, contrary to the form of the statute, &c." * * *

Secondly, it was objected, that it does not appear that any evidence was given in support of the information, negativing the qualifications mentioned in the statute, which is necessary, in order to found the jurisdiction of the justices; for if the party be qualified in any one respect, the justices have no jurisdiction. And herein a proceeding before a justice differs from an action. It seems, therefore, that prima facie evidence, at least, ought to be required; though it must be admitted, that in Rex v. Stone, 1 East, 639, the Court were divided in opinion upon this point.[42]

LORD ELLENBOROUGH, C. J. The question is, upon whom the onus probandi lies; whether it lies upon the person who affirms a qualification, to prove the affirmative, or upon the informer, who denies any qualification to prove the negative. There are, I think, about ten different heads of qualification enumerated in the statute 22 & 23 Car. 2, c. 25, § 3, to which the proof may be applied; and, according to the argument of to-day, every person who lays an information of this sort is bound to give satisfactory evidence before the magistrates to negative the defendant's qualification upon each of those several heads. The argument really comes to this, that there would be a moral impossibility of ever convicting upon such an information. If the informer should establish the negative of any part of these different qualifications, that would be insufficient, because it would be said, non liquet, but that the defendant may be qualified under the other. And does not, then, common sense shew, that the burden of proof ought to be cast on the person, who, by establishing any one of the qualifications, will be well defended? Is not the Statute of Anne in effect a prohibition on every person to kill game, unless he brings himself within some one of the qualifications allowed by law; the proof of which is easy on the one side, but almost impossible on the other? I remember the decision of Rex v. Stone; and the arguments of the learned Judges, who held the necessity of giving negative proof, were undoubtedly urged with great force; but I felt at the time, that if they were right, it would, in most cases, be impossible to convict at all. But in Spieres v. Parker, 1 T. R. 144, I find Lord Mansfield laying down the rule, that in actions upon the game laws, (and I see no good reason why the rule should not be applied to informations as well as actions) the plaintiff must negative the exceptions in the enacting clause, though he throw the burden of proof on the other side. The same was said by Heath, J., in Jelfs v. Ballard, 1 B. & P. 468; and such I believe has been the prevailing opinion of the profession, and the practice. I am, therefore, of opinion, that this conviction, which specifies negatively in the information the several qualifications men-

[42] Statement condensed and opinion of Bayley, J., omitted.

tioned in the statute, is sufficient, without going on to negative, by the evidence, those qualifications.

HOLROYD, J. I also am of the same opinion. It is a general rule, that the affirmative is to be proved, and not the negative, of any fact which is stated, unless under peculiar circumstances, where the general rule does not apply. Therefore it must be shewn, that this is a case which ought to form an exception to the general rule. Now all the qualifications mentioned in the statute, are peculiarly within the knowledge of the party qualified. If he be entitled to any such estate, as the statute requires, he may prove it by his title deeds, or by receipt of the rents and profits: or if he is son and heir apparent, or servant to any lord or lady of a manor appointed to kill game, it will be a defence. All these qualifications are peculiarly within the knowledge of the party himself, whereas the prosecutor has, probably, no means whatever of proving a disqualification. If this be so, instead of saying that the general rule of law ought not to apply to this case, it seems to be the very case to which the rule ought peculiarly to apply. The other objections do not appear to me to be well founded; and, therefore, I think this conviction ought to be affirmed.

Conviction affirmed.[48]

THE KING v. INHABITANTS OF TWYNING.

(Court of King's Bench, 1819. 2 Barn. & Ald. 386.)

Two justices removed Mary Burns, the wife of Francis Burns, an Irishman, then absent, and James and Ann her children, from the township of Manchester to the parish of Twyning in the county of Gloucester. The sessions, on appeal, confirmed the order, subject to the opinion of the Court of King's Bench, upon the following case:

About seven years ago, the pauper Mary Burns intermarried with one Richard Winter, with whom she lived a few months, when he enlisted for a soldier, went abroad on foreign service, and has never been heard of since. In a little more than twelve months after his departure, the pauper Mary, being then settled in Twyning, intermarried with the said Francis Burns, with whom she has cohabited from the time of such marriage to the present period; the children, mentioned in the order of removal, were born during such cohabitation, and are the children of the said Francis Burns. One of them was born in the parish of Tewksbury, and the other in a parish in the city of Worcester. On the part of the appellants it was contended, that the respondents ought further to have proved the death of Richard Winter, prior to the marriage with Francis Burns, and that in the absence of such proof, the presumption of law was, that he was then alive, and that

[48] For comments on this class of cases, see Doe v. Whitehead, 8 Adol. & Ellis, 571 (1838); Lisbon v. Lyman, 49 N. H. 553 (1870).

consequently the children must be considered as illegitimate, and settled where born, and that as to them, the order ought to be set aside.

The sessions were of opinion, that there was sufficient evidence of the non-access of Richard Winter, and that the burden of proof lay upon the appellants, to shew that he was alive at the time of the second marriage, and confirmed the order.

BAYLEY, J.[44] * * * The facts of this case are, that there is a marriage of the pauper with Francis Burns, which is prima facie valid, but the year before that took place, she was the wife of Richard Winter, and if he was alive at the time of the second marriage, it was illegal, and she was guilty of bigamy. But are we to presume that Winter was then alive? If the pauper had been indicted for bigamy, it would clearly not be sufficient. In that case Winter must have been proved to have been alive at the time of the second marriage. It is contended that his death ought to have been proved, but the answer is, that the presumption of law is, that he was not alive when the consequence of his being so is, that another person has committed a criminal act. I think, therefore, that the sessions decided right in holding the second marriage to have been valid, unless proof had been given that the first husband was alive at the time.

BEST, J. I am also of opinion that the sessions have decided correctly in this case. They had a right to presume that the pauper had not committed a crime, and if so, the second marriage would be valid, unless proof had been given of the first husband being then alive. The cases cited are very distinguishable, they only decide that seven years after a person has been last heard of, you are in all cases to presume his death. But they do not shew, that where conflicting presumptions exist, you may not presume the death at an earlier period. Now, those conflicting presumptions exist here, and I think the sessions were warranted in presuming the death of the first husband, on the ground that they would not presume that the woman had committed bigamy. I think, therefore, that their order was right.

Order of sessions confirmed.[45]

THE KING v. INHABITANTS OF HARBORNE.

(Court of King's Bench, 1835. 2 Adol. & El. 540.)

On appeal against an order for the removal of Ann Smith, wife of Henry Smith, from the parish of Harborne, in the county of Stafford, to the parish of East Haddon, in the county of Northampton; the sessions quashed the order, subject to the opinion of this Court upon the following case:

[44] Part of opinion omitted.

[45] For the presumption in favor of the validity of the second marriage see Brigham v. Hughson, 173 Cal. 448, 160 Pac. 548 (1916), and comments in 30 Harvard Law Review, 500.

The respondents proved that Henry Smith, being settled in the parish of East Haddon, married the pauper on the 11th of April, 1831, and had since deserted her. The appellants then proved that the said Henry Smith had married one Elizabeth Meadows on the 4th of October, 1821; and, in order to shew that she was alive at the time he married the pauper, and consequently that such second marriage was invalid, they called the father of Elizabeth Meadows, who proved that his daughter and Henry Smith continued to live together till 1825, when he left her, and she went into the Northampton hospital. The witness had since received several letters from her dated from Van Diemen's Land, and he produced a letter dated Hobart Town, 17th of March, 1831, which he proved to be in her handwriting. The sessions received the letter in evidence, and quashed the order. The question for the opinion of this Court was, whether, upon the above evidence, the sessions were justified in presuming that Smith's first wife was alive at the time of his marriage with the pauper.

LORD DENMAN, C. J.[46] The question is, whether the sessions were justified in coming to the conclusion that a party was alive on the 11th of April, who was alive on the 17th of March preceding? If she was alive, there was no marriage, on the 11th of April; and if there was no marriage, there was no settlement in East Haddon. It seems to me that the evidence was proper, and the conclusion proper. There was no contrary evidence. The only circumstance raising any doubt in my mind, is the doctrine laid down by Bayley, J., in Rex v. Twyning, 2 B. & Ald. 388. But, in that case, the sessions found that the party was dead; and this Court merely decided, that the case raised no presumption upon which the finding of the sessions could be disturbed. The two learned Judges, Bayley, J., and Best, J., certainly appear to have decided the case upon more general grounds: the principle, however, upon which they seem to have proceeded, was not necessary to that decision. I must take this opportunity of saying, that nothing can be more absurd than the notion, that there is to be any rigid presumption of law on such questions of fact, without reference to accompanying circumstances, such, for instance, as the age or health of the party. There can be no such strict presumption of law. In Doe dem. Knight v. Nepean, 5 B. & Ad. 86, the question arose much as in Rex v. Twyning, 2 B. & Ald. 386. The claimant was not barred, if the party was presumed not dead till the expiration of the seven years from the last intelligence. The learned Judge who tried the cause held that there was a legal presumption of life until that time, and directed a verdict for the plaintiff, because, if there was a legal presumption, there was nothing to be submitted to the jury. But this Court held, that no legal presumption existed, and set the verdict aside. That is quite consistent with the view which we take in the present case; and Rex v. Twyning, 2 B. & Ald. 386, may be explained in the same

[46] Opinion of Littledale, J., omitted.

way. I am aware that, in this latter case, Bayley, J., founds his decision on the ground of contrary presumptions; but I think that the only questions in such cases are, what evidence is admissible, and what inference may fairly be drawn from it. It may be said, suppose a party were shewn to be alive within a few hours of the second marriage, is there no presumption then? The presumption of innocence cannot shut out such a presumption as that supposed. I think no one, under such circumstances, could presume that the party was not alive at the actual time of the second marriage.

WILLIAMS, J. I am entirely of the same opinion. The question which the case states for us is, whether the sessions were justified in presuming as they did. It is argued, in opposition to the order of sessions, that the question is, upon whom does the onus probandi lie? and that, after the settlement of Smith, and his marriage, have been proved by the respondents, the onus is shifted upon the appellants, who are then to shew that Smith, at the time of that marriage, was a married man. But still this question remains: is there any particular rule established for deciding the fact of the life of a party on principles unlike those by which other facts are decided? When we are told that the life must be proved by express evidence, I am at a loss to understand what is meant. There was express evidence: the party was alive within a month. To be sure, death might have intervened: that is possibility against probability; for it is a question of degree. If it be necessary to shew an impossibility that the fact should be otherwise, what proof can be given, short of producing the person? If the evidence given was not enough would it have been enough to shew that the party was alive three hours before the time? The sessions seem to me to have acted quite rightly. In Rex v. Twyning, 2 B. & Ald. 386, the question was, whether the sessions were justified in acting upon the presumption there; and I have no doubt that this Court was right in holding that there was evidence upon which the presumption might be founded. Here, also, the sessions founded their opinion upon a presumption which they were entitled to make.

Order of sessions affirmed.

In re LEWES' TRUST.

(Court of Appeal in Chancery, 1871. L. R. 6 Ch. App. Cas. 356.)

John Lewes, by his will, gave pecuniary legacies to his son Thomas Lewes, and gave the residue of his estate to Lieut. Colonel J. Lewes. John Lewes died on the 20th of February, 1860. Thomas Lewes left England in 1858, and went to Australia, whence he wrote a letter, dated the 3d of January, 1859, since which nothing had been heard of him. The legacies were paid into Court, and the residuary legatee petitioned for payment on the ground that, in the absence of proof that the legatee survived the testator, the legacy must be taken to

have lapsed. The Vice Chancellor Malins made an order for payment accordingly, considering himself bound by In re Phene's Trusts, Law Rep. 5 Ch. 139. The case is reported Id. 11 Eq. 236, where the facts are more fully stated.

The next of kin of Thomas Lewes, one of whom had been appointed to represent him, appealed.

SIR W. M. JAMES, L. J. This case is entirely covered by In re Phene's Trusts. The Vice Chancellor says that he is bound by the rule in that case, that a legatee must establish his title by affirmative proof. The rule of law laid down in Doe v. Nepean [5 Barn. & Ad. 86, and 2 Mees. & W. 894][47] is, that where any person has to prove the fact of death, he proves it by presumption of law from the lapse of time, but when he has to prove the time of death, he must prove it affirmatively for there is no presumption that the death took place at any time in that seven years. If anything is to be presumed it would be, according to Doe v. Nepean, that the death took place on the first day of the seven years. Death is presumed from the person not being heard of for seven years, and whoever has to make out the case of death at any particular time must prove it by affirmative evidence, and those who claim under a person who is said to have survived a particular period must prove the fact. Here the onus of proof is on those who claim under the legatee, and they have not succeeded. It is impossible to suggest any principle of common law or common sense by which it can make any difference whether the residuary legatee or the next of kin are the claimants.

SIR G. MELLISH, L. J. I am of the same opinion. If at the end of seven years a person has not been heard of, the presumption is that he is dead, but there is no presumption as to when, during the seven years he died. The person upon whom it rests to prove the affirmative, either that the legatee was alive or that he was dead at a particular period, must establish the proposition by distinct evidence, and not by showing merely that he was alive at the beginning of the period. I do not think it signifies whether the petition is presented by the residuary legatee or by the representatives of the particular legatee. It would be absurd to make the determination of the question depend upon that, as the executor might then have to keep the legacy forever. The question is upon whom the onus really lies. The representatives of the legatee have to make out that the legatee was alive at the death

[47] In Doe v. Jesson, 6 East, 80 (1805), Lord Ellenborough directed a jury that there was fair ground to presume death after seven years absence, unheard of, etc. In Doe v. Nepean, 5 Barn. & Ad. 86 (1833), the matter was treated in much the same way, viz., that such facts furnished evidence from which a jury might fairly find that death had taken place. When the case reached the Exchequer Chamber, 2 Mees. & W. 894 (1837), the facts were treated as raising a legal presumption. That the rule does not apply where the absent person would not naturally communicate with his former friends or family, Watson v. England, 14 Simmons, 28 (1844). But see Mutual Ben. Life Ins. Co. v. Martin, 108 Ky. 11, 55 S. W. 694 (1900), where the insured was a fugitive from justice.

of the testator, for the residuary legatee can say that he is entitled to everything except what is proved not to come to him. The rule is now clearly established on a right basis, and the appeal must be dismissed with costs.[48]

DUKE OF NEWCASTLE v. HUNDRED OF BROXTOWE.

(Court of King's Bench, 1832. 4 Barn. & Adol. 273.)

This was an action on the statute 7 & 8 G. 4, c. 31, to recover damages for felonious demolition in part of Nottingham Castle, by persons unlawfully, riotously, and tumultuously assembled. Plea, the general issue. At the trial before Vaughan, B., at the Summer assizes for Nottingham, two questions were made: first, whether Nottingham Castle was within the hundred of Broxtowe; and, secondly, assuming it to be so, on what principle the compensation given by the statute was to be calculated.

Upon the first point, the plaintiff gave in evidence letters-patent of the 8 Jac. 1, whereby that king granted to E. Ferrers and F. Phelps, inter alia, the dovehouse close, the brewhouse, and the site, ground, and foundation of the castle mills, described as theretofore being part of the possessions of the castle of Nottingham; secondly, a grant of the 18th of February, 20 Jac. 1, whereby that king granted to Francis Earl of Rutland, inter alia, the castle of Nottingham, and the site, circuit, ambit, and precinct thereof, and the close called Dove-cott Close in Nottingham Park, and a meadow called King's Meadow, lying in or near the liberties or precincts of the town of Nottingham; all which were described in the grant as parcel of the lands and possessions belonging to the king in right of his crown of England. The plaintiff then put in a series of documents, among which were the following:—Entries in a book of orders made at the quarter sessions in April and October 1654, and January and April 1655: in these it was stated, that the castle and brewhouse were in the hundred of Broxtowe, and the inhabitants of the hundred were thereby ordered to maintain certain poor people living under the castle and at the brewhouse, who had been previously relieved out of the general coun-

[48] For a collection of American cases on this point, see Butler v. Order of Foresters, 26 L. R. A. (N. S.) 293 (1909), annotated; White v. Brotherhood of Locomotive Firemen, 165 Wis. 418, 162 N. W. 441 (1917).

That there is no presumption that the absent person died unmarried or without issue, see Emerson v. White, 29 N. H. 482 (1854), where a number of the cases are reviewed.

For a peculiar treatment of a presumption against suicide in an action on an accident policy, so as to place the burden on the insurer of establishing the negative, that death was not accidental, see Reynolds v. Maryland Casualty Co., 274 Mo. 83, 201 S. W. 1128 (1918). Compare the dissenting opinion of Faris, J., in that case.

See McGowin v. Menken, 223 N. Y. 509, 119 N. E. 877 (1918), for the burden of proof of survivorship in an action on a life insurance policy, where the insured and the primary beneficiary perished in the same accident.

ty stock. The first two orders gave as a reason for their having been so relieved, that the brewhouse and yard were not formerly known to be of any particular parish, but that they were then known to be in the wapentake of Broxtowe, and chargeable therewith to the relief of their own poor. Another order of the 1st of January 1660 was also given in evidence, to shew that on occasion of a robbery of A. R. in Nottingham Park, the justices, with the consent of the grand jury, &c. to save the expense of an action, ordered the money to be levied on the hundred of Broxtowe, and paid to the person robbed. It was contended that these orders were not admissible as judgments of the Court of quarter sessions, because the justices had no authority to make them; nor as evidence of reputation, because it was not proved that the justices resided in the county, or had any peculiar knowledge on the subject-matter; and, further, because it appeared from the orders themselves, that at the time when they are made, it had been matter of dispute whether the brewhouse yard was within the hundred or not. The learned Judge thought they were admissible as evidence of reputation.

The learned Judge directed the jury, first, to find for the plaintiff if they thought upon the evidence that the castle was locally situate within the hundred of Broxtowe; and he recapitulated all the evidence, and observed, upon the charter of Hen. 6, that leaving the castle in the county of Nottingham, when the town was made a county of itself, did not shew in what hundred the castle originally was, and that the orders of sessions and the land-tax duplicates were entitled to great weight, as shewing that, in point of reputation, the castle had, for two centuries, been considered part of the hundred; and he added that, when things for a great length of time had gone in a certain course, it was reasonable to infer that they had always done so, unless the evidence to the contrary were certain. The question of damages he left generally to the jury. They found for the plaintiff, damages £21,000. In the early part of the term,

Wilde, Serjt., moved for a new trial.[49]

PARKE, J., now delivered the judgment of the Court.

In this case, my Brothers Taunton and Patteson and myself, before whom the motion for a new trial was made (my Lord Chief Justice not having at that time taken his seat on the Bench), are of opinion that no rule should be granted.

The first objection was, that certain orders of sessions, in number five, and made between the years 1654 and 1660, each inclusive, were improperly received in evidence.

These documents were admitted, not as orders upon matters over which the magistrates had jurisdiction, but as evidence of reputation; and in that point of view we are of opinion that they were admissible. Four of them contain an express statement, the fifth an implied one, that the castle (or the brewhouse, or the park of Nottingham which

[49] Statement condensed and part of opinion omitted.

belong to it) is within the wapentake or hundred of Broxtowe: the statement is made by the justices of the peace, assembled in sessions, who, though they were not proved to be resiants in the county or hundred, must, from the nature and character of their offices alone, be presumed to have sufficient acquaintance with the subject to which their declarations relate; and the objection cannot prevail, that they were made after a controversy upon that subject had arisen, because there appears to have been no dispute upon the particular question whether the castle and its precincts were in the hundred of Broxtowe or not. These statements, therefore, fall within the established rule as to the admission of evidence of reputation.

The second objection was, that the learned Judge did not present the question to the jury in the manner in which he ought to have done; not that he misinstructed them in point of law, but that, in observing upon the facts, he ascribed too great weight to the evidence of modern usage and reputation, and particularly to the above-mentioned orders, and too little to the ancient documents produced on the part of the defendants. But we must receive with very great caution objections of this nature; for if we were to yield to them on all occasions in which we might disagree with some observation made on particular parts of the evidence, upon which it is the province of the jury to decide, we should seldom have any case which involved many facts brought to a termination. It is only in those cases in which we are satisfied that the jury have been led to a wrong conclusion that we ought to interfere; and we cannot possibly say that they have been induced to form a wrong conclusion in this. Without meaning to say that the learned Judge was wrong in attaching great weight to these particular documents, we all agree that the general scope of his observations upon the evidence was perfectly correct. We understood him to have said, in substance, that as by the usage and reputation for nearly two centuries, the castle and its precincts had been considered as being within the hundred, it ought to be inferred that they were legally so, unless the ancient documents clearly and satisfactorily proving that they were not. This is only an example of the principle which is applicable to all rights of way and common, to tolls, to moduses, in short, to all prescriptive and ancient rights, customs, exemptions, and obligations: in all which long usage should always be referred, if possible, to a legal origin; and it is only by the constant practical application of this principle that much valuable property and many important rights and privileges are preserved.

In adapting this principle to the present case, there being strong and uniform evidence of modern usage since the middle of the seventeenth century, the only question is, whether the older documents clearly show that this usage is wrong, and that the castle and its precincts could not have been within the hundred at the time of the first institution of that division? Now these documents prove, that from an early date, viz., at the time of Domesday, there was a borough of

Nottingham: that the borough in later periods had a jury distinct from that of the hundred; one of them in the 3 Ed. 3 tends to shew that the castle was within the jurisdiction of that jury; and the charter of Hen. 6 may be considered as demonstrating, that at the time of the erection of the borough into a county of itself the castle did, for some purposes at least, form a part of the borough, for the borough is made a county with the exception of the castle. But admitting this, what reason is there, why the castle, though being in the borough for some purposes, might not also be a part of the hundred? for as a borough may include a part of two counties (the city of Oxford and borough of Tamworth for example), why may it not comprise part of a hundred, or part of two or more hundreds? and we may not also reconcile the exclusion of the castle from the new county, on the supposition that it had originally belonged to the hundred? We do not think that any of these documents are so clearly inconsistent with the long usage and reputation in modern times as to prevent a jury from drawing the usual inference, that what has existed so long has existed from the earliest period necessary to give it validity. * * *

Rule refused.[50]

DELANO v. BARTLETT.

(Supreme Judicial Court of Massachusetts, 1850. 6 Cush. 364.)

Assumpsit on a promissory note. The defense relied on was a want of consideration. Verdict for defendant, and the plaintiff alleged exceptions. The facts are sufficiently stated in the opinion.[51]

FLETCHER, J. The plaintiff having produced the note on which this action was brought, and the signatures being admitted, rested her case on that evidence. The defence relied on at the trial was a want of consideration. To maintain this defence, the defendants offered evidence, that the sum received by Bartlett of the plaintiff, and for which the note was given, was Bartlett's own money, and was paid to him by the plaintiff, supposing him entitled to it; and that the note was taken for it, on the understanding and agreement, that if on the settlement of the affairs between Bartlett and the plaintiff's intestate, it should appear, that Bartlett was not entitled to the money, the plaintiff might call for it on this note; and that in point of fact the whole sum for which the note was given belonged to Bartlett, and was less than he was entitled to, and that no part of it belonged to the plaintiff's in-

[50] See the development of such a policy into a rule requiring a verdict in accordance with certain kinds of proof unless the contrary has been established. Bryant v. Foot, L. R. 2 Q. B. 161 (1867).

So a rule of policy seems to require that one disputing the legitimacy of a person born of a married woman should establish the negative of the proposition beyond a reasonable doubt. Bosvile v. Attorney General, L. R. 12 P. D. 177 (1887).

[51] Statement condensed.

testate. All the evidence was submitted to the jury, to be considered and weighed by them, in settling the questions of fact involved in the defence.

The plaintiff, relying on the note, which, upon its face, imported a consideration, and thus making out a prima facie case, requested the court to instruct the jury, that the burden of proof was on the defendants, to establish the want of consideration. But the defendants having produced evidence tending to disprove or overcome this prima facie case, on the part of the plaintiff, and the proof on both sides being applied to the affirmative or negative of the same issue, the plaintiff being the party whose case required proof of a consideration, the presiding judge instructed the jury, that the burden of proof was throughout on the plaintiff, to satisfy them, upon the whole evidence in the case, of the fact of a consideration for the note. To this ruling and instruction the plaintiff's counsel excepted.

The rule in regard to the burden of proof is laid down with great distinctness in the case of Powers v. Russell, 13 Pick. 69, 76. The chief justice says: "It was stated here, that the plaintiff had made out a prima facie case, and therefore that the burden of proof was shifted and placed on the defendant. In a certain sense this is true. When the party, having the burden of proof, establishes a prima facie case, and no proof to the contrary is offered, he will prevail. Therefore, the other party, if he would avoid the effect of the prima facie case, must produce evidence of equal or greater weight, to balance or control it, or he will fail. Still, the proof upon both sides applies to the affirmative or negative of one and the same issue or proposition of fact, and the party, whose case requires the proof of that fact, has all along the burden of proof. It does not shift, though the weight in either scale may at times preponderate. But when the party having the burden of proof gives competent and prima facie evidence of a fact, and the adverse party, instead of producing proof which would go to negative the same proposition of fact, proposes to show another and a distinct proposition, which avoids the effect of it, then the burden of proof shifts and rests upon the party proposing to show the latter fact."

Apply this rule to the present case, and it is quite clear, that the instruction to the jury was entirely correct. It was incumbent on the plaintiff to prove a consideration for the note, which was the foundation of the suit. That was a part of her case, and the burden was on her to establish that fact. But the note itself was prima facie evidence of a consideration; so that, by producing the note, the plaintiff made a prima facie case. That evidence, if not rebutted, would be sufficient to maintain the plaintiff's case. But it was competent for the defendants to rebut this evidence on the part of the plaintiff, and thus to avoid the prima facie case made by her. Accordingly the defendants did offer evidence to rebut the evidence on the part of the plaintiff, and to show that there was no consideration. The evidence on both

sides applied to the affirmative or negative of the same issue or proposition of fact, a consideration for the note, and the plaintiff's case requiring her to establish that fact, the burden of proof was all along on her to satisfy the jury, upon the whole evidence in the case, of the fact of a consideration for the note. The rule, as laid down in the case of Powers v. Russell, has been fully recognized in the cases of Parish v. Stone, 14 Pick. 198, 201, 25 Am. Dec. 378; Davis v. Jenney, 1 Metc. 221, 224; Sperry v. Wilcox, 1 Metc. 267; Commonwealth v. Dana, 2 Metc. 329, 340; Brown v. King, 5 Metc. 173, 180; Tourtellot v. Rosebrook, 11 Metc. 460, 463. In Jennison v. Stafford, 1 Cush. 168, 48 Am. Dec. 594, the defence was not an original want of consideration, but a failure of consideration; that is, to avoid the prima facie case of the plaintiff made by producing the note, the defendant proposed to show another and distinct proposition. The court no doubt correctly ruled, that the burden of proof was on the defendant, to make out this distinct proposition to avoid the prima facie case of the plaintiff. There is a sentence in this opinion, which may be misunderstood. The judge, in delivering the opinion, says: "Such a note is presumed to be founded on a valid and sufficient consideration, and the burden of proof is on the maker to establish the contrary." This must be understood to mean, that the burden of proof is on the maker to rebut the prima facie case made by producing the note, otherwise the prima facie evidence will be conclusive.

Exceptions overruled.[52]

BROWN v. KENDALL.

(Supreme Judicial Court of Massachusetts, 1850. 6 Cush. 292.)

This was an action of trespass for assault and battery, originally commenced against George K. Kendall, the defendant, who died pending the suit, and his executrix was summoned in.

It appeared in evidence, on the trial, which was before Wells, C. J., in the court of common pleas, that two dogs, belonging to the plaintiff and the defendant, respectively, were fighting in the presence of their masters; that the defendant took a stick about four feet long, and commenced beating the dogs in order to separate them; that the plaintiff was looking on, at the distance of about a rod, and that he advanced a step or two towards the dogs. In their struggle, the dogs approached the place where the plaintiff was standing. The defend-

[52] In a number of the states want of consideration for a promissory note has become an affirmative defense to be pleaded and established by the defendant. Pastene v. Pardini, 135 Cal. 431, 67 Pac. 681 (1902). For certain interesting problems on the burden of proof on the question of holder for value where the defense of fraud is made, see Harvey v. Towers, 6 Exch. 656 (1851); Smith v. Braine, 16 Q. B. (N. S.) 244 (1851); Hamilton v. Marks, 63 Mo. 167 (1876); Leavitt v. Thurston, 38 Utah, 351, 113 Pac. 77 (1911), under N. I. L.

ant retreated backwards from before the dogs, striking them as he retreated; and as he approached the plaintiff, with his back towards him, in raising his stick over his shoulder, in order to strike the dogs, he accidentally hit the plaintiff in the eye, inflicting upon him a severe injury.

Whether it was necessary or proper for the defendant to interfere in the fight between the dogs; whether the interference, if called for, was in a proper manner, and what degree of care was exercised by each party on the occasion; were the subject of controversy between the parties, upon all the evidence in the case, of which the foregoing is an outline.

The defendant requested the judge to instruct the jury, that "if both the plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care and the plaintiff was not, or if at that time both plaintiff and defendant were not using ordinary care, then the plaintiff could not recover."

The defendant further requested the judge to instruct the jury, that, "under the circumstances, if the plaintiff was using ordinary care and the defendant was not, the plaintiff could not recover, and that the burden of proof on all these propositions was on the plaintiff."

The judge declined to give the instructions, as above requested, but left the case to the jury under the following instructions:

"If the defendant, in beating the dogs, was doing a necessary act, or one which it was his duty under the circumstances of the case to do, and was doing it in a proper way; then he was not responsible in this action, provided he was using ordinary care at the time of the blow. If it was not a necessary act; if he was not in duty bound to attempt to part the dogs, but might with propriety interfere or not as he chose; the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word 'inevitable' not in a strict but a popular sense."

"If, however, the plaintiff, when he met with the injury, was not in the exercise of ordinary care, he cannot recover, and this rule applies, whether the interference of the defendant in the fight of the dogs was necessary or not. If the jury believe, that it was the duty of the defendant to interfere, then the burden of proving negligence on the part of the defendant, and ordinary care on the part of the plaintiff, is on the plaintiff. If the jury believe, that the act of interference in the fight was unnecessary, then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of the plaintiff, is on defendant."

The jury under these instructions returned a verdict for the plaintiff; whereupon the defendant alleged exceptions.[58]

[58] Statement condensed and part of opinion omitted.

SHAW, C. J. * * * The facts set forth in the bill of exceptions preclude the supposition, that the blow, inflicted by the hand of the defendant upon the person of the plaintiff, was intentional. The whole case proceeds on the assumption, that the damage sustained by the plaintiff, from the stick held by the defendant, was inadvertent and unintentional; and the case involves the question how far, and under what qualifications, the party by whose unconscious act the damage was done is responsible for it. We use the term "unintentional" rather than "involuntary," because in some of the cases, it is stated, that the act of holding and using a weapon or instrument, the movement of which is the immediate cause of hurt to another, is a voluntary act, although its particular effect in hitting and hurting another is not within the purpose or intention of the party doing the act. * * *

We think, as the result of all the authorities, the rule is correctly stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show either that the intention was unlawful, or that the defendant was in fault; for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable. 2 Greenl. Ev. §§ 85 to 92; Wakeman v. Robinson, 1 Bing. 213. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom. Davis v. Saunders, 2 Chit. R. 639; Com. Dig. Battery, A. (Day's Ed.) and notes; Vincent v. Stinehour, 7 Verm. 69. In applying these rules to the present case, we can perceive no reason why the instructions asked for by the defendant ought not to have been given; to this effect, that if both plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care, and the plaintiff was not, or if at that time, both the plaintiff and defendant were not using ordinary care, then the plaintiff could not recover. * * *

The court instructed the jury, that if it was not a necessary act, and the defendant was not in duty bound to part the dogs, but might with propriety interfere or not as he chose, the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word not in a strict but a popular sense. This is to be taken in connection with the charge afterwards given, that if the jury believed, that the act of interference in the fight was unnecessary, (that is, as before explained, not a duty incumbent on the defendant,) then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of plaintiff, was on the defendant.

The court are of opinion that these directions were not conformable to law. If the act of hitting the plaintiff was unintentional, on the part of the defendant, and done in the doing of a lawful act, then the de-

fendant was not liable, unless it was done in the want of exercise of due care, adapted to the exigency of the case, and therefore such want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it. 2 Greenl. Ev. § 85;[54] Powers v. Russell, 13 Pick. 69, 76; Tourtellot v. Rosebrook, 11 Metc. 460.[55]

Perhaps the learned judge, by the use of the term "extraordinary care," in the above charge, explained as it is by the context, may have intended nothing more than that increased degree of care and diligence, which the exigency of particular circumstances might require, and which men of ordinary care and prudence would use under like circumstances, to guard against danger. If such was the meaning of this part of the charge, then it does not differ from our views, as above explained. But we are of opinion, that the other part of the charge, that the burden of proof was on the defendant, was incorrect. Those facts which are essential to enable the plaintiff to recover, he takes the burden of proving. The evidence may be offered by the plaintiff or by the defendant; the question of due care, or want of care, may be essentially connected with the main facts, and arise from the same proof; but the effect of the rule, as to the burden of proof, is this, that when the proof is all in, and before the jury, from whatever side it comes, and whether directly proved, or inferred from circumstances, if it appears that the defendant was doing a lawful act, and unintentionally hit and hurt the plaintiff, then unless it also appears to the satisfaction of the jury, that the defendant is chargeable with

[54] The passage in question is as follows: "And here also the plaintiff must come prepared with evidence to show, either that the intention was unlawful, or that the defendant was in fault; for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable. Thus, if one intend to do a lawful act, as to assist a drunken man, or prevent him from going without help, and in so doing a hurt ensue, it is no battery. So, if a horse by a sudden fright runs away with his rider, not being accustomed so to do, and runs against a man; or if a soldier, in discharging his musket by lawful military command, unavoidably hurts another,—it is no battery; and in such cases the defence may be made under the general issue. But, to make out a defence under this plea, it must be shown that the defendant was free from any blame, and that the accident resulted entirely from a superior agency. A defence which admits that the accident resulted from an act of the defendant must be specially pleaded."

Compare Lord Ellenborough in Knapp v. Salsbury, 2 Campb. 500 (1810): "These facts ought to have been pleaded specially. The only thing to be tried under the plea of not guilty is, whether the defendant's cart struck the plaintiff's chaise, and killed his horse. That it did is now admitted; and the intention of defendant is immaterial. This is an action of trespass. If what happened arose from inevitable accident, or from the negligence of the plaintiff, to be sure the defendant is not liable; but as he in fact did run against the chaise and kill the horse, he committed the acts stated in the declaration, and he ought to have put on the record any justification he may have had for doing so. The plea denying these acts must clearly be found against him."

[55] The case of Tourtellot v. Rosebrook, 11 Metc. 460 (1846), was an action on the case for negligently setting out a fire.

some fault, negligence, carelessness, or want of prudence, the plaintiff fails to sustain the burden of proof, and is not entitled to recover.

New trial ordered.

BIRD v. GREAT NORTHERN RY. CO.

(Court of the Exchequer, 1858. 28 Law J. Exch. 3.)

This was an action for an injury alleged to have arisen from negligence by a railway company in the care and management of their railway.

Plea—Not guilty.

At the trial, before Pollock, C. B., at the London Sittings after last term, it appeared that the engine on the occasion in question had suddenly gone off the line, at a spot to which the process of "fishing" the rails, which was being carried on above and below that spot, had not been extended. It was admitted that this process was an improvement, but it also appeared that it had been only of late introduced, and that in a great portion of the railways it had not been carried out. There was a great deal of evidence on both sides as to negligence; the Lord Chief Baron left the evidence to the jury, who found "for the defendants, because there was not sufficient evidence as to the cause of the accident."

Edwin James now moved for a new trial, on the ground of misdirection, in that the jury were not told that there was a prima facie case of negligence; and that if it was not satisfactorily answered by the defendants, the verdict should be for the plaintiff. The occurrence of the injury itself is prima facie proof of negligence. Carpue v. The London and Brighton Railway Company, 52 B. 747; s. c. 13 Law J. Rep. (N. S.) I. B. 133.

[POLLOCK, C. B. That depends on the nature of the accident; as, for instance, if it arises from a collision of different trains on the same line, then it may be so. Here it was otherwise; the accident was of a nature consistent with the absence of negligence. WATSON, B., cited Skinner v. London, Brighton & South Coast Railway Company, 5 Exch. Rep. 787; s. c. 19 Law J. Rep. (N. S.) Exch. 162.]

At all events, the plaintiff gave as much evidence of negligence as a passenger possibly could, who necessarily must be unable to ascertain the exact cause of an accident; and the railway being entirely under the control of the company's servants, the onus probandi was then upon the defendants; so that if they failed satisfactorily to shew that there was no negligence, the plaintiff was entitled to the verdict.

[POLLOCK, C. B. It was for the plaintiff to prove negligence; the defendants' undertaking was not to carry safely but to carry with reasonable care. They are not, as carriers of goods, insurers. Therefore, the burthen of proof was on the plaintiff.]

PER CURIAM. The whole question was left to the jury, and the

meaning of their finding was, that they could not find for the plaintiff; in effect, that he had not proved that the accident arose from negligence. It is impossible to say that the accident itself, even if prima facie proof of negligence, was conclusive proof of it. And if not, then, as there was evidence on both sides, the question was for the jury; and their finding was substantially a finding for the defendants, on the ground that there was no negligence.

Rule refused.[56]

MONTGOMERY & E. RY. CO. v. MALLETTE.

(Supreme Court of Alabama, 1890. 92 Ala. 209, 9 South. 363.)

This action was brought by the appellee, C. P. Mallette, against the appellant railroad corporation, and sought to recover damages for injuries alleged to have been sustained and suffered by the plaintiff on account of the negligence of the defendant's servants and employés. The complaint contained three counts. Each of them claimed damages for injuries sustained by the plaintiff, while a passenger upon the railroad of defendant, and resulting from the negligence of the defendant, its servants or employés. The defendant pleaded the general issue; and a judgment was rendered for the plaintiff, assessing his damages at $4,000.

The following facts were undisputed, as gathered from the bill of exceptions: That the plaintiff purchased a ticket at Albany, Georgia, took the train running from that point to Montgomery over the Central Railroad of Georgia to Eufaula, and from thence over defendant's road to Montgomery, plaintiff's destination; that while he was on defendant's train, and while the train was in the act of backing to the depot in Eufaula, the car in which plaintiff was riding turned over, and the plaintiff was injured; that the direct cause of the accident was, that while train was backing as described, the sleeper, which was in the rear of the train, at a switch way, which it had to pass in order to get to the depot, ran off the track, and threw the car, in which plaintiff was riding, off the track, and it turned over.

There was testimony introduced by the defendant tending to show that the switch and all of the fixtures thereabouts were in good order; that the cars were all right, and that there was no known cause for the accident. The proof showed that the train was backing very slowly at the time the accident occurred.

In his general charge to the jury, which was in writing, the court among other things, charged them as follows:

(1) "If you are reasonably satisfied from the evidence, that the

[56] That where there was no special relation between the parties, a prima facie showing of negligence did not impose on the defendant the burden of establishing due care, see Tourtellot v. Rosebrook, 11 Metc. (Mass.) 460 (1846).

plaintiff in some point in Georgia received and paid for a ticket as a passenger on the defendant's railroad to Montgomery, and was such passenger on defendant's train, and while on the route to Montgomery, the train of cars, or some of the cars thereof, ran off the track, and plaintiff was injured thereby, then the plaintiff makes out a prima facie case for recovery, and he is entitled to recover, unless the defendant reasonably overcomes this prima facie right of recovery by the evidence in the case."

(2) "In order to avoid the liability growing out of a prima facie case made out by plaintiff, the defendant must reasonably satisfy the jury that it exercised that degree of care which the law requires of it in order to avoid and prevent the happening of accidents."

(3) "The law requires the highest degree of care and diligence and skill by those engaged in the carriage of passengers by railroads, known to careful, diligent and skillful persons engaged in such business."

(4) "If you find from the evidence that plaintiff, under the rule given, has made out a prima facie case, then defendant, in order to avoid liability, must reasonably satisfy the jury that it used that degree of care, diligence and skill."

There was judgment for the plaintiff, as stated above. The defendant prosecutes this appeal, and assigns the rulings of the lower court on the evidence, and upon the charges given and refused, as error.[57]

McCLELLAN, J. * * * There was no error in the charges of the court to the effect that "the law required the highest degree of care and diligence and skill, by those engaged in the carriage of passengers by railroads, known to careful, diligent, and skillful persons engaged in such business." This is the universal doctrine of the courts and text-writers. Searle's Adm'r v. Railway Co., 32 W. Va. 370, 9 S. E. 248; Railroad Co. v. Snyder, 117 Ind. 435, 20 N. E. 284, 3 L. R. A. 434, 10 Am. St. Rep. 60; notes to Frelsen v. Railway Co., 44 Amer. & Eng. R. Cas. 319, 42 La. Ann. 673, 7 South. 800; Railroad Co. v. Ritter, 85 Ky. 368, 3 S. W. 591; Railway Co. v. Daugherty (Pa.) 6 Amer. & Eng. R. Cas. 139; Railroad Co. v. Anderson, 94 Pa. 351, 39 Am. Rep. 787; Railroad Co. v. Rainbolt, 99 Ind. 551; Railway Co. v. Higgs, 38 Kan. 375, 16 Pac. 667, 5 Am. St. Rep. 754; Smith v. Railway Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; Dodge v. Steam-Ship Co., 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541; Treadwell v. Whittier, 80 Cal. 575, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175; Hutch. Carr. §§ 503, 799–801; Thomp. Carr. 175 et seq.; 2 Amer. & Eng. Enc. Law, p. 745; 2 Wood, Ry. Law, p. 1095; Railroad Co. v. Jones, 83 Ala. 376, 3 South. 902; Railway Co. v. Love, 91 Ala. 432, 8 South. 714, 24 Am. St. Rep. 927.

[57] Statement condensed and part of opinion omitted.

The authorities present equal unanimity to the proposition that where a passenger receives injuries from the breaking down of the carrier's vehicle, from the derailment of a car, from collisions or the like,—occurrences which ordinarily would not take place but for some negligence on the part of the carrier,—the prima facie presumption is that the injury was the result of the carrier's negligence; and in an action therefor, the plaintiff having shown that he was a passenger, and that he was injured by the derailment, for instance, of the car in which he was being transported, he is, upon this and without more, entitled to recover the damages thereby sustained, unless the defendant, in rebuttal of this prima facie presumption, reasonably satisfies the jury that the derailment was not due to any negligence, and could not have been prevented by the exercise of the highest degree of care, skill, and diligence on the part of the carrier. Authorities supra; Thomp. Carr. 181 et seq.; 2 Wood, Ry. Law, 1096; 2 Amer. & Eng. Enc. Law, 768 et seq.; Railroad Co. v. Wightman, 29 Grat. (Va.) 431, 26 Am. Rep. 384; Railroad Co. v. Sanders, 73 Ga. 513; Railway Co. v. Seybolt, 18 Am. & Eng. R. Cas. 162; Hipsley v. Railway Co., 27 Am. & Eng. R. Cas. 287, and note; Railway Co. v. Leonhardt, 66 Md. 70, 5 Atl. 346; Railroad Co. v. Timmons, 51 Ark. 459, 11 S. W. 690, 40 Am. & Eng. R. Cas. 698, and notes; Stokes v. Saltonstall, 13 Pet. 181, 10 L. Ed. 115; Railroad Co. v. Pollard, 22 Wall. 341, 22 L. Ed. 877.

The cases of Railway Co. v. Hughes, 87 Ala. 610, 6 South. 413, and Railroad Co. v. Reese, 85 Ala. 497, 5 South. 283, 7 Am. St. Rep. 66, to which our attention has been invited in this connection, are not in point. The parties injured, and who were plaintiffs in those actions, were not passengers of the defendant companies, and the principles we have been considering had no application in either of them. The trial court correctly stated the law as to what facts made out a prima facie case for the plaintiff, entitling him to recover, and as to the measure of proof necessary to overturn the presumption of negligence growing out of and resting upon the facts adduced in the first instance by the plaintiff. The special objection urged to the charges on this part of the case is that they authorized a verdict for the plaintiff if the evidence, aside from the presumption, was in equipoise on the question of defendant's negligence. We understand this to be the law; otherwise, the presumption would exert no influence in the case. If there is no evidence of defendant's negligence except the fact of derailment, or, which is the same thing in legal effect, the evidence as to negligence aside from the derailment is equally balanced, there is nothing to rebut the prima facie presumption of a want of due care, skill, and diligence which that fact imports, and upon it the plaintiff would be entitled to a verdict. To rebut and overturn the presumption, the defendant must affirmatively satisfy the jury that it was not guilty of negligence as charged by the court; and this in no sense can be said

to be done where the evidence is in such equipoise on the point as not to impress the minds of the jury one way or the other. * * *

Reversed (on question of damages).

STARRATT et al. v. MULLEN.

(Supreme Judicial Court of Massachusetts, 1889. 148 Mass. 570, 20 N. E. 178, 2 L. R. A. 697.)

Contract, on an account annexed, for clothes sold and delivered and money lent. At the trial in the superior court, before Lathrop, J., the defendant admitted that the clothes were delivered by the plaintiffs to him, and that he received the money, but contended, and offered evidence tending to show, that he lent to the plaintiffs four thousand dollars, for which they gave him their promissory notes, in which nothing was said about interest, and that when he lent the money to the plaintiffs they orally agreed that for the use of the money they would pay him the sum of twenty dollars per week and furnish him with his clothes.

The plaintiffs asked the judge to rule that the agreement would be void, not being in writing, and also that, the defendant having relied upon this agreement, the burden of proof was upon him to prove it. The judge refused so to rule, but ruled that the burden of proof was upon the plaintiffs to show that the money sued for was lent, and that the goods sued for were sold by the plaintiffs to the defendant.

The jury found for the defendant; and the plaintiffs alleged exceptions.

HOLMES, J. Whether the agreement set up by the defendant could have been enforced or not, the plaintiffs were at liberty to perform it if they saw fit; and, if they furnished the clothes in pursuance of it, they could not recover in this action. Marvin v. Mandell, 125 Mass. 562. The contract is not relied on as an executory or binding undertaking, but simply to show that the plaintiffs delivered the clothes upon an executed consideration, in which case, as in that of a gift, they did not deliver them for pay to be received thereafter.

The ruling as to the burden of proof was correct. Phipps v. Mahon, 141 Mass. 471, 5 N. E. 835. We shall not repeat the reasoning of that decision, with which we remain satisfied; but, as it was questioned at the bar, we shall add a few words to what was said then. Undoubtedly many matters which, if true, would show that the plaintiff never had a cause of action, or even that he never had a valid contract, must be pleaded and proved by the defendant; for instance, infancy, coverture, or, probably, illegality. Where the line should be drawn might differ, conceivably, in different jurisdictions. But in the narrowest view of what constitutes the plaintiff's case, if he declares on a special contract, he must prove its terms as alleged; and on the

same principle, if he declares on the common counts, he must prove that the goods or services were furnished for a reward to be paid thereafter in money. "The plaintiff is bound to prove such a sale and delivery as will raise a debt payable on request." Parke, B., in Cousins v. Paddon, 2 Cromp., M. & R. 547, 5 Tyrw. 535, 543.

Hence it was settled in England that even under the Hilary rules, if the defense was that the goods, although delivered to the defendant at his request, were delivered as a gift, or under a contract to pay in beer, or upon a consideration previously executed by the defendant, the proper course was to plead the general issue, and that a special plea would be bad upon special demurrer. Jones v. Nanney, 1 Mees. & W. 333; Grounsell v. Lamb, Id. 352; Morgan v. Pebrer, 3 Bing. N. C. 457, 466, 467; Wilson v. Story, 4 Jur. 463; Collingbourne v. Mantell, 5 Mees. & W. 289; Gardner v. Alexander, 3 Dowl. 146. See Marvin v. Mandell, ubi supra. So as to special contracts. Brind v. Dale, 2 Mees. & W. 775; Kemble v. Mills, 1 Man. & G. 757, 770; Nash v. Breese, 12 Law J. Exch. 305.

The cases cited answer the argument that payment in advance would have to be pleaded and proved as payment. Payment in advance would mean that the goods were furnished upon an executed consideration, in pursuance of an antecedent duty, and that there never was a debt due for them for a single instant. It has been held in England that, even where the transaction was a cash sale, and the payment was made at the same moment that the goods were furnished, the proper plea in debt after the Hilary rules was nunquam indebitatus. Bussey v. Barnett, 9 Mees. & W. 312; Wood v. Bletcher, 4 Wkly. Rep. 506, 27 Law T. 126; Dicken v. Neale, 1 Mees. & W. 553, 559. See Com. v. Devlin, 141 Mass. 423, 431, 6 N. E. 64. We do not refer to the foregoing cases as deciding the question of burden of proof, but the reasoning on which they proceed, coupled with the rule that the burden of proof never shifts, leads inevitably to the result reached in Phipps v. Mahon.

Proof of delivery of clothes by a tailor to the defendant at his request makes out a prima facie case, no doubt, because, in the ordinary course of events, a suit of clothes is followed by a bill. But this is only a probability, and, if the probability is shaken, it is for the plaintiffs to show that the language or the circumstances imported an assumption of liability by the defendant to pay money.

Exceptions overruled.

NEW ORLEANS & N. E. R. CO. v. HARRIS.

(Supreme Court of the United States, 1918. 247 U. S. 367, 38 Sup. Ct. 535, 62 L. Ed. 1167.)

Mr. Justice McREYNOLDS [58] delivered the opinion of the Court.

While employed in interstate commerce by plaintiff in error, a common carrier by railroad then engaging in such commerce, Van Harris a brakeman was run over by the tender of an engine moving in the yard at New Orleans, Louisiana—February 5, 1914. He died within a few minutes without regaining consciousness. Having qualified as administratrix, his mother (defendant in error), charging negligence and relying upon the federal Employers' Liability Act, sued for damages in a state court for Lauderdale county, Mississippi. A judgment in her favor was affirmed by the Supreme Court without opinion. * * *

Upon request of the administratrix, the following instruction (among others) was given to the jury:

"No. 1. The court charges the jury for the plaintiff in this case that under the rule of evidence in the state of Mississippi all that is required of the plaintiff in this case is to prove that injury was inflicted by the movement of the defendant's train or engine and then the law presumes negligence and then the burden of proof shifts to the defendant to prove all of the facts and circumstances surrounding the injury and from those facts so shown exonerate itself from all negligence. * * *"

The so-called "Prima Facie Act" of Mississippi, set out below,[59] provides that in actions against railroads for damages proof of injury inflicted by an engine propelled by steam shall be prima facie evidence of negligence. Relying upon and undertaking to apply this statute, the trial court gave the quoted instruction, and in so doing, we think, committed error.

The federal courts have long held that where suit is brought against a railroad for injuries to an employé resulting from its negligence,

[58] Part of opinion omitted.

[59] Mississippi Code 1906, § 1985, as amended by chapter 215, Laws 1912, p. 290:

"1985 (1808). *Injury to Persons or Property by Railroads Prima Facie Evidence of Want of Reasonable Skill and Care, etc.*—In all actions against railroad corporations and all other corporations, companies, partnerships and individuals using engines, locomotives, or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, for damages done to persons or property, proof of injury inflicted by the running of the engines, locomotives or cars of any such railroad corporations or such other corporation, company, partnership or individual shall be prima facie evidence of the want of reasonable skill and care of such railroad corporation, or such other corporation, company, partnership or individual in reference to such injury. This section shall also apply to passengers and employés of railroad corporations and of such other corporations, companies, partnerships and individuals."

such negligence is an affirmative fact which plaintiff must establish. Nitro-Glycerine Case, 15 Wall. 524, 537, 21 L. Ed. 206; Patton v. Texas & Pacific Railway Co., 179 U. S. 658, 663, 21 Sup. Ct. 275, 45 L. Ed. 361; Looney v. Metropolitan Railroad Co., 200 U. S. 480, 487, 26 Sup. Ct. 303, 50 L. Ed. 564; Southern Ry. Co. v. Bennett, 233 U. S. 80, 85, 34 Sup. Ct. 566, 58 L. Ed. 860. In proceedings brought under the federal Employers' Liability Act rights and obligations depend upon it and applicable principles of common law as interpreted and applied in federal courts; and negligence is essential to recovery. Seaboard Air Line v. Horton, 233 U. S. 492, 501, 502, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; Southern Ry. v. Gray, 241 U. S. 333, 339, 36 Sup. Ct. 558, 60 L. Ed. 1030; New York Central R. R. Co. v. Winfield, 244 U. S. 147, 150, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139; Erie R. R. Co. v. Winfield, 244 U. S. 170, 172, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662. These established principles and our holding in Central Vermont Ry. v. White, 238 U. S. 507, 511, 512, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252, we think make it clear that the question of burden of proof is a matter of substance and not subject to control by laws of the several states. * * *

Reversed.[60]

PEOPLE v. GARBUTT.

(Supreme Court of Michigan, 1868. 17 Mich. 9, 97 Am. Dec. 162.)

COOLEY, C. J.[61] The defendant was convicted in the recorder's court of the city of Detroit, on an information charging him with the murder of one La Plante. On the trial it was shown that La Plante, and a young woman named Emily Boucher, were coming down Woodward avenue together, on the afternoon of September 21, 1867, when they were overtaken by the defendant, who, after a few words, fired a pistol at La Plante, wounding him mortally. No question was made that La Plante died of this wound, but it was insisted, on behalf of the defendant, that it was inflicted by him under circumstances of great provocation, sufficient to reduce the offense from murder to manslaughter; and it was further claimed that he was at the time mentally incompetent of a criminal intent; the reason being temporarily over-

[60] For a different view as to the effect of a statute making certain facts presumptive evidence, see People v. Cannon, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668 (1893); State v. Salmon, 216 Mo. 466, 526, 115 S. W. 1106 (1909); Rockford v. Mower, 259 Ill. 604, 102 N. E. 1032 (1913). Compare Sackheim v. Pigueron, 215 N. Y. 62, 109 N. E. 109 (1915), to the effect that an amendment to the New York Code, providing that the defense of contributory negligence should be pleaded and proved by the defendant in actions under the death statute, thus changing the former rule, was a mere matter of procedure and not of substance, and hence might be applied to a case pending when the amendment took effect.

[61] Part of opinion omitted.

thrown through the combined influence of intoxicating drinks, the great provocation, and perhaps of hereditary tendencies also. * * *

The defendant's counsel also requested the court to charge the jury that sanity is a necessary element in the commission of crime, and must be proved by the prosecution as a part of their case whenever the defense is insanity. Also, that where the defense makes proof of insanity, partial or otherwise, whenever it shall be made to appear from the evidence that prior to or at the time of the offense charged, the prisoner was not of sound mind, but was afflicted with insanity, and such affliction was the efficient cause of the act he ought to be acquitted by the jury. These requests were refused.

It is not to be denied that the law applicable to cases of homicide where insanity is set up as a defense, is left in a great deal of confusion upon the authorities; but this, we conceive, springs mainly from the fact that courts have sometimes treated the defense of insanity as if it were in the nature of a special plea, by which the defendant confessed the act charged, and undertook to avoid the consequences by showing a substantive defense, which he was bound to make out by clear proof. The burden of proof is held by such authorities to shift from the prosecution to the defendant when the alleged insanity comes in question; and while the defendant is to be acquitted unless the act of killing is established beyond reasonable doubt, yet when that fact is once made out, he is to be found guilty of the criminal intent, unless by his evidence he establishes with the like clearness, or at least by a preponderance of testimony, that he was incapable of criminal intent at the time the act was done: Regina v. Taylor, 4 Cox, C. C. 155; Regina v. Stokes, 3 C. & K. 188; State v. Brinyea, 5 Ala. 244; State v. Spencer, 21 N. J. Law, 202; State v. Stark, 1 Strob. (S. C.) 479. These cases overlook or disregard an important and necessary ingredient in the crime of murder; and they strip the defendant of that presumption of innocence which the humanity of law casts over him, and which attends him from the initiation of the proceedings until the verdict is rendered. Thus, in Regina v. Taylor, supra, it is said: "In cases of insanity there is one cardinal rule never to be departed from viz.: that the burden of proving innocence rests on the party accused." And in State v. Spencer, supra, the rule is laid down thus: "Where it is admitted or clearly proved that the prisoner committed the act, but it is insisted that he was insane, and the evidence leaves the question of insanity in doubt, the jury ought to find against him. The proof of insanity at the time of committing the act ought to be as clear and satisfactory, in order to acquit a prisoner on the ground of insanity, as proof of committing the act ought to be in order to find a sane man guilty." These cases are not ambiguous, and, if sound, they more than justify the recorder in his charge in the case before us.

The defendant was on trial for murder. Murder is said to be committed when a person of sound mind and discretion unlawfully killeth

any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied: 3 Coke Inst. 47; 4 Bl. Com. 195; 2 Chit. Cr. L. 724. These are the ingredients of the offense; the unlawful killing, by a person of sound mind and with malice; or to state them more concisely, the killing with criminal intent; for there can be no criminal intent when the mental condition of the party accused is such that he is incapable of forming one.

These, then, are the facts that are to be established by the prosecution in every case where murder is alleged. The killing alone does not in any case completely prove the offense, unless it was accompanied with such circumstances that malice in law or in fact is fairly to be implied. The prosecution takes upon itself the burden of establishing not only the killing, but also the malicious intent in every case. There is no such thing in the law as a separation of the ingredients of offense, so as to leave a part to be established by the prosecution, while as to the rest the defendant takes upon himself the burden of proving a negative. The idea that the burden of proof shifts in these cases is unphilosophical, and at war with fundamental principles of criminal law. The presumption of innocence is a shield to the defendant throughout the proceedings, until the verdict of the jury establishes the fact that beyond a reasonable doubt he not only committed the act, but that he did so with malicious intent.

It does not follow, however, that the prosecution at the outset must give direct proof of an active malicious intent on the part of the defendant; or enter upon the question of sanity before the defendant has controverted it. The most conclusive proof of malice will usually spring from the circumstances attending the killing, and the prosecution could not well be required in such cases to go further than to put those circumstances in evidence. And on the subject of sanity, that condition being the normal state of humanity, the prosecution are at liberty to rest upon the presumption that the accused was sane, until that presumption is overcome by the defendant's evidence. The presumption establishes, prima facie, this portion of the case on the part of the government. It stands in the place of the testimony of witnesses, liable to be overcome in the same way. Nevertheless it is a part of the case for the government; the fact which it supports must necessarily be established before any conviction can be had; and, when the jury come to consider the whole case upon the evidence delivered to them, they must do so upon the basis that on each and every portion of it they are to be reasonably satisfied before they are at liberty to find the defendant guilty.

This question of the burden of proof as to criminal intent was considered by this court in the case of Maher v. People, 10 Mich. 212, 81 Am. Dec. 781, and a rule was there laid down which is entirely satisfactory to us, and which we have no disposition to qualify in any manner. Applying that rule to the present case, we think that the recorder did not err in refusing to charge that proof of sanity must be

given by the prosecution as a part of their case. They are at liberty to rest upon the presumption of sanity until proof of the contrary condition is given by the defense. But when any evidence is given which tends to overthrow that presumption, the jury are to examine, weigh and pass upon it with the understanding that although the initiative in presenting the evidence is taken by the defense, the burden of proof upon this part of the case, as well as upon the other, is upon the prosecution to establish the conditions of guilt. Upon this point the case of People v. McCann, 16 N. Y. 58, 69 Am. Dec. 642, is clear and satisfactory, and the cases of Commonwealth v. Kimball, 24 Pick. (Mass.) 373, Commonwealth v. Dana, 2 Metc. (Mass.) 340, State v. Marler, 2 Ala. 43, 36 Am. Dec. 398, Commonwealth v. McKie, 1 Gray (Mass.) 61, 61 Am. Dec. 410, Commonwealth v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458, and Hopps v. People, 31 Ill. 385, 83 Am. Dec. 231, may be referred to in further illustration of the principle. See also Doty v. State, 7 Blackf. (Ind.) 427. The recent case of Walter v. People, 32 N. Y. 147, does not overrule the case of People v. McCann, but, so far as it goes, is entirely in harmony with the views here expressed. * * *

New trial awarded.[62]

[62] Accord: State v. Crawford, 11 Kan. 32 (1873); State v. Bartlett, 43 N. H. 224, 80 Am. Dec. 154 (1861); Davis v. United States, 160 U. S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499 (1895); People v. Penman, 271 Ill. 82, 110 N. E. 894 (1915).

Compare Wagner, J., in State v. Klinger, 43 Mo. 127 (1868): "Both observation and experience show that insanity is easily simulated; and if a bare doubt, which may be created in the minds of a jury by slight circumstances, is permitted to control and produce an acquittal, the guilty will often go unpunished, and the interests of society suffer great injury. Mr. Bishop, a writer of great accuracy on Criminal Law, remarks: 'Sanity, as observed by a learned judge, is presumed to be the normal state of the human mind, and it is never incumbent on a prosecutor to give affirmative evidence that such state exists in a particular case. But, suppose this normal state is denied to have existed in the particular instance, then, if evidence is produced in support of such denial, the jury must judge of it and its effect on the main issue of guilty or not guilty; and if, considering all the evidence, and considering the presumption that what a man does is sanely done, and suffering the evidence and the presumption to work together in their minds, they entertain a reasonable doubt whether the prisoner did the act in a sane state of mind, they are to acquit, otherwise they are to convict.' 1 Bish. Crim. Proc. § 534. I think that the safest and most reasonable rule is that, as the law presumes every person who has reached the age of discretion to be of sufficient capacity to be responsible for crimes, the burden of establishing the insanity of the accused affirmatively to the satisfaction of the jury, on the trial of a criminal case, rests upon the defense. It is not necessary, however, that this defense be established beyond a reasonable doubt; it is sufficient if the jury is reasonably satisfied, by the weight or preponderance of the evidence, that the accused was insane at the time of the commission of the act. Loeffner v. State, 10 Ohio St. 598 (1857); Fisher v. People, 23 Ill. 283 (1860); Commonwealth v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458 (1844); Commonwealth v. Eddy, 7 Gray (Mass.) 583 (1856)."

PEOPLE v. MILNER.

(Supreme Court of California, 1898. 122 Cal. 171, 54 Pac. 833.)

HENSHAW, J.[68] Defendant, tried for the murder of S. J. Darrah, was convicted of manslaughter. He appeals from the judgment, and from the order denying him a new trial. The facts are presented without conflict upon any material proposition, and under them defendant's counsel strenuously insist that the verdict is against the evidence. * * *

The only fair conclusion to be drawn from all this is that the defendant's evidence is not contradicted upon any essential matter by any other direct and positive evidence in the case. If this consideration could properly end here, there can be no doubt but that a new trial should be ordered, for the reason urged, that the verdict is contrary to the evidence; but a trial for murder differs in some respects from the trial of any other criminal offense. "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." Pen. Code, § 1105.

In this case the killing by the defendant was clearly established by the people's proof. No circumstances of mitigation or justification to bring the case within the exception contemplated by the section were shown in the prosecution's evidence. The burden of proof, then, of justifying and excusing the act, or of proving circumstances which would lessen the gravity of the offense to manslaughter, devolved upon the defendant. At the close of the prosecution's case the presumption against the defendant was that he had committed an unlawful homicide. It may not be said that the presumption of innocence countervailed against this, since by the express provision of the law the presumption of innocence was overcome, and a presumption of guilt took its place when the required facts were proven.

By section 2061 of subdivision 2 of the Code of Civil Procedure, jurors are to be instructed "that they are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, against a less number, or against a presumption or other evidence satisfying their minds." In this is a distinct recognition of the fact—First, that a presumption is evidence; and, second, that it is evidence which may outweigh the positive testimony of witnesses against it. It has been said that disputable presumptions are allowed to stand, not against the facts they represent, but in lieu of proof of the facts, and that when the fact is proven contrary to the presumption no conflict arises, but the presumption

[68] Part of opinion omitted.

is simply overcome and dispelled. Society v. Burnett, 106 Cal. 514, 39 Pac. 922.

This is true. Against a proved fact, or a fact admitted, a disputable presumption has no weight; but, where it is undertaken to prove the fact against the presumption, it still remains with the jury to say whether or not the fact has been proven, and, if they are not satisfied with the proof offered in its support, they are at liberty to accept the evidence of the presumption. In the Burnett Case, supra, both parties testified to a state of facts contrary to the presumption. It was like an admission. It relieved the question from conflict. But here the burden of proving circumstances exonerating the defendant, or reducing the grade of the crime, was cast upon him; and, even though there be no direct contradictory evidence in the record, the jury was not bound to decide in accordance with the defendant's statement, if the presumption the better satisfied their minds.

In this connection the language of Justice Field in Quock Ting v. United States, 140 U. S. 417, 11 Sup. Ct. 733, 851, 35 L. Ed. 501, is peculiarly applicable: "Undoubtedly, as a general rule," says the learned justice, "positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his own account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying, may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statement, although there be no adverse verbal testimony adduced." * * *

It is easily possible for this court to say, when the identity of the slayer is in doubt, whether the evidence adduced is legally sufficient for the conviction of the defendant; and, if it be not, then clearly it is the duty of the court to set the verdict aside. Under such a state of facts no burden is cast upon a defendant to prove anything. In the case at bar, however, the killing by defendant is both proved and admitted. The burden then is by law cast upon him to exculpate himself, or mitigate the gravity of the crime with which he is charged. He has to do this to the satisfaction of the jury. They are to weigh his evidence, and determine the fact whether or not it is to be believed, and, if believed, whether it is sufficient. How much or how little weight has the jury attached to his evidence? How much has the witness' credibility been affected in their minds in his appearance upon the witness stand, by his manner of testifying, by what may seem to them some improbability in his story? All these are considerations

before the jury in passing upon the weight of evidence. In this case by its verdict the jury has, in effect, said: "The burden of proof cast by law upon the defendant has not, in our judgment, been sustained. His evidence does not produce conviction in our minds against the presumption arising from the proof of the people, which does satisfy our minds." In such a case as this, therefore, the verdict of the jury may not be set aside for the lack of legally sufficient evidence to support it.

New trial granted (on other grounds).[64]

EGBERS v. EGBERS.

(Supreme Court of Illinois, 1898. 177 Ill. 82, 52 N. E. 285.)

CARTER, C. J.[65] This was a bill filed by defendants in error to contest the validity of an instrument purporting to be the last will of Magdalena Egbers, and to set aside the probate thereof. The bill alleged that the alleged will, dated August 7, 1896, was probated in the county court of Hancock county; that it was never signed or published by Magdalena Egbers, and that she was at the time of its alleged execution so sick with fever that she was unable to execute an instrument of any kind; that she was unconscious and out of her mind; that she was very low with typhoid fever, unable to sit up in bed or to write, or understand anything about the disposition of her property; and that she had made a valid will three years before. The will sought to be set aside is as follows:

"State of Illinois, County of Hancock. August 7, 1896. I want all my legal heirs to have $100 dollars, and the remainder to John W. Egbers; the land and household to use as he sees fit, as he is my executor. Magdalena Egbers.

"Viola Egbers. Miss Mary Schaffner.

"Annie McArthur."

The land contained 80 acres, and was valued at about $4,000. Issues were made, and tried before a jury, and a verdict was returned that the said instrument was not the last will and testament of Magdalena Egbers. This verdict was set aside, and another trial had, with the same result. A decree was then entered setting aside the alleged will and the probate thereof, and that John W. Egbers pay the costs. Proponents have sued out this writ of error to reverse the decree. * * *

[64] A somewhat similar statute in Illinois is construed as placing the burden of establishing self-defense on the defendant. Appleton v. People, 171 Ill. 473, 49 N. E. 708 (1898).

Compare People v. Downs, 123 N. Y. 558, 25 N. E. 988 (1890), that the burden is on the prosecution to establish guilt, and not on the defendant to establish an excuse; and so in State v. Wingo, 66 Mo. 181, 27 Am. Rep. 329 (1877).

[65] Part of opinion omitted.

It is next urged that the court erred in giving to the jury the following instruction at the request of the contestants: "You are instructed that the burden of proof is upon the proponents to show that the will offered by them was signed by Magdalena Egbers on August 7, 1896, and, unless he has proven such execution by a preponderance of the evidence, you should find for the contestants. But if you believe from the evidence that Magdalena Egbers did execute the instrument offered as a will, and that the same was attested by two credible witnesses in her presence, and that the two subscribing witnesses have sworn that at the time she executed it she was of sound mind, then the burden shifts, and the contestants assume the burden of proving the testatrix was not of sound mind, as defined in these instructions." It is said that this instruction required the proponents, throughout the whole case, to sustain the burden of proving the signing [66] of the will, whereas, it is contended, the burden of proving the execution of the instrument, as well as the alleged unsoundness of mind of the testatrix, after a prima facie case had been made by the proponents, shifted to the contestants, who were required to prove by a preponderance of all the evidence the allegations of their bill that she never signed or executed the same.

As said by the learned author of the article entitled "Burden of Proof" in 5 Am. & Eng. Enc. Law (2d Ed.), the term "burden of proof" has two distinct meanings. By the one is meant the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises. By the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial, in order to make or meet a prima facie case. See notes and cases there cited. Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of evidence, rests throughout upon the party asserting the affirmative of the issue, and, unless he meets this obligation upon the whole case, he fails. This burden of proof never shifts during the course of a trial, but remains with him to the end. This court has repeatedly said that the law presumes every man to be sane until the contrary is proved, and the burden of proof rests upon the party alleging insanity. Argo v. Coffin, 142 Ill. 368, 32 N. E. 679, 34 Am. St. Rep. 86; Guild v. Hull, 127 Ill. 523, 20 N. E. 665; Menkins v. Lightner, 18 Ill. 282. But it is incumbent on the proponents of the will to make out a prima facie case in the first instance, by proper proof of the due execution of the will by the testator, and of his mental capacity, as required by the statute. The burden of proof is then upon the con-

[66] See rule in California that under the statute the contestant has the burden of establishing the grounds of contest, including lack of due execution. In re Latour, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441 (1892).

testants to prove the allegations of their bill by a preponderance of all of the evidence,—that the testator was mentally incompetent. The law throws the weight of the legal presumption [67] in favor of sanity into the scale in favor of the proponents, from which it necessarily results that upon the whole case the burden of proof rests upon the contestants to prove the insanity of the testator. Craig v. Southard, 162 Ill. 209, 44 N. E. 393; Id., 148 Ill. 37, 35 N. E. 361; Taylor v. Pegram, 151 Ill. 106, 37 N. E. 837; Wilbur v. Wilbur, 129 Ill. 392, 21 N. E. 1076; Carpenter v. Calvert, 83 Ill. 62.

We are not called upon to consider in this case whether the rule relating to the burden of proof is the same in its application to both questions raised by the pleadings, viz.: First, that Magdalena Egbers did not sign the alleged will; and, second, that she was mentally incompetent to make a valid will. There is the natural presumption that she was sane, which, with all of proponents' evidence, must be overcome, and sufficient evidence adduced so that upon the whole evidence there is a preponderance in support of the allegation in the bill of her mental unsoundness, before the will can be set aside on that ground. See cases cited above. But there is no presumption that she signed the will, except that which the law raises from the prima facie case made by the proponents. But, whether any distinction can be drawn or not (Purdy v. Hall, 134 Ill. 298, 25 N. E. 645; McCommon, 151 Ill. 428, 38 N. E. 145), it is a sufficient answer to the point made on the instruction, that the court gave to the jury two instructions at the request of the proponents, which, in the respect mentioned, were in substance the same as the instruction complained of, and they cannot be heard to complain of an alleged error which they asked the court to commit. * * *

Decree affirmed.[68]

[67] Baker, J., in Graves v. Colwell, 90 Ill. 612 (1878): "It has been said that presumptions of law derive their force from jurisprudence and not from logic, and that such presumptions are arbitrary in their application. This is true of irrebuttable presumptions, and, primarily, of such as are rebuttable. It is true of the latter until the presumption has been overcome by proofs, and the burden shifted; but when this has been done, then the conflicting evidence on the question of fact is to be weighed and the verdict rendered, in civil cases, in favor of the party whose proofs have most weight, and in this latter process the presumption of law loses all that it had of mere arbitrary power, and must necessarily be regarded only from the standpoint of logic and reason, and valued and given effect only as it has evidential character. Primarily, the rebuttable legal presumption affects only the burden of proof, but if that burden is shifted back upon the party from whom it first lifted it, then the presumption is of value only as it has probative force, except it be that on the entire case the evidence is equally balanced, in which event the arbitrary power of the presumption of law would settle the issue in favor of the proponent of the presumption. Regarded in its evidential aspect, a given presumption of law may have either more or less of probative value, dependent upon the character of the presumption itself and upon the circumstances of the particular case in which the issue may arise."

[68] In New York the prima facie effect of the probate is invoked to place the burden of establishing incapacity on the contestant. Dobie v. Armstrong, 160 N. Y. 584, 55 N. E. 302 (1899).

BALDWIN et al. v. PARKER et al.

(Supreme Judicial Court of Massachusetts, 1868. 99 Mass. 79, 96 Am. Dec. 697.)

Appeal by Artemas Parker, Stephen Taylor and his wife, Emmeline, and the minor children of Frederick Parker, from a decree of the judge of probate, allowing as the last will of Jonas Parker, of Carlisle, who died June 2, 1866, an instrument executed May 17, 1866, which disposed of the bulk of the testator's estate to his second wife and her children.

At the hearing, before Gray, J., the formal execution and attestation of this instrument were proved; and a trial by jury was had upon two issues: (1) Whether the testator at the time of the execution was of sound and disposing mind. (2) Whether the execution was procured by the undue influence of Anna Parker, John Gleason, Joanna Gleason and John F. Baldwin, or some of them. It appeared in evidence that Jonas Parker was twice married, the first time in 1809 and the second in 1818; that the appellants Artemas and Emmeline, together with Frederick and Jonas, who died before him, were his children by his first wife, who died in 1817; and that Joanna, wife of John Gleason, and Fanny, wife of John F. Baldwin, were his children by his second wife, Anna Parker, who survived him.

The appellants contended that the burden of proof was upon the executors on both issues; the judge ruled that the burden of proving the sanity of the testator was upon the executors, but the burden of proving undue influence was upon the appellants; and to this ruling the appellants alleged exceptions.[69]

HOAR, J. * * * The other question reserved upon the report is of more difficulty and importance. It is the question, Upon whom is the burden of proof upon the issue of undue influence? The claim on the part of the appellants is, that the party propounding the will is bound to prove that it is the will of the testator, and not of some other person operating upon and through him. On the other hand, the executors contend that when the execution of the instrument and testamentary capacity are established, nothing more is required by law to be shown affirmatively; and that, to avoid an instrument for fraud or duress, they must be proved by him who alleges them. In support of the former view it is argued that the issue upon the probate of a will is substantially a single one, to prove that the instrument was freely executed, according to the forms required by law, by a testator of sound mind; and that, whatever presumptions may exist upon any part of this issue, the burden of proof does not shift.

The question is certainly not without difficulty, and the authorities upon it are very conflicting. It is settled in this Commonwealth that on the issue of sanity or testamentary capacity the burden of proof

[69] Part of statement and opinion omitted.

is upon the party that offers the will for probate; and that the presumption [70] of sanity does not shift the burden upon the opposing

[70] Knowlton, C. J., in Clifford v. Taylor, 204 Mass. 358, 90 N. E. 862 (1910): "The petitioner requested the judge to instruct the jury as follows: 'Although the executor has the burden of proof upon him to satisfy the jury that testatrix was of sound and disposing mind and memory at the time of the execution of the will, there is a presumption of sanity, and that presumption stands until it is rebutted.' Using the word 'rebutted' in the sense of 'met by evidence to the contrary,' the proposition is correct. Richardson v. Bly, 181 Mass. 97, 99, 63 N. E. 3 (1902). Looking at the instruction on this subject in different parts of the charge, it is not clear what the jury would understand as the law of the case. Some of the judge's language seems to be substantially in accordance with this proposition. Other language seems to imply that, the moment an issue is presented by a denial of sanity, the presumption becomes of no effect, and the case is to be tried upon the evidence introduced by the parties, as if there were no presumption. The true rule is that the presumption is enough to sustain the burden of proof, until evidence is introduced which tends to control it. On the introduction of such evidence, the case is to be determined upon the whole evidence, including the presumption of sanity, and if the preponderance of the evidence is in favor of sanity, the burden of proof is sustained and the jury will find for the executor. If, upon the whole evidence, including this presumption, the scales are in even balance, the finding will be for the contestant, on the ground that the executor has failed to sustain the burden of proof. Fulton v. Umbehend, 182 Mass. 487, 65 N. E. 829 (1903); Cohasset v. Moors, 204 Mass. 173, 90 N. E. 978 (1910)."

Compare Doe, J., in Lisbon v. Lyman, 49 N. H. 553 (1870): "If there was a presumption of law that minors are not emancipated, it amounted to no more than this, the plaintiff alleging emancipation had the burden of proof; and that was known without the assistance of a presumption. A legal presumption is a rule of law—a reasonable principle, or an arbitrary dogma—declared by the court. There may be a difficulty in weighing such a rule of law as evidence of a fact, or in weighing law on one side, against fact on the other. And if the weight of a rule of law as evidence of a fact, or as counterbalancing the evidence of a fact, can be comprehended, there are objections to such a use of it. In this case, on the question of emancipation, if the scales holding all the evidence on both sides were even, did the presumption when added to the defendant's side incline them in his favor? If it did, it had no effect on the case, because it was not necessary for the defendant to produce a preponderance of the evidence; if it did not, the jury were instructed to weigh as evidence, that which had no weight. If the scales holding all the evidence on both sides, preponderated in favor of the plaintiff, did the presumption, when added to the defendant's side, restore the equilibrium? If it did, the plaintiff was required to produce something more than a preponderance of the evidence; if it did not, it was useless. A legal presumption is not evidence. In civil cases, it is the finding of a fact or the decision of a point, when there is no testimony, and no inference of fact from the absence of testimony, on the subject, or when the evidence is balanced. And often the fact is also found, or the decision made, by the rule of law which imposes the burden of proof on the party having the affirmative. When this is the case, the assignment of the burden of proof to one party, and the benefit of the legal presumption to the other, is a double and unjust use of one and the same thing. Among the various ways in which the province of the jury has been encroached upon, in England, the use of legal presumptions as substitutes for evidence, is one of the most conspicuous. In this country, where the right of the jury, and the right of parties to a full trial of facts by jury, are more carefully observed, the English collection of legal presumptions, is not to be adopted upon the mere strength of precedent. In each instance a critical examination is to be made to ascertain whether that which is asserted as a legal presumption is anything more than a conclusion of fact at which the court may think the jury ought to arrive. The presumption against the freedom of minors, was not an element of

party. Crowninshield v. Crowninshield, 2 Gray, 524; Baxter v. Abbott, 7 Gray, 72. The burden is undoubtedly on the same side to prove the formal execution of the instrument, and that the testator executed it as and for his last will.

The objection to a will that it was obtained by undue influence is not one which it is easy to define with precision. The term seems to include both fraud and coercion. Sir John Nicholl defines it to be that degree of influence which takes away from the testator his free agency; such as he is too weak to resist; such as will render the act no longer that of a capable testator. Kinleside v. Harrison, 2 Phillim. 551. Where influence has been exerted upon a person of feeble mind, or whose faculties are impaired by age or disease, it is not always easy to draw the line between the issues of sanity and of undue influence. So it is possible that in many cases the coercion might be such as to be available to set aside the will on the ground that it had not been executed by the testator.

But where the issue of undue influence is a separate and distinct issue, involving proof that the testator, though of sound mind, and intending that the instrument, which he executes with all the legal formalities, shall take effect as his will, was induced to execute it by the controlling power of another, we think the weight of authority and the best reason are in favor of imposing upon the party who alleges the undue influence the burden of proving it. And we are inclined to think that this has been the general practice in this Commonwealth. Glover v. Hayden, 4 Cush. 580.

evidence; could not be weighed as evidence; and it does not appear that any use could rightfully be made of it in the case. It was put into the scale with the defendant's evidence, where it would be likely to mislead the jury, and give the defendant a material advantage to which he was not entitled; but this is no cause for setting aside the verdict on the defendant's motion."

A rule of law may place the burden of producing evidence on the negative instead of the affirmative, or it may place the burden of establishing on the negative instead of the affirmative, and it may conceivably do the latter in case the affirmative establishes some subordinate proposition. For comments on such a rule, see article by Professor Abbott in 6 Harvard Law Review, 125.

It is impossible, however, to understand the mental process involved in balancing or weighing a rule of law along with evidence. As Lord Justice Bowen expressed it, in Abrath v. Railway, 11 Q. B. D. 440 (1883), when a jury is asked as to a plain question of fact, either they believe it or do not believe it, or can not arrive at a conclusion. But the general probability on which many presumptions are based might conceivably affect the conclusion reached by the jury. For example, the general probability that a person is more likely to be sane than otherwise, because the majority of individuals are sane, does not appear to furnish much aid in the determination of the mental condition of X., as to whose behavior there is ample evidence. While it is true that the majority of individuals are sane, it is equally true that the majority of sane individuals do not behave in certain unusual ways. On the other hand the probability that the scattering of fire by a locomotive is due to bad condition or faulty construction may have considerable force as an argument in a given case, quite apart from any technical rule of presumption. When courts talk of weighing presumptions with evidence, they doubtless mean that such probabilities may be considered, but the expression is unfortunate, and apt to mislead a jury.—*Editor.*

The most recent decision in the court of appeals in the state of New York upon the question is to the same effect. Tyler v. Gardiner, 35 N. Y. 559. All the judges concurred upon this point, though they differed upon others arising in the case.

The decision in Crowninshield v. Crowninshield, and in Baxter v. Abbott, ubi supra, that the burden of proof is upon the party propounding the will to establish the sanity of the testator, although the presumption of law is in favor of sanity, is placed very much upon the construction of the statute of wills, which makes the sanity of the testator a condition precedent to his power to make a will. But when all is proved that the statute requires; when a testator of sound mind has intentionally made and published a will according to the forms of law, his will is as much a legal conveyance and disposition of his property as any other lawful instrument of conveyance. It may be impeached or made invalid by proof of fraud, duress, or undue influence, which have caused it to contain provisions which he has been wrongfully induced to insert in it; but so may a deed or other contract be impeached for the like reason.

The defence of duress or fraud, when made in avoidance of a deed, is required to be specially pleaded, and is not good under the issue of non est factum. The reason seems to be, that the instrument is voidable, and not void; it is the deed of the maker of it; and, if he would avoid it, he is called upon to prove the existence of facts which will authorize him to do so. Yet the issue of fraud or duress involves the question whether the deed was ever obligatory, as much as the same issue does the original validity of a will. It is true that the distinction between a voidable and void act has no precise application to a will; because a will is in its nature revocable, and may be set aside by a testator at his pleasure. But the question whether a will is his free act, the product of his own volition and not of another's is essentially the same as in the case of a contract; and there is no positive statute rule to make a difference in this respect.

It was said by Baron Parke in Barry v. Butlin, 1 Curteis, 638, and the observation was quoted with approbation by Mr. Justice Thomas in Crowninshield v. Crowninshield, "that the onus probandi lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator." This statement, though apparently supporting the doctrine that the burden of proof on the issue of undue influence is on the party propounding the will, we do not feel sure was so intended.

The case was tried upon an allegation by the executors propounding the will, and upon allegations of the heir setting up that it was obtained by undue influence. The question discussed by Baron Parke upon the burden of proof was upon the point, whether, if it appeared that the will was prepared by a person who took a benefit under it, it

made a presumption and onus probandi against the will, and required proof that the contents of the will were known to the testator.

He says: "If it is intended to be stated, as a rule of law, that in every case in which the party preparing the will derives a benefit under it, the onus probandi is shifted, and that not only a certain measure, but a particular species of proof is therefore required from the party propounding the will, we feel bound to say that we conceive the doctrine to be incorrect. The strict meaning of the term onus probandi is this, that if no evidence is given by the party on whom the burden is cast the issue must be found against him." "In all cases this onus is imposed on the party propounding a will; it is in general discharged by proof of capacity and fact of execution; from which the knowledge of and assent to the contents of the instrument are assumed, and it cannot be that the simple fact of the party who prepared the will being himself a legatee is in every case and under all circumstances to create a contrary presumption, and to call on the court to pronounce against the will unless additional evidence is produced to prove the knowledge of its contents by the deceased."

He concludes that it amounts only to a circumstance of suspicion, calling for care in the court, and calling on it not to grant probate without entire satisfaction that the instrument does express the real intentions of the deceased.

The whole result of the reasoning would seem to be, that upon the separate issue of undue influence the burden of proof is upon the party alleging it; and that it does not shift upon the party having the general burden of establishing the will, upon the mere introduction of evidence of a single circumstance of suspicion. If no evidence were offered on either side, the allegation of undue influence would fail. In the language of Chief Justice Mellen, "the law requires proof of facts; especially when the object is to destroy and set aside an act apparently deliberate, and executed with all usual and legal formalities." Small v. Small, 4 Greenl. (Me.) 224, 16 Am. Dec. 253. The view which we have taken of the English doctrine on the subject is confirmed by a recent decision in the house of lords, Boyse v. Rossborough, 6 H. L. Cas. 2. In that case, page 49, Lord Cranworth says: "One point, however, is beyond dispute, and that is, that where once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it. Undue influence cannot be presumed."

The rule which was adopted at the trial seems therefore to us to be correct in principle, and supported by authority, as well as obviously the most convenient in practice; and none of the objections to the probate of the will can be supported.

Judgment on the verdict.[71]

[71] That the burden of establishing undue influence is on the contestants, see Boyse v. Rossborough, 6 H. L. C. 2 (1857); Michael v. Marshall, 201

WHEELER et al. v. ROCKETT et al.

(Supreme Court of Errors of Connecticut, 1917. 91 Conn. 388, 100 Atl. 13.)

THAYER, J.[72] The jury gave the plaintiffs a verdict setting aside an alleged will of Mrs. Keppy which had been approved by the probate court. The defendant alleges error in the court's refusal to set aside the verdict, and in several rulings upon questions of evidence, in the charge as given, and in refusing to charge as requested. * * *

The tenth assigns error in the court's failure to charge, as requested by the defendant, that the law presumes every person sane and capable of making a will until the contrary is shown. The request was not adapted to the circumstances of the case before the jury, and if given would have tended to mislead them as to the party on whom the burden of proof lay upon the question of the testatrix's soundness of mind. The burden of proving that the testatrix was of sound mind was upon the proponents of the will. They might in the first instance prove the execution of it in due form, and if nothing in the circumstances at the time of its execution tended to show the contrary, the proponents might rely upon the prima facie presumption that the testatrix was of sound mind. The presumption of sanity would be sufficient until evidence tending to show the contrary was introduced by the contestants. The proponents would after the introduction of such evidence be required to rebut this by preponderating evidence, and the presumption of sanity would have no probative force. Knox's Appeal, 26 Conn. 20, 22; Livingston's Appeal, 63 Conn. 68, 72, 26 Atl. 470; Barber's Appeal, 63 Conn. 393, 402, 27 Atl. 973, 22 L. R. A. 90; Vincent v. Mutual Reserve Fund Association, 77 Conn. 281, 290, 291, 58 Atl. 963. There was evidence in this case, as we have said before, tending to show that the testatrix harbored a delusion which

Ill. 70, 66 N. E. 273 (1903); Prentis v. Bates, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494 (1892); Morton v. Heidorn, 135 Mo. 608, 37 S. W. 504 (1896); Campbell v. Carlisle, 162 Mo. 634, 63 S. W. 701 (1901); In re Kindberg, 207 N. Y. 220, 100 N. E. 789 (1912). Contra: Sheehan v. Kearney, 82 Miss. 688, 21 South. 41, 35 L. R. A. 102 (1903), strong opinion.

That in certain cases of confidential relations, the burden of establishing the absence of undue influence is on the proponent, see Hegney v. Head, 126 Mo. 619, 29 S. W. 587 (1895); In re Cowdry's Will, 77 Vt. 359, 60 Atl. 141, 3 Ann. Cas. 70 (1905).

In England there appears to be no presumption of undue influence from confidential relations. Parfitt v. Lawless, L. R. 2 P. & D. 462 (1872).

But in certain cases of wills prepared by one standing in a confidential relation, the general presumption from formal execution is not sufficient, and the proponent is required to prove that the testator knew and approved the contents of the instrument. Tyrrell v. Painton [1894] Probate, 151. Compare Barry v. Butlin, 2 Moore, P. C. 480 (1838).

[72] Part of opinion omitted.

might lead her to cut off her younger daughter with a pittance as she did. The court therefore properly refused the request in question.
* * *

No error.[73]

HUGHES v. WILLIAMS.

(Supreme Judicial Court of Massachusetts, 1918. 229 Mass. 467, 118 N. E. 914.)

RUGG, C. J. This is a petition for the registration of title to land. It was appealed from the land court to the superior court, where it was tried to a jury upon four issues. There was found to be no error of law in the trial of three of these issues, but as to the other issue exceptions were sustained and a new trial ordered confined to that issue. 218 Mass. 448, 105 N. E. 1056. The material dates and facts respecting the chain of title are these: On April 1, 1896, the respondent Williams acquired title to the locus by deed which was duly recorded. He retained that title until July 5, 1901, when he deeded it to one Jones by deed duly recorded; on the same date he took a deed back from Jones to himself, which was not recorded until March, 1908. Meanwhile, on May 24, 1906, while the record title stood in the name of Jones, one Duckery brought an action against Jones, and attached the locus, which was sold on execution sale to the petitioner, and a sheriff's deed thereof to him dated April 10, 1909, was duly recorded.

The petitioner alleges that he is the owner of the land by reason of this sheriff's deed. The respondent pleaded that he was owner by virtue of his deed of April 1, 1896, and of the deed from Jones. The previous trial resulted in findings that Williams protested at the execution sale, and that the petitioner before his purchase at the execution sale was informed that the beneficial interest was in Williams and that Jones had a bare record title.

[73] Barclay, J., in Morton v. Heidorn, 135 Mo. 608, 37 S. W. 504 (1896): "In the case at hand, the jury is required to find the charge of undue influence 'proven' to their 'satisfaction' by a 'preponderance of the evidence,' having just been told that, upon proof of due execution and attestation of the document and of the soundness of testator's mind, 'said instrument of writing was and is presumed to be his free and voluntary act.' In the connection in which the words appear, we apprehend the jury would naturally infer that the 'preponderance of evidence' must be such as to overcome the presumption which the court declared to exist as a matter of law. That declaration is not entirely correct. When the cause was submitted to the jury, there was no presumption of the law that the document was testator's 'free and voluntary act.' There was evidence before them which all the parties and the court alike interpreted as tending to prove undue influence. Both adversary parties asked and obtained instructions on that theory. In that state of the case it was not proper to give proponents of the will the benefits of a so-called presumption which is merely one of fact, applied in the absence of any evidence permitting a different inference."

Compare reasoning of Baldwin, J., in Sturdevant's Appeal, 71 Conn. 392, 42 Atl. 70 (1899).

The single question submitted at the last trial was this: "Did James H. Duckery, before his attachment of the property in question, have actual knowledge of the existence of the deed back from Jones to Williams, of July 5, 1901?"

The trial judge ruled that the burden of proof was on the petitioner to satisfy the jury that Duckery did not have such knowledge. The point now presented for decision is the correctness of that ruling.

It is provided by R. L. c. 127, § 4, that: "A conveyance of an estate in fee simple * * * shall not be valid as against any person, except the grantor * * * his heirs and devisees and persons having actual notice of it" unless it is recorded.

The burden of proving that he was entitled to the registration of the title to the premises rested upon the petitioner, and remained upon him throughout. Temple v. Benson, 213 Mass. 128, 132, 100 N. E. 63; Hughes v. Williams, 218 Mass. 448, 449, 105 N. E. 1056.

The petitioner's title appeared to be perfect on the record. It could be defeated only provided that Duckery, the attaching creditor in the action against Jones, had actual knowledge of the unrecorded deed from his debtor, Jones, to the respondent, and provided it appeared further that the petitioner himself at the time of his purchase also had such actual knowledge. The respondent did not attack the sufficiency of the petitioner's title on the record, nor did he assail the validity of any instrument through which the petitioner claimed title; but he asserted title in himself on the strength of facts which he alleged existed outside the record, namely, actual knowledge by Duckery at the time of making his attachment of the existence of the deed to himself and actual knowledge by the petitioner of the same fact at the time of his purchase. If these were the facts, the respondent was entitled to prevail under the terms of the statutes. Wenz v. Pastene, 209 Mass. 359, 95 N. E. 793. But this assertion by the respondent was in the nature of a confession of the record title, of the petitioner and an avoidance of its natural force and effect by the existence of extraneous facts, which as matter of common honesty and under the statute would prevent the petitioner from taking advantage of his clear record title.

The statement of the legal principle where the burden of proof rests is plain. The party who makes and is required to make an assertion of a fact in order to set forth a case as matter of law entitling him to prevail, and whose case requires the proof of that fact, has at all times the burden of proving such fact. But where the party upon whom the burden of proof is cast offers competent proof of that fact, and his adversary instead of producing proof to negative that same fact proposes to show another and a distinct fact which avoids the effect of the first fact, then the burden of proof rests upon the party proposing to show the latter fact. This is an affirmative defense, the burden of proving which rests upon the party asserting it. Powers v. Russell,

13 Pick. 69, 76, 77; Wylie v. Marinofsky, 201 Mass. 583–584, 88 N. E. 448; Wood v. Blanchard, 212 Mass. 53–56, 98 N. E. 616; Stocker v. Foster, 178 Mass. 591–600, 601, 60 N. E. 407; Parker v. Murphy, 215 Mass. 72–75, 102 N. E. 85.

The practical application of the rule oftentimes raises questions of difficulty. Several cases have arisen where the burden of proof of the "actual notice" mentioned in the statute has been referred to. In Pomroy v. Stevens, 11 Metc. 244, at 248, it was said: "The party relying on an unregistered deed, against a subsequent purchaser or attaching creditor, must prove that the latter had actual notice or knowledge of such deed."

In Dooley v. Wolcott, 4 Allen, 406, the trial judge instructed the jury that it was incumbent upon the tenant, who relied upon an unrecorded deed, to prove that the demandant had actual notice of it, and it was said at page 409: "Upon the question of notice to the demandant of the tenant's prior unrecorded deed, and as to the right of the tenant to maintain his title thereby, the court properly instructed the jury."

In Lamb v. Pierce, 113 Mass. 72, the defendant relied upon an unrecorded deed. It was said at page 74: "This statute requires that the plaintiff must be shown to have had actual notice that there had been a conveyance to the defendant of the estate. * * * The party who claims under an unrecorded deed must prove that the subsequent purchaser had actual knowledge or notice of such deed."

In all these cases as they were presented the burden was upon the tenant in a real action, or upon the defendant in an action of trespass, and hence what has been quoted from these opinions is precisely applicable to the case at bar. It also is said in Jackson on Real Actions, p. 158: "If the defendant * * * undertakes to show a better title in himself, then he becomes the actor, and must show his title with the same certainty that was before required of the plaintiff."

The case is somewhat analogous to insurance policies, where the burden of showing that death or accident resulted from excepted or prohibited risks added to the main contract by way of proviso rests upon the insurer. Nichols v. Commercial Travelers' Ass'n, 221 Mass. 540, and cases collected at 546, 109 N. E. 449. It is not unlike the classification of goods as inflammable under exceptions in a bill of lading, the burden of proving which rests upon the carrier. A. J. Tower Co. v. Southern Pacific Co., 184 Mass. 472, 69 N. E. 348. It is distinguishable from cases arising under the negotiable instruments act, where by the statute the burden of proving want of notice of infirmity in note is cast upon the holder, Phillips v. Eldridge, 221 Mass. 103, 108 N. E. 909, and from cases where the matter of defense, though apparently somewhat special, really strikes at the root of a fact essential to the support of the plaintiff's case. Central Bridge v. Butler, 2 Gray, 130; Sohier v. Norwich Fire Ins. Co., 11 Allen, 336–338;

Cohen v. Longarini, 207 Mass. 556, 93 N. E. 702. The case at bar also is distinguishable from the decision as to waiver of his rights by the respondent or estoppel against asserting them, the burden of proving which was held when the case was here before to be upon the petitioner. That was an affirmative issue, and the burden rested upon the one who set it up, namely, upon the petitioner.

The result is that the burden of proving the issue in the case at bar rested upon the respondent.

Exceptions sustained.[74]

CUBA R. CO. v. CROSBY.

(Supreme Court of the United States, 1912. 222 U. S. 473, 32 Sup. Ct. 132, 56 L. Ed. 274, 38 L. R. A. [N. S.] 40.)

Mr. Justice HOLMES[75] delivered the opinion of the court:

This is an action for the loss of a hand through a defect in machinery, in connection with which the defendant in error, the plaintiff, was employed. The plaintiff had noticed the defect and reported it, and, according to his testimony, had been promised that it should be repaired or replaced as soon as they had time, and he had been told to go on in the meanwhile. The jury was instructed that if that was what took place, the defendant company assumed the risk for a reasonable time, and, in effect, that if that time had not expired, the plaintiff was entitled to recover. The jury found for the plaintiff. The accident took place in Cuba, and no evidence was given as to the Cuban law, but the judge held that if that law was different from the lex fori, it was for the defendant to allege and prove it, and that as it had pleaded only the general issue, the verdict must stand. (C. C.) 158 Fed. 144. The judgment was affirmed by a majority of the circuit court of appeals. 95 C. C. A. 539, 170 Fed. 369.

The court below went on the ground that, in the absence of evidence to the contrary, it would "apply the law as it conceives it to be, according to its idea of right and justice; or, in other words, according to the law of the forum." We regard this statement as too broad, and as having been wrongly applied to this case.

It may be that, in dealing with rudimentary contracts or torts made or committed abroad, such as promises to pay money for goods or services, or battery of the person, or conversion of goods, courts would assume a liability to exist if nothing to the contrary appeared. Par-

[74] For the burden in fraud cases where the question of purchaser for value without notice is involved, see cases collected in note to Pelham v. Chattahoochee Grocery Co., 8 L. R. A. (N. S.) 448 (1906). That the defense of purchaser for value without notice of an equity is to be affirmatively established by the one relying on it, see Wright-Blodgett Co. v. U. S., 236 U. S. 397, 35 Sup. Ct. 339, 59 L. Ed. 637 (1915); Krueger v. U. S., 246 U. S. 69, 38 Sup. Ct. 262, 62 L. Ed. 582 (1917).

[75] Part of opinion omitted.

rot v. Mexican C. R. Co., 207 Mass. 184, 34 L. R. A. (N. S.) 261, 93 N. E. 590. Such matters are likely to impose an obligation in all civilized countries. But when an action is brought upon a cause arising outside of the jurisdiction, it always should be borne in mind that the duty of the court is not to administer its notion of justice, but to enforce an obligation that has been created by a different law. Slater v. Mexican Nat. R. Co., 194 U. S. 120, 126, 48 L. Ed. 900, 902, 24 Sup. Ct. 581. The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there. With very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. American Banana Co. v. United Fruit Co., 213 U. S. 347, 356, 53 L. Ed. 826, 832, 29 Sup. Ct. 511, 16 Ann. Cas. 1047. See Bean v. Morris, 221 U. S. 485, 486, 487, 55 L. Ed. 821, 823, 31 Sup. Ct. 703. That, and that alone, is the foundation of their rights. * * *

We repeat that the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well-founded belief that it was a cause of action in that place. The right to recover stands upon that as its necessary foundation. It is part of the plaintiff's case, and if there is reason for doubt, he must allege and prove it. The extension of the hospitality of our courts to foreign suitors must not be made a cover for injustice to the defendants of whom they happen to be able to lay hold.

In the case at bar the court was dealing with the law of Cuba, a country inheriting the law of Spain, and, we may presume, continuing it with such modifications as later years may have brought. There is no general presumption that that law is the same as the common law. We properly may say that we all know the fact to be otherwise. Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co. (C. C.) 164 Fed. 869. Whatever presumption there is is purely one of fact, that may be corrected by proof. Therefore the presumption should be limited to cases in which it reasonably may be believed to express the fact. Generally speaking, as between two common-law countries, the common law of one reasonably may be presumed to be what it is decided to be in the other, in a case tried in the latter state. But a statute of one would not be presumed to correspond to a statute in the other, and when we leave common-law territory for that where a different system prevails, obviously the limits must be narrower still. Savage v. O'Neil, 44 N. Y. 298; Crashley v. Press Pub. Co., 179 N. Y. 27, 32, 33, 71 N. E. 258, 1 Ann. Cas. 196; Aslanian v. Dostumian, 174 Mass. 328, 331, 47 L. R. A. 495, 75 Am. St. Rep. 348, 54 N. E. 845.

Even if we should presume that an employee could recover in Cuba if injured by machinery left defective through the negligence of his employer's servants, which would be going far, that would not be enough. The plaintiff recovered, or, under the instructions stated at the beginning of this decision, at least may have recovered, notwith-

standing his knowledge and appreciation of the danger, on the strength of a doctrine the peculiarity and difficulties of which are elaborately displayed in the treatise of Mr. Labatt. 1 Labatt, Mast. & S. chap. 22, esp. § 424. To say that a promise to repair or replace throws the risk on the master until the time for performance has gone by, or that it does away with or leaves to the jury what otherwise would be negligence as matter of law, is evidence of the great consideration with which workmen are treated here, but cannot be deemed a necessary incident of all civilized codes. It could not be assumed without proof that the defendant was subject to such a rule.

There was some suggestion below that there would be hardship in requiring the plaintiff to prove his case. But it should be remembered that parties do not enter into civil relations in foreign jurisdictions in reliance upon our courts. They could not complain if our courts refused to meddle with their affairs, and remitted them to the place that established and would enforce their rights. A discretion is asserted in some cases even when the policy of our law is not opposed to the claim. The Maggie Hammond, 9 Wall. 435, 19 L. Ed. 772. The only just ground for complaint would be if their rights and liabilities, when enforced by our courts, should be measured by a different rule from that under which the parties dealt.

Judgment reversed.[76]

SECTION 2.—JUDICIAL NOTICE

FOSTER v. LEONARD.

(Court of Queen's Bench, 1581. Cro. Eliz. 1.)

Attachment upon prohibition against the defendant, farmer of the Parsonage of Sevenoak in Kent, for suing for tithes of great wood, by the name of silva cædua, against the 45 Edw. 3. c. 3. The defendant pleaded, that for 300 loads of the trees, they were of birch, of which by law he ought to have tithes as silva cædua; and as to the rest, which were of oak and elm, they were under the growth of twenty years. Upon the first it was demurred in law, and upon the second plea they were at issue. After argument upon the first point by Clerk and Weeks of the one side, and by Fuller and Tanfield of the other, it was adjudged for the defendant, that he shall have tithes of birch; for birch is not such wood as the statute intends by the name

[76] For common-law jurisdictions it will be presumed that the foreign common law, but not the statutory law, is the same as the local law. Cherry v. Sprague, 187 Mass. 113, 72 N. E. 456, 67 L. R. A. 33, 105 Am. St. Rep. 381 (1904), annotated case.

See, also, article by Professor Kales, 19 H. L. R. 401, on "Presumptions as to Foreign Law."

of gross bois, for it is intended of such wood as serveth for building, and other uses of a high nature, and not only for fuel, as the nature of birch is. And of oak and elm cut down before the age of twenty years, tithes shall be paid; for until that age they are not of such value as the law regardeth for the purposes aforesaid. Therefore, as to the birch, it was awarded he should have a consultation; he having entered a non vult ulterius prosequi for the residue.

PAGE v. FAUCET.

(Court of Queen's Bench, 1587. Cro. Eliz. 227.)

Error of a judgment given in Lynne. The error assigned was, that the judgment was given at a Court held there 16 February, 26 Eliz. and this day was Sunday, see 29 Car. 2, c. 7, and it was so found by the examination of the almanacks of that year. And it was ruled, that this examination was sufficient, and a trial per pais was not necessary, although it were an error in fact. And the judgment was reversed.

JONES v. DAVERS.

(Court of Queen's Bench, 1596. Cro. Eliz. 496.)

The plaintiff, being register to the Bishop of Gloucester, brought an action upon the case; and declares, that the defendant dixit et propalavit hæc Latina verba in præsentia diversorum, qui intellexerunt Romanam linguam, viz. "inimicus meus (innuendo the plaintiff) is an extortioner," and divers other slanderous words, which were clearly actionable. The defendant pleaded a vicious bar; and it was thereupon demurred. But now Snagg for the defendant moved, that upon this declaration the plaintiff ought not to recover. First, it is supposed that the defendant spoke slanderous words in Latin, in præsentia diversorum who understood linguam Romanam, which well may be; for lingua Romana at this day intends the Italian tongue, and not the Latin tongue. And then, if the words were spoken in the presence of those who understood not that tongue, the action clearly is not maintainable; for it was not slanderous where none understood it And therefore it was adjudged in the Exchequer, where one spake divers slanderous words in the Welsh tongue, the action lay not, without averring them to be spoken in the presence of those who understood the Welsh tongue. And of that opinion was the whole Court, that if it might be intended that the Latin and Roman tongues differed (as at this time it seemeth they differ; for the Roman tongue now used may be intended the Italian tongue), then the action lies not.[77] * * *

[77] Part of case is omitted.

MAKARELL v. BACHELOR.

(Court of Queen's Bench, 1598. Cro. Eliz. 588.)

Debt upon divers contracts; all for apparel; some for fustian suits, some for velvet and satin suits laced with gold lace, amounting to £44. Whereof he was satisfied £4. The defendant pleaded infancy. The plaintiff replied, that he was one of the gentlemen of the chamber to the Earl of Essex; and so it was for his necessary apparel. And it was thereupon demurred. The Court held, that they were to adjudge what was necessary apparel; and such suits of satin and velvet cannot be necessary for an infant, although he be a gentleman, &c. It was then prayed, that he might have judgment for those which were necessary apparel. But the Court held, in regard he had acknowledged satisfaction for £4. parcel, &c. and they did not know wherefore it was payed, therefore he could not have judgment for any part; otherwise he should have judgment for those contracts which were allowed of, &c. Wherefore, &c.[78]

[78] Notice that at this time juries might decide on their own knowledge. See Bushell's Case, ante, p. 7. For a modern statement, see the following extract from the opinion of Willes, J., in Ryder v. Wombwell, L. R. 4 Exch. 32, (1868): "The Lord Chief Baron, in his judgment, questions whether under any circumstances it is competent to the judge to determine as a matter of law, whether particular articles are or are not to be deemed necessaries suitable to the estate and condition of an infant, and whether, if in any case the judge may so determine, his jurisdiction is not limited to those cases in which it is clear and obvious that the articles in question not merely are not, but cannot, be necessaries to any one of any rank, or fortune, or condition whatever? This is an important principle which, if correct, fully supports the judgment below, but we cannot assent to it. We quite agree that the judges are not to determine facts, and therefore where evidence is given as to any facts the jury must determine whether they believe it or not. But the judges do know, as much as juries, what is the usual and normal state of things, and consequently whether any particular article is of such a description as that it may be a necessary under such usual state of things. If a state of thing exist (as well it may) so new or so exceptional that the judges do not know of it, that may be proved as a fact, and then it will be for the jury under a proper direction to decide the case. But it seems to us that if we were to say that in every case the jury are to be at liberty to find anything to be a necessary, on the ground that there may be some usage of society, not proved in evidence and not known to the Court, but which it is suggested that the jury may know, we should in effect say that the question for the jury was whether it was shabby in the defendant to plead infancy. We think the judges must determine whether the case is such as to cast on the plaintiff the onus of proving that the articles are within the exception, and then whether there is any sufficient evidence to satisfy that onus. In the judgment of Bramwell, B., in the Court below, many instances are put well illustrating the necessity of such a rule. It is enough for the decision of this case if we hold that such articles as are here described are not prima facie necessary for maintaining a young man in any station of life, and that the burden lay on the plaintiff to give evidence of something peculiar making them necessaries in this special case, and that he has given no evidence at all to that effect."

Notice the difference in results, where the judge decides on his own general knowledge, as in the principal case, and where the jury are allowed to decide on their general knowledge, as in certain instances indicated in the note to Bushell's Case, ante, p. 7.

MacKELLY'S CASE.

(Court of King's Bench, 1612. 1 Rolle, Abr. 524.)

If a man should be indicted for the killing of a sergeant of London while executing process of the King on the 18th day of November, between the hours of five and six, though in truth this time in November is a part of the night, yet the court is not held ex officio to take notice of this [79] (a prendre conusans de ceo), any more than in a case of burglary, without the words, in nocte ejusdem diei, or noctanter.

HODGES v. STEWARD.

(Court of King's Bench, 1692. 1 Salk. 125.)

In an action on the case on an inland bill of exchange brought by the indorsee against the drawer, these following points were resolved:

1st. A difference was taken between a bill payable to J. S. or bearer, and J. S. or order; for a bill payable to J. S. or bearer is not assignable by the contract so as to enable the indorsee to bring an action, if the drawer refuse to pay, because there is no such authority given to the party by the first contract, and the effect of it is only to discharge the drawee, if he pays it to the bearer, though he comes to it by trover, theft, or otherwise. But when the bill is payable to J. S. or order, there an express power is given to the party to assign, and the indorsee may maintain an action. * * *

4thly. The plaintiff declared on a special custom in London for the bearer to have this action. To which the defendant demurred, without traversing the custom; so that he confessed it, whereas in truth there was no such custom; and the court was of opinion, that for this reason judgment should be given for the plaintiff; for though the Court is to take notice of the law of merchants as part of the law of England, yet they cannot take notice of the custom of particular places; and the custom in the declaration being sufficient to maintain the action, and that being confessed, he had admitted judgment against himself.[80] * * *

Judgment pro quer.[81]

[79] See same notion applied in Amory v. McGregor, 12 Johns. (N. Y.) 287 (1815), to the effect that an allegation that a contract was made in July, 1812, was not equivalent to an allegation that it was made during the War of 1812.

[80] Part of case omitted.

[81] In Argyle v. Hunt, 1 Strange, 187 (1719), it was said: "It is true, these words appear to be spoke in London, but how does the custom of London appear to us? There is nothing of that in the libel, and though we have such a private knowledge of it, that upon motion we do not put the party to produce an affidavit, because the other side never disputes it; yet we cannot judicially take notice of it, and if any body will insist on an affi-

HENRY v. COLE.

(Court of Queen's Bench, 1702. 2 Ld. Raym. 811.)

Upon issue joined in an action, the writ of nisi prius was awarded in the name of the King, and then entry was made upon the record, that before the day in bank the King died; and at the day in bank the writ is returned by the justices of the Queen. And Mr. Ward moved, that it did not appear, that the King died before the day of nisi prius; and if not, the execution of the writ by the justices of the Queen was erroneous. Sed non allocatur. For, per curiam, they will take notice on what day the King died, which was the eighth of March, and consequently before the twenty-seventh of April, which was the day of nisi prius. And therefore the execution of the writ by the justices of the Queen good. And judgment was given for the plaintiff. See the late act of parliament.

DEYBEL'S CASE.

(Court of King's Bench, 1821. 4 Barn. & Ald. 243.)

The prisoner, an impressed seaman, was brought up by virtue of a writ of habeas corpus, directed to the admiral of the fleet at Chatham. The return to the writ stated, that, on the 28th November, 1820, a certain foreign smuggling vessel, called the George, of Flushing, on board of which were divers, to wit, six subjects of his majesty, being mariners, was found and discovered by the commander and crew of his majesty's revenue cruiser, called The Griper, to have been and to be within eight leagues of that part of the coast of Great Britain called Suffolk, that is to say, within eight leagues of Orfordness, in the county of Suffolk, having then and there on board thereof divers large quantities of foreign spirits, tea, and tobacco. [The return further stated that the prisoner was arrested on said vessel, etc. Lawes, Sergt., objected to the return because it did not appear that the ship was at the time within the limits fixed by 59 G. 3, c. 121, § 1.]

BAYLEY, J.[82] It is quite true, that this court will take judicial notice of the general division of the kingdom into counties, because they are continually in the habit of directing their process to the sheriffs of those counties, and because they are mentioned in a great variety of acts of parliament. But still, I think, that the present return is insufficient. In these cases, the greatest certainty is requisite; for the court must see, distinctly, that the party who is brought up is justly

davit, we must have it in every case. It was never known, that the court judicially take notice of private customs, but they are always specially returned."

[82] Opinions of Holroyd and Best, JJ., omitted.

deprived of his liberty. Now the act of parliament says, that a party may be properly detained in custody, if he is found on board a vessel within four leagues of the coast between the North Foreland and Beachy-Head, or within eight leagues of any other part of the coast. This return does not follow the words of the act of parliament, but states, that the vessel was discovered, not within eight leagues of the coast of the county of Suffolk, but within eight leagues of a place in a part of the coast called Suffolk. Now I cannot say, judicially, that there is no place on the coast between the North Foreland and Beachy-Head, which is called Suffolk, and therefore, if it had stopped there, it seems to me, that this return would have been insufficient. But it is said, that there is an additional averment, stating, that the vessel was discovered within eight leagues of Orfordness, in the county of Suffolk. I have before said, that this court will take judicial notice of the general divisions of counties, but that cannot be extended to the particular parts of counties and their local situation. We know very well, that there are many parts of counties separated from the general body of the county. There is a part of the county of Durham which is situated to the north of Northumberland, and so the parish of Creyke, belonging to the same county, is surrounded by the North Riding of Yorkshire; and there are many other parts of other counties similarly situated. The court, therefore, cannot judicially know, whether Orfordness, which is averred to be part of the county of Suffolk, may not be an isolated part of it, situated on the coast between the North Foreland and Beachy-Head; and if so, there is nothing on this return to show, that the vessel was discovered within the limits mentioned in the act of parliament. The proper course would have been, to have stated, negatively, that the vessel was found within eight leagues of a part of the coast of Great Britain, not between the North Foreland and Beachy-Head, to wit, within eight leagues of Orfordness, in the county of Suffolk. The present return, however, is insufficient, and the prisoner must be discharged.

The prisoner was discharged.[88]

[88] In Kearney v. King, 2 B. & A. 301 (1819), the same court refused to take notice that there was but one Dublin, viz., that in Ireland. In Humphreys v. Budd, 9 Dowling, 1000 (1841), on a motion to set aside service of process, the court refused to take notice that there was no such place as Holborn in the county of Surrey. In Brun v. P. Nacey Co., 267 Ill. 353, 108 N. E. 301 (1915), the court required proof that a point on a certain street was within the city limits at a certain time.

KING v. GALLUN et al.

(Supreme Court of the United States, 1883. 109 U. S. 99, 3 Sup. Ct. 85, 27 L. Ed. 870.)

WOODS, J.[84] We are of opinion that the patent of complainant does not describe a patentable invention. The claim is for an article of manufacture, to-wit, a bale of plasterers' hair consisting of several bundles inclosed in bags, and compressed and secured to form a package. It is evident that the patent does not cover any improvement in the quality of the hair. Its qualities are unchanged. It does not cover the packing of the hair into parcels, or the size, shape, or weight of the parcels, nor the compression of the parcels separately. Nor does it cover the material of the bags which constitute the outer covering of the parcels. Complainant claims none of these things as secured by his patent. The packing of hair and other articles in parcels of the same shape, size, and weight, and the compression of the several parcels, has from time immemorial been in common use. Neither does complainant contend that his patent covers a single parcel or package of hair. All, therefore, that the patent can cover is simply an article of manufacture resulting from the compression and tying together in one bale of several similar parcels or packages of plasterers' hair. The object of this invention is thus set out in the specification: "For the convenience of the trade"—that is to say, to enable the retail dealer more easily to parcel out the hair in quantities to suit his customers—"I propose to form the hair in small bundles of one bushel each, and with several bundles into a bale of convenient size for transportation." The invention and the object to be accomplished by it are thus seen to be contained within narrow limits.

In deciding whether the patent covers an article, the making of which requires invention, we are not required to shut our eyes to matters of common knowledge, or things in common use. Brown v. Piper, 91 U. S. 43, 23 L. Ed. 200; Terhune v. Phillips, 99 U. S. 592, 25 L. Ed. 293; Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6546.

The subdivision and packing of articles of commerce into small parcels for convenience of handling and retail sale, and the packing of these small parcels into boxes or sacks, or tying them together in bundles for convenience of storage and transportation, is as common and well known as any fact connected with trade. This well-known practice is applied, for instance, to fine-cut chewing and fine-cut smoking tobacco, to ground coffee and spices, oatmeal, starch, farina, desiccated vegetables, and a great number of other articles. This practice having been common and long known, it follows that there is nothing left for the patent of complainant to cover but the compression of the bale formed of several smaller parcels. Can this be dignified by the name of invention? When the contents of the small-

[84] Statement omitted.

er parcels are such as to admit of compression into a smaller compass, the idea of compressing the bale of the smaller parcels for transportation and storage would occur to any mind. There is as little invention in compressing a bale of several parcels of hair tied up together, as in compressing one large parcel of the same commodity. But it is perfectly well known that the compression of several packages of the same thing into larger packages or bundles is not new, and that it has long been commonly practiced. Packages of wool, feathers, and plug tobacco have been so treated. The case of plug tobacco is a familiar instance. The plugs are formed so as to retain their identity and shape, the outer leaves of the plug forming at the same time a part of the plug as well as its covering. The plugs, after being so put up as to preserve their identity under pressure, are, as is well known, placed in a frame and subjected to pressure, and reduced to a smaller and compact mass, which is then boxed up and is ready for market. This is done in part for convenience in handling, transportation, and storage. When the box is opened by the retail dealer, the plugs can be taken out separately and sold. This method of treating plug tobacco would suggest to every one the compression into a bale of distinct packages of plasterers' hair, and leaves no field for invention in respect to the matter to which the patent of complainant relates.

In view of the facts to which we have referred, which are of common observation and knowledge, we are of opinion that the article of manufacture described in the specification and claim of the complainant's patent does not embody invention, and that the patent is for that reason void.

In support and illustration of our views, we refer to the following cases decided by this court: Hotchkiss v. Greenwood, 11 How. 248, 13 L. Ed. 683; Phillips v. Page, 24 How. 167, 16 L. Ed. 639; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; Terhune v. Phillips, 99 U. S. 592, 25 L. Ed. 293; Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438; Slawson v. Grand Street, etc., R. Co., 107 U. S. 649, 2 Sup. Ct. 663, 27 L. Ed. 576.

The patent of complainant cannot be sustained by the authority of the case of Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. Ed. 952, where the court said: "The invention is a product or manufacture made in a defined manner. It is not a product alone, separate from the process by which it is created." In that case the invention was the product of a new process applied to old materials. In this case it is the product of an old process applied to old materials.

Judgment affirmed.[85]

[85] See, also, Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200 (1875), cold storage process; Phillips v. Detroit, 111 U. S. 604, 4 Sup. Ct. 580, 28 L. Ed. 532 (1884), paving process.

Compare Austin v. Tennessee, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224 (1900), where the same court refused to take notice that cigarettes were particularly harmful.

COMMONWEALTH v. MARZYNSKI.

(Supreme Judicial Court of Massachusetts, 1889. 149 Mass. 68, 21 N. E. 228.)

Complaint on the Pub. Sts. c. 98, § 2, alleging that the defendant, at Boston, on July 22, 1888, that day being the Lord's day, "did keep open his shop there situate, and numbered one hundred and four in Eliot street, for the purpose of doing business therein; the same not being then and there works of necessity or charity."

At the trial in the superior court, before Dewey, J., the government called several witnesses, showing that the defendant was a tobacconist; that his shop was at the corner of Eliot street and Tremont street, in Boston; and that he kept his shop open, and made a sale of cigars and tobacco, between the hours of eleven o'clock in the forenoon and four o'clock in the afternoon of Sunday, July 22, 1888, that day being the Lord's day. The defendant contended that he had a right to keep his shop open on Lord's day for the purpose of selling tobacco and cigars, and called Dr. F. A. Harris, and, after qualifying him as an expert, asked him numerous questions as to whether or not tobacco and cigars, or either of them, were drugs or medicines; and as to whether they had any medicinal effect upon the human system; or whether, if used for pleasurable purposes, that fact deprived them of medicinal effect; or whether the fact that a drug is thus used for a pleasurable purpose makes it less a drug. The judge excluded all of these questions; and the defendant excepted.

The defendant offered in evidence the United States Dispensatory, for the purpose of showing the medicinal effects of tobacco as therein described; but the judge excluded the evidence, and the defendant excepted.

The defendant then called one Benatuille, and, after qualifying him as an expert in the manufacture of cigars, proved by him that a cigar is made of leaf tobacco.

The jury returned a verdict of guilty, and the defendant alleged exceptions.[86]

KNOWLTON, J. The defendant was prosecuted for having kept his shop open upon the Lord's day for the purpose of doing business therein. The evidence showed that he was a tobacconist, and that he kept his shop open, and made a sale of tobacco and cigars, on the day named in the complaint. We understand this sale to have included tobacco and cigars in a single transaction. The defendant did not contend at the trial "that he kept, or had a right to keep, his shop open on the Lord's day for any other purpose than that of selling tobacco and cigars." The jury were instructed, in substance, that keeping one's shop open to sell cigars on the Lord's day would sub-

[86] Statement condensed.

ject him to conviction of the offense named in this complaint, and the principal question in the case is whether that instruction was correct. Under the instruction the jury must have found that the defendant's purpose was to sell cigars, and in this aspect of the case the evidence offered in regard to tobacco was immaterial. The act complained of was keeping open the shop, not making the sale, and one question arises under St. 1887, c. 391, § 2, which amends Pub. St. c. 98, § 2, by adding a provision that nothing in this last section shall be held to prohibit certain named acts and kinds of business, among which is "the retail sale of drugs and medicines." If, upon the facts of this case, keeping the defendant's shop open to sell cigars was merely keeping it open to sell drugs and medicines, the instruction was erroneous; but if, as a matter of law, it was keeping it open for a purpose other than that of selling drugs and medicines, the instruction was correct.

Ordinarily, whether a substance or article comes within a given description is a question of fact; but some facts are so obvious and familiar that the law takes notice of them, and receives them into its own domain. If the proof had been that the shop was kept open for the purpose of selling guns or pistols, it would hardly be contended that the judge might not properly have ruled that the sale of these articles was not a sale of drugs or medicines. The court has judicial knowledge of the meaning of common words, and may well rule that guns and pistols are not drugs or medicines, and may exclude the opinion of witnesses who offer to testify that they are. Com. v. Peckham, 2 Gray, 514; Com. v. Crowley, 145 Mass. 430, 14 N. E. 459. Cigars are manufactured articles familiar to everybody. The materials of which they are composed are carefully prepared and put into form, until they lose their original character as mere materials, and become articles of commerce, known by a new name and adapted to a particular use. We are of opinion that cigars sold by a tobacconist in the ordinary way are not drugs or medicines, within the meaning of those words as used in the statute. Many things which are not in themselves medicines may be put to a medicinal use, and when so used they may become medicines. But there was no evidence in the present case that the cigars which the defendant sold were used or were intended to be used as a medicine, or that the defendant kept his shop open for the purpose of furnishing cigars to be used medicinally. The instruction must therefore be construed in its application to evidence of an ordinary sale of cigars, and, so applied, we are of opinion that it was correct.

In their application to the evidence of such a sale all the questions to the witness Harris were immaterial and incompetent. The record in the case of Com. v. Burwell was not between the parties now contending, and was rightly excluded. The court rightly ruled that the United States Dispensatory could not be put in evidence. Com. v.

Brown, 121 Mass. 69. The instructions to the jury in regard to their duty to follow the charge of the judge in matters of law were in accordance with the rule laid down in Com. v. Anthes, 5 Gray, 185, which has ever since been the settled law of this commonwealth.

We find no error in any other of the rulings or refusals to rule set out in the bill of exceptions. Exceptions overruled.[87]

PEOPLE v. MAYES.

(Supreme Court of California, 1896. 113 Cal. 618, 45 Pac. 860.)

HARRISON, J.[88] The appellant was convicted of felony, in stealing a blue steer, and has appealed from the judgment thereon, and from an order denying a new trial. The evidence connecting him with the taking of the animal was sharply conflicting, and testimony impeaching nearly all of the witnesses who testified on either side of the case was presented to the jury. Under these circumstances, the sufficiency of the evidence to sustain the verdict is not open for examination. * * *

A witness on behalf of the defendant testified that on the night when the animal was taken he met Ruiz, one of the witnesses for the prosecution, driving a dark-colored animal; that the moon was up and shining, and the night was pretty light. On being asked what time of the night it was, he said that he was unable to tell but thought that it was "along about ten o'clock, somewheres about there, I suppose," and at another time he said that it was "betwixt nine and ten, I suppose." The court instructed the jury, as a matter of judicial knowledge, that the moon on that night rose at 10:57 p. m. It does not appear that any evidence upon that point had been offered at the trial, nor was such evidence necessary. People v. Chee Kee, 61 Cal. 404. Section 1875, subd. 8, Code Civ. Proc., declares that courts take judicial knowledge of "the laws of nature, the measure of time, and the geographical conditions and political history of the world," and that "the court may resort for its aid to appropriate books or documents of reference"; and section 2102, Code Civ. Proc., declares, "Whenever the knowledge of the court is by this Code made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to adopt it." "Judicial notice will be taken of the time the moon rises and sets on the several days of the year, as well as of the successsion of the seasons, the difference of time in different longitudes, and the constant and invariable course of nature." Case v. Perew, 46 Hun, 57. See, also,

[87] See, also, State v. Main, 69 Conn. 123, 37 Atl. 80, 36 L. R. A. 623, 61 Am. St. Rep. 30 (1897), where, under a statute dealing with "peach yellows," the court refused to submit the nature of such disease as a question of fact to the jury.

[88] Part of opinion omitted.

State v. Morris, 47 Conn. 179; Munshower v. State, 55 Md. 11, 39 Am. Rep. 414.

Upon his motion for a new trial the appellant assigned the above instruction as error, and, in support thereof, presented an affidavit by Lewis Swift that on that night the moon rose at 10:35 p. m. No precedent in support of the practice of showing by affidavits that the court erred in instructing a jury upon matters within its judicial knowledge has been cited to our attention, and we are of the opinion such practice ought not to prevail. The judicial notice which courts take of matters of fact embraces those facts which are within the common knowledge of all, or are of such general notoriety as to need no evidence in their support, and also those matters which do not depend upon the weight of conflicting evidence, but are in their nature fixed and uniform, and may be determined by mere inspection, as of a public document, or by demonstration, as in the calculations of an exact science. These matters may not be within the personal knowledge of the judge who presides over the court, but, if a knowledge of them is necessary for a proper determination of the issues in the case, he is authorized to avail himself of any source of information which he may deem authentic, either by inquiring of others, or by the examination of books, or by receiving the testimony of witnesses. Rogers v. Cady, 104 Cal. 290, 38 Pac. 81, 43 Am. St. Rep. 100. As this knowledge of the court does not depend upon the weight of evidence, and is not to be determined upon a consideration of the credibility of witnesses, it is evident that, when the court has stated to the jury a fact of which it takes judicial knowledge, the correctness of such statement is not to be controverted or set aside on an appeal by affidavits which are merely contradictory of the correctness of such statement.

The appellate court takes judicial notice of the fact, in the same manner as does the trial court; but, in the absence of any personal knowledge of the fact by the individual members of the court, the fact as stated by the court below will be assumed to be correct, and the appellant will be required to show affirmatively that the court erred in its statement of it. The record does not show the means or sources from which the court obtained its knowledge of this fact,—whether from information derived from others, or from books, or by means of an individual calculation; and, although it appears from an affidavit on behalf of the appellant that the times of the rising of the moon, in the Family Christian Almanac, are correct, and that the ordinary almanacs found in drug stores, and sometimes called "patent-medicine almanacs," are not reliable, the time stated in either of these almanacs at which the moon rose on that night is not given, nor does it appear that the court below referred to either of them. While it is said in the affidavit of Swift that his statement is "made from accurate, correct, and reliable astronomical observations, calculations, and data," he does not state that he made the calculations, or the person by whom

they were made; so that his affidavit is in reality of no higher grade than hearsay, and is insufficient to overcome the presumption of the correctness of the court's statement to the jury. * * *

Judgment affirmed.[89]

LAZIER v. WESTCOTT.

(Court of Appeals of New York, 1862. 26 N. Y. 146, 82 Am. Dec. 404.)

DAVIES, J.[90] This is an action upon a judgment recovered in the Court of Common Pleas of Upper Canada against this defendant by this plaintiff. The cause was tried before a referee, who gave judgment for the plaintiff and judgment on his report to be affirmed at General Term.

On the trial the plaintiff offered in evidence an exemplification of the record of a judgment in the Court of Common Pleas of Upper Canada, which was received under objection and exception. Numerous interlineations, alterations and erasures appeared in the record, but they all appeared to be marked or authenticated by the initials "L. H.," being the initials of the name of the clerk, and said initials appeared to be in the same handwriting as that of the signature of said clerk. The defendant's counsel objected to the introduction of said papers on the ground:

(1) That this government does not recognize the province named in the record as one of the independent powers of the world, and that it was not such in fact; and that the evidence of the authority of the officers acting must come from the government creating them.

(2) That the paper is not authenticated in the manner required by law. * * *

I shall consider them in the order above enumerated. I do not read our statute in reference to the exemplification of the records and judicial proceedings in any court in any foreign country as confining the admission of the records only of such foreign country as shall have been acknowledged by this government as one of the independent powers of the world, and with which we have diplomatic intercourse. I think the obvious meaning of the statute is to admit the records of any court of any foreign country, and it is quite immaterial whether such foreign country is one of the great powers of the world, or one of minor importance and having a circumscribed extent. The size of the country cannot alter the rule of evidence, and the rec-

[89] In Munshower v. State, 55 Md. 11, 39 Am. Rep. 414 (1880), it was held that an almanac was properly admitted to prove when the moon rose. In State v. Morris, 47 Conn. 179 (1879), it was said that there was no error in admitting an almanac to show the time of sunset, because the court would take notice of the fact. In Wilson v. Van Leer, 127 Pa. 371, 17 Atl. 1097, 14 Am. St. Rep. 854 (1889), it was held proper to refer in argument to an almanac which had not been offered in evidence.

[90] Part of opinion omitted.

ords of a court of the Republic of San Marino are of equal validity as those of the Empire of all the Russias. The only question is, does the record come from a court of a foreign country? If so, and it is properly authenticated, it is to be admitted as evidence under the provisions of our Revised Statutes. 3 R. S. (5th ed.) 678, § 26.

The court will take judicial notice that the province of Upper Canada is a foreign country, and forms no part of our own (Ennis v. Smith, 14 How. 430, 14 L. Ed. 472), that it has a government and courts, and that those courts proceed according to the course of the common law. The record produced was, therefore, the record of a court of a foreign country, and it is authenticated by the attestation of the clerk of the court, with the seal [91] of the court annexed. There is also attached the certificate of the chief justice of the court, that the person attesting such record is the clerk of the court, and that the signature of such clerk is genuine. These papers are further authenticated by the certificate of the assistant secretary of state of said province, and by the governor in chief of said province, having charge of the great seal of said province, and which fact is attested by the affixing the great seal to said certificate, and which of itself imports verity, under the authority of which government said court is held, and which certificate declares that such court is lawfully and duly constituted, and specifies the general nature of its jurisdiction, and it also verifies the signature of the clerk of such court, and the signature of the chief justice thereof. It seems to me, therefore, that all the provisions of the statute have been complied with, to authorize the reading of this record in evidence in any court of this State. The referee, therefore, properly admitted it to be read. If I am correct in these views they dispose of the first and second objections of the defendant's counsel. * * *

Judgment affirmed.

STATE v. HORN.

(Supreme Court of Vermont, 1870. 43 Vt. 20.)

PECK, J.[92] The paper purporting to be a marriage certificate of a marriage in the State of Pennsylvania, admitted against the objection of the respondent, was incompetent evidence, and ought to have been excluded. It did not prove itself. Aside from the certificate there was no evidence that there was any such man as Benjamin Jay who was a justice of the peace, or that by the laws of Pennsylvania a justice of the peace has authority to solemnize marriages. The case

[91] It is frequently said that courts take notice of the seal of a foreign notary certifying his protest of a foreign bill. Pierce v. Indseth, 106 U. S. 546, 1 Sup. Ct. 418, 27 L. Ed. 254 (1882). It is doubtful, however, whether this means anything more than that the courts will presume the genuineness of what purports to be a foreign notarial seal.

[92] Statement and part of opinion omitted.

states that the presiding judge stated to the jury, in his charge, that of his own knowledge justices of the peace by the laws of Pennsylvania had such authority, but that is not proof. The laws of other States, when material to the merits of a case, cannot be established except by legal evidence, and if statute laws, they must be proved by the production of the statute. If a justice of the peace has such authority by the laws of Pennsylvania, it is to be taken to exist by statute. * * *

Judgment reversed.[93]

CITY OF WINONA v. BURKE.

(Supreme Court of Minnesota, 1876. 23 Minn. 254.)

GILFILLAN, C. J.[94] The defendant was convicted in the court below for the alleged violation of a city ordinance. On the trial no proof of the ordinance was made, and the defendant moved to dismiss the prosecution on that ground, which motion was denied. It is claimed on behalf of the city that, because of Laws 1873, c. 68—which provides that, when the "by-laws, ordinances, etc., of any city * * * have been or shall hereafter be printed and published by authority of the corporation, the same shall be received in evidence in all courts and places without further proof"—the court will take judicial notice of the existence of the ordinance, without proof. Such was not the intention of the act, as is clear from its language, and does not affect the necessity of proving the ordinance. Courts do not take judicial notice of city ordinances. Garvin v. Wells, 8 Iowa, 286; Goodrich v. Brown, 30 Iowa, 291. Such ordinances should be pleaded and proved.

Judgment reversed.[95]

[93] An American court does not take notice of the laws of England since the Revolution. Liverpool & G. W. S. Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788 (1889). But notice will be taken of the law formerly in force in territory now a part of the United States. United States v. Perot, 98 U. S. 428, 25 L. Ed. 251 (1878).

[94] Statement omitted.

[95] The omission to prove an ordinance at the trial cannot be supplied by proof in the appellate court. Porter v. Waring, 69 N. Y. 250 (1877), in which the following reasons are given for the general rule: "If the court could take judicial notice of the ordinances of a municipal corporation, it would involve the consideration of all the numerous enactments, whether printed or otherwise, which the common council have adopted which relate to the subject of the controversy, and the existence of many of which might be entirely unknown to the parties or their counsel. It would open the door in many cases to mere conjecture, and involve an inquiry as to local enactments, the time when they took effect, the priority of the same, and their application to the case in litigation, which it would be difficult to dispose of without proof, and which are not properly embraced within the ordinary scope of judicial knowledge in the determination and trial of cases."

LANE v. SARGENT.

(Circuit Court of Appeals of the United States, First Circuit, 1914. 217 Fed. 237, 133 C. C. A. 231.)

BINGHAM, Circuit Judge.[96] The plaintiff, Sargent, a citizen of the state of New Hampshire, brings this action against the defendant, Lane, a citizen of the commonwealth of Massachusetts, in the District Court of the United States for the District of New Hampshire, to recover damages for injuries received on August 4, 1912, by being run into by an automobile operated by the defendant. The accident took place while the plaintiff was crossing Main street, in Salisbury, Mass. There was a trial by jury and a verdict for the plaintiff. The case is now here on defendant's bill of exceptions, and the errors assigned are to the exclusion of certain evidence offered by the defendant and the refusal of the judge to give certain requests for rulings.

The accident having occurred in Massachusetts, and the law of the road of that state being a material point in the case, the defendant offered to show what the law of Massachusetts on that subject was by introducing in evidence three decisions of the Massachusetts Supreme Judicial Court, as reported in Galbraith v. West End St. Ry. Co., 165 Mass. 581, 43 N. E. 501, Scannell v. Boston Elevated Ry. Co., 176 Mass. 173, 57 N. E. 341, and Commonwealth v. Horsfall, 213 Mass. 232, 100 N. E. 362, Ann. Cas. 1914A, 682. The evidence was excluded, and the defendant excepted. The trial court, in excluding the evidence, made the following ruling:

"I think this question is a question of law for the court to pass upon, and the court is very glad to have any citation of Massachusetts law submitted to the court, and the court will instruct the jury upon what the Massachusetts law is. Upon that assumption, with this view of the law, the court will not allow the opinions of the Massachusetts court which have been called to its attention to be read to the jury."

The defendant contends that the law of Massachusetts, where the accident occurred, is the law of a foreign jurisdiction, and must be proved as a fact; that the court could not take judicial cognizance of it. This contention cannot be sustained. In Mills v. Green, 159 U. S. 651, 657, 16 Sup. Ct. 132, 134 (40 L. Ed. 293), Mr. Justice Gray, in delivering the opinion of the court, said:

"The lower courts of the United States, and this court, on appeal from their decisions, take judicial notice of the Constitution and public laws of each state of the Union. Owings v. Hull, 9 Pet. 607, 625 [9 L. Ed. 246]; Lamar v. Micou, 112 U. S. 452, 474 [5 Sup. Ct. 221, 28 L. Ed. 751]; Id., 114 U. S. 218, 223 [5 Sup. Ct. 857, 29 L. Ed. 94]; Hanley v. Donoghue, 116 U. S. 1, 6 [6 Sup. Ct. 242, 29 L. Ed. 535]; Fourth National Bank v. Francklyn, 120 U. S. 747, 751 [7 Sup. Ct.

[96] Part of opinion omitted.

757, 30 L. Ed. 825]; Gormley v. Bunyan, 138 U. S. 623 [11 Sup. Ct. 453, 34 L. Ed. 1086]; Martin v. Baltimore & Ohio Railroad, 151 U. S. 673, 678 [14 Sup. Ct. 533, 38 L. Ed. 311]."

And in Hanley v. Donoghue, 116 U. S. 1, 6, 6 Sup. Ct. 242, 245 (29 L. Ed. 535), the same Justice, in speaking for the court, said:

"In the exercise of its general appellate jurisdiction from a lower court of the United States, this court takes judicial notice of the laws of every state of the Union, because those laws are known to the court below as laws alone, needing no averment or proof. * * *

"But on a writ of error to the highest court of a state, in which the revisory power of this court is limited to determining whether a question of law depending upon the Constitution, laws, or treaties of the United States has been erroneously decided by the state court upon the facts before it—while the law of that state, being known to its courts as law, is of course within the judicial notice of this court at the hearing on error—yet, as in the state court, the laws of another state are but facts, requiring to be proved in order to be considered, this court does not take judicial notice of them, unless made part of the record sent up, as in Green v. Van Buskirk, 7 Wall. 139 [19 L. Ed. 109]. * * *

"Where by the local law of a state (as in Tennessee, Hobbs v. Memphis & Charleston Railroad, 9 Heisk. 873) its highest court takes judicial notice of the laws of other states, this court also, on writ of error, might take judicial notice of them."

See Martin v. Baltimore & Ohio Railroad, 151 U. S. 673, 678, 14 Sup. Ct. 533, 38 L. Ed. 311.

The Pawashick, 2 Low. 142, Fed. Cas. No. 10,851, a case relied upon by the defendant in support of his contention, is not in point. There the question was whether a federal court would take judicial notice of the law of a foreign country or it should be proved as a fact. * * *

Judgment affirmed.[97]

UNDERHILL v. HERNANDEZ.

(Supreme Court of the United States, 1897. 168 U. S. 250, 18 Sup. Ct. 83, 42 L. Ed. 456.)

George F. Underhill was a citizen of the United States, who had constructed a waterworks system for the city of Bolivar, under a contract with the government, and was engaged in supplying the place with water; and he also carried on a machinery repair business. Some time after the entry of Gen. Hernandez, Underhill applied to him, as

[97] The courts of the several states take notice of the laws of the United States. Gooding v. Morgan, 70 Ill. 275 (1873); Eastwood v. Kennedy, 44 Md. 563 (1876); Louisville & N. Ry. Co. v. Scott, 133 Ky. 724, 118 S. W. 990, 19 Ann. Cas. 392 (1909).

the officer in command, for a passport to leave the city. Hernandez refused this request, and requests made by others in Underhill's behalf, until October 18th, when a passport was given, and Underhill left the country.

This action was brought to recover damages for the detention caused by reason of the refusal to grant the passport, for the alleged confinement of Underhill to his own house, and for certain alleged assaults and affronts by the soldiers of Hernandez's army.

The cause was tried in the Circuit Court of the United States for the Eastern District of New York, and on the conclusion of plaintiff's case the Circuit Court ruled that upon the facts plaintiff was not entitled to recover, and directed a verdict for defendant, on the ground that "because the acts of defendant were those of a military commander, representing a de facto government in the prosecution of a war, he was not civilly responsible therefor." Judgment having been rendered for defendant, the case was taken to the Circuit Court of Appeals, and by that court affirmed, upon the ground "that the acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government." 26 U. S. App. 573, 13 C. C. A. 51, and 65 Fed. 577. Thereupon the cause was brought to this court on certiorari.[98]

Mr. Chief Justice FULLER. Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Nor can the principle be confined to lawful or recognized governments, or to cases where redress can manifestly be had through public channels. The immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agents of governments ruling by paramount force as matter of fact. Where a civil war prevails (that is, where the people of a country are divided into two hostile parties, who take up arms and oppose one another by military force), generally speaking, foreign nations do not assume to judge of the merits of the quarrel. If the party seeking to dislodge the existing government succeeds, and the independence of the government it has set up is recognized, then the acts of such government, from the commencement of its existence, are regarded as those of an independent nation. If the political revolt fails of success, still, if actual war has been waged, acts of legitimate warfare cannot be made the basis of individual liability. United States v. Rice, 4 Wheat. 246, 4 L. Ed. 562;

[98] Statement condensed and part of opinion omitted.

Fleming v. Page, 9 How. 603, 13 L. Ed. 276; Thorington v. Smith, 8 Wall. 1, 19 L. Ed. 361; Williams v. Bruffy, 96 U. S. 176, 24 L. Ed. 716; Ford v. Surget, 97 U. S. 594, 24 L. Ed. 1018; Dow v. Johnson, 100 U. S. 158, 25 L. Ed. 632; and other cases.

Revolutions or insurrections may inconvenience other nations, but by accommodation to the facts the application of settled rules is readily reached. And, where the fact of the existence of war is in issue in the instance of complaint of acts committed within foreign territory, it is not an absolute prerequisite that that fact should be made out by an acknowledgment of belligerency, as other official recognition of its existence may be sufficient proof thereof. The Three Friends, 166 U. S. 1, 17 Sup. Ct. 495, 41 L. Ed. 897.

In this case the archives of the state department show that civil war was flagrant in Venezuela from the spring of 1892, that the revolution was successful, and that the revolutionary government was recognized by the United States as the government of the country; it being, to use the language of the secretary of state in a communication to our minister of Venezuela, "accepted by the people, in the possession of the power of the nation, and fully established."

That these were facts of which the court is bound to take judicial notice, and for information as to which it may consult the department of state, there can be no doubt. Jones v. United States, 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691; Mighell v. Sultan of Jahore [1894] 1 Q. B. 149.

It is idle to argue that the proceedings of those who thus triumphed should be treated as the acts of banditti, or mere mobs.

We entertain no doubt, upon the evidence, that Hernandez was carrying on military operations in support of the revolutionary party. It may be that adherents of that side of the controversy in the particular locality where Hernandez was the leader of the movement entertained a preference for him as the future executive head of the nation, but that is beside the question. The acts complained of were the acts of a military commander representing the authority of the revolutionary party as a government, which afterwards succeeded, and was recognized by the United States. We think the circuit court of appeals was justified in concluding "that the acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government." * * *

Judgment affirmed.[99]

[99] The same court has taken notice of the American occupation of Cuba (Neely v. Henkel, 180 U. S. 109, 21 Sup. Ct. 302, 45 L. Ed. 448 [1901]), and of the great war in Europe (United States v. Hamburg-Amerikanische Packet-Fahrt Actien Gesellschaft Co., 239 U. S. 466, 36 Sup. Ct. 212, 60 L. Ed. 387 [1916]).

And so that the United States had recognized the Carranza government as the de facto, and later as the de jure, government of Mexico. Oetjen v. Central Leather Co., 246 U. S. 297, 38 Sup. Ct. 309, 62 L. Ed. 726 (1918).

SECTION 3.—ADMISSION AND EXCLUSION OF EVIDENCE [1]

THE KING v. STONE.

(Court of King's Bench, 1796. 6 Term R. 527.)

The prisoner was tried at the bar of this court on the 28th and 29th days of January in this term upon an indictment for high treason on two branches of the 25 Ed. 3, st. 5, c. 2, for compassing the death of the king, and for adhering to his enemies. The overt acts were the

[1] Where the admissibility of any particular item of evidence depends on the existence of some matter of fact, such fact must normally be established before the evidence in question is offered, though in a proper case the court may in its discretion admit the evidence upon the undertaking of counsel to supply the preliminary proof later.

The most serious objection to varying the natural order in such cases is that, in the event of a failure to establish the preliminary fact, the evidence already admitted may have a prejudicial effect, which in many cases is difficult, if not impossible, to counteract by any direction withdrawing it from the consideration of the jury.

A different situation is presented where the proof of a proposition involves several steps or a number of subordinate facts, no one of which is of any importance except in connection with the others.

Obviously a number of facts cannot be proved simultaneously. Hence in such a case no particular preliminary showing can be required, because, no matter with what fact the proof begins, the same objection would apply; it is not sufficient unless there is proof of additional facts. This was very clearly pointed out by Caton, J., in Rogers v. Brent, 10 Ill. (5 Gilman) 573, 50 Am. Dec. 422 (1849): "* * * The question is, not whether it was sufficient of itself to make out the defense, but would it aid to make out the case? Would it tend to prove the defense? Most cases have to be proved by a succession of distinct facts, neither of which, standing alone, would amount to anything, while all taken together form a connected chain, and establish the issue, and from necessity a party must be allowed to present his case in such detached parts as the nature of his evidence requires. It would be no less absurd than inconvenient, when proof is offered in its proper order, of one necessary fact, to require the party to go on and offer to prove at the same time all the other necessary facts to make out the case. Such a practice would embarrass the administration of justice, and prove detrimental to the rights of parties."

Where the connection is doubtful, or prejudice is likely, the court may, and should, make such a preliminary investigation as may be necessary.

The course which may well be followed in such cases is that suggested by Ferris, J., in State v. Hyde, 234 Mo. 200, 136 S. W. 316, Ann. Cas. 1912D, 191 (1911): "In a case like this, involving a large amount of testimony concerning other crimes, which would occupy days in presentation, it would be impracticable to give a preliminary hearing to all the details. In such case the court may properly be guided by the offer of proof and by such testimony as can be conveniently presented; enough to satisfy the court that the evidence is relevant and of sufficient weight to authorize its submission to the jury. The great danger that evidence of other crimes, even if it fails to establish them, and even if it is by an instruction withdrawn from the jury, will prejudice the jury against the defendant, and obscure their judgment upon the real issues before them, suggests the propriety of determining in advance of its introduction that such testimony is competent."

same in each count, being eleven in number; but that to which the evidence chiefly applied was the conspiring with John Hurford Stone William Jackson and others unknown to collect the intelligence within this kingdom and the kingdom of Ireland of the disposition of the king's subjects in case of an invasion of Great Britain or Ireland, and to communicate such intelligence to the persons exercising the powers of government in France, enemies of our lord the king, for their aid, assistance, direction, and instruction, in their conduct and prosecution of the war, &c.

Evidence having been given to connect the prisoner with John Hurford Stone who was during the transaction resident in France and domiciled there and Jackson, and to shew that they were engaged in a conspiracy for the above stated purpose; lord Grenville the secretary of state for the foreign department was called to prove that a letter of Jackson's containing treasonable information had been transmitted to him from abroad, but in a confidential way, which made it impossible for him to divulge by whom it was communicated.

Adair, Serjt. and Erskine objected, on behalf of the prisoner, to the reading of this letter as it had not been proved to have come to the hands or knowledge of the prisoner; and insisted that nothing could be received to affect the prisoner but his own acts.

The Attorney General answered that, as the overt act charged was a conspiracy of which proof was before the court, the act of each conspirator in the prosecution of such conspiracy was evidence against all: that it had been so determined by Buller, J., in the case of The King v. Bowes and others 30th May 1787, who were convicted for a conspiracy to carry away lady Strathmore; and that the same principle had been also settled in The King v. Harday, and The King v. Tooke, at the Old Bailey in 1794. And that where several were engaged in the same design, nothing was more common than to receive the acts of one against another, though not present; as in the cases of murder and burglary, the acts of him who actually killed the person or broke open the house were evidence against those who at a distance were employed watching to guard against any interruption.

Lord Kenyon, C. J., said he had no doubt but that there was sufficient evidence to connect Jackson and the prisoner: but that as to the evidence now offered he should have great doubts of its admissibility, if it had not been sanctioned by the respectable authority of the judges who sat upon the late trials for treason at the Old Bailey; the determination of that court however had great weight with him; and the instances in murder and burglary alluded to went a great way to remove his doubts. That scruples in a case of blood might induce a doubt, when on further consideration there would be no doubt.

Ashhurst, J., thought the evidence admissible.

Grose, J. If a number of persons meet towards one common end, the act of each is evidence against all concerned.

LAWRENCE, J., said that in Tooke's case he had alluded to the cases of lord Stafford and lord Lovatt to shew that in order to prove a conspiracy the acts of the different conspirators as connected with and in conformity with his own were admissible evidence, though acts to which the prisoner was no direct party, and that in this case evidence having been given sufficient for the jury to consider whether the prisoner was not one engaged in a conspiracy for treasonable purposes with Jackson, if they were of that opinion, Jackson's acts done in pursuance of that conspiracy were in contemplation of law the acts of the prisoner.

The evidence was received. This was on the first day of the trial.

LORD KENYON, C. J.[2] The next morning said he had thought of the point, and was satisfied it had been rightly decided by the court.

* * *

Verdict, not, guilty.[3]

THOMAS v. JENKINS.

(Court of King's Bench, 1837. 6 Adol. & El. 525.)

Replevin for taking cattle. Avowry and cognizances, averring the cattle to have been distrained damage-feasant. Pleas in bar, traversing the title, as pleaded, to the place in which, &c. Issues thereon. On the trial before Coleridge, J., at the Glamorganshire Spring assizes, 1837, the material question was as to the boundary dividing the estate which comprises the locus in quo from another estate. An old witness, who was called for the defendant, swore that he had kept cattle on the first mentioned estate, and turned off those of other people; that his father at that time was tenant of the estate; that his father and brother told him what line of boundary he was to keep, and that he had acted accordingly in keeping the boundary; that his father and brother were overseers of the hamlet of Glyncorrwg; and that the boundary of the estate was the same as that of the hamlet. He was then asked whether he had heard from old persons, since dead, what was the boundary of the hamlet. The question was objected to, as an attempt to prove the limits of a private estate by reputation. Coleridge, J., held the evidence admissible; and the witness then stated what he had heard as to the boundary of the hamlet; and other evidence was afterwards given on the same point. In summing up, the learned judge left the evidence of reputation, as to the boundary of the hamlet, to the jury, but desired them not to take it into

[2] Part of opinions omitted.

[3] And so in State v. Walker, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133 (1888); Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461 (1917), where a large number of the cases are collected.

consideration unless they were satisfied that the boundary of the estate was the same with that of the hamlet. Verdict for the defendant.

PATTESON, J.[4] The point in dispute on the trial was a very simple one, namely, whether the place in which the cattle were taken was or was not parcel of a certain estate; and that was, of course, to be determined by any evidence which could be admissible upon such a question. On this precise question, evidence of reputation was clearly not admissible; but such proof is receivable to show the boundary of a hamlet; and that being so, I do not see how it could be excluded in the present case, when it was established that the boundaries of the hamlet and of the farm were the same. Mr. Chilton, indeed, seems not to rest his objection on the ground that such evidence is at all events inadmissible, but to contend that, before it can be let in, the boundaries must be shown beyond all doubt to have been identical. That, however, would be trying the question twice over; and I think that, as soon as some evidence of the identity was given, this proof was receivable, the jury being cautioned by the learned judge not to take it into consideration unless satisfied that the boundaries were the same. If the identity of the boundaries had been proved by evidence of reputation, the case would have been different; but the witness called on this subject stated it positively, and not as matter of reputation; and, that being so, the proof of reputation as to the boundary of the hamlet was let in, and supported the defendant's case, provided the jury were satisfied of the identity upon the witness's statement.

Rule (for new trial) refused.[5]

DOE dem. JENKINS et al. v. DAVIES et al.

(Court of Queen's Bench, 1847. 10 Adol. & El. [N. S.] 314.)

Ejectment for a tract of land in Cardiganshire. At the trial before Coltman, J., there was a verdict for defendant. Williams obtained a rule nisi for a new trial.[6]

LORD DENMAN, C. J., in this vacation (February 8th,) delivered the judgment of the Court.

It was admitted that the defendants were entitled to the verdict, if one Elizabeth Stevens was legitimate; that is, if her mother was the wife of her father John Davies.

[4] Opinions of Lord Denman, C. J., and Coleridge, J., omitted.

[5] For a somewhat analogous situation see Winslow v. Bailey, 16 Me. 319 (1839).

See confused discussion of a similar problem in Commonwealth v. Robinson, 146 Mass. 571, 16 N. E. 452 (1888), with which compare State v. Hyde, 234 Mo. 200, 136 S. W. 316, Ann. Cas. 1912D, 191 (1910).

[6] Statement condensed and part of opinion omitted.

The plaintiff began, and brought forward facts to make this improbable, particularly the declarations of John Davies, who was reported to have said that he had not married her, because she was a bad woman. It appeared, however, that they lived together, and passed as man and wife. Some members of the family had treated her as his wife; others had treated her daughter Elizabeth Stevens as their relation.

Witnesses were then called for the defendants, who gave additional evidence to the same effect: and then an attorney produced a certificate of the marriage of John Davies with Eleanor Dillon, and stated that he had received it from Elizabeth Stevens when he was inquiring into the pedigree. He was then asked whether Stevens made any statement respecting her mother's marriage; and the question was objected to on various grounds.

First: That she was not yet conclusively proved to be a member of the family.[7] The answer is, that it was the duty of the Judge to decide whether it was proved to him: and he decided that it was. There are conditions precedent which are required to be fulfilled before evidence is admissible for the jury. Thus an oath, or its equivalent, and competency,[8] are conditions precedent to admitting vivâ voce evidence; and apprehension of immediate death to admitting evidence of dying declarations;[9] and search to secondary evidence of lost writings; and stamp to certain written instruments: and so is consanguinity or affinity in the declarant to declarations of deceased relatives. The Judge alone has to decide whether the condition has been fulfilled. If the proof is by witnesses, he must decide on their credibility. If counter-evidence[10] is offered, he must receive it before he

[7] See question of declarations to prove pedigree, chapter III, § 2, VIII, post, 661.

[8] Buller, J., in Rex v. Atwood, 2 Leach, C. C. 521 (1788): "The distinction between the competency and the credit of a witness has been long settled. If a question be made respecting his competency, the decision of that question is the exclusive province of the judge; but if the ground of the objection go to his credit only, his testimony must be received and left with the jury, under such directions and observations from the court as the circumstances of the case may require, to say whether they think it sufficiently credible to guide their decision of the case. An accomplice, therefore, being a competent witness, and the jury in the present case having thought him worthy of credit, the verdict of guilty, which has been found, is strictly legal, though found on the testimony of the accomplice only."

[9] The King v. John, 1 East, P. C. 357 (1790), post, 464.

[10] But see Hitchins v. Eardley, L. R. 2 P. & D. 248 (1871), in which Lord Penzance appears to have admitted similar evidence on a prima facie showing because of the practical difficulties involved in any other course: "The rule of law on the subject is perfectly plain. It is that when a witness is called to give evidence of the declarations of a person whose connection with the family is in question, the judge is to decide whether this connection is established. It is obvious the application of this rule must lead to some practical difficulties, where the person whose declarations are tendered and objected to is also the person whose legitimacy is the question in the suit, and the court must do its best to meet those difficulties in a practical way. The defendants propose to give evidence of declarations of the person whose

decides; and he has no right to ask the opinion of the jury on the fact as a condition precedent. See Bartlett v. Smith, 11 M. & W. 483. In this case the Judge thought the condition had been fulfilled; and we are of the same opinion.

It was further objected, that the question, whether Elizabeth Stevens was a member of the family, was in fact the issue for the jury, as she was not contended to be so unless she was legitimate; and, if she was decided to be legitimate, her declarations to prove her legitimacy were superfluous. The answer is, that neither the admissibility nor the effect of the evidence is altered by the accident that the fact which is for the Judge as a condition precedent is the same fact which is for the jury in the issue.

It was further objected that the evidence of the declaration of the delivery of the marriage certificate to Elizabeth Stevens by her mother ought not to have been received. But the handing down of pedigree papers is a fact which may be proved by declaration, according to the class of cases where family pedigrees have been held admissible by reason of their being handed down from past generations. But this declaration appears to us to be no more than the act done, the handing her marriage certificate from her own keeping to that of her daughter. * * * Rule discharged.[11]

legitimacy is in dispute, and it is suggested by Mr. Matthews that, in order to determine whether these declarations are admissible, the court ought to have the whole of the evidence in the suit on both sides. The effect of taking that course would be to postpone the reception of the evidence of these declarations until all the rest of the evidence in the case had been produced, and then practically to hear the whole of the evidence over again, together with those declarations. * * * This shows the inconvenience of the course suggested by the plaintiffs' counsel. It is impossible to lay down an abstract rule on the subject, for each case must be determined by its own facts. * * * It cannot be denied that a strong prima facie case has been made out, and I think it will be better that I should at once admit these declarations, for the purpose of having the whole case laid before the jury. The jury will understand that they will ultimately have to form their own opinion upon the matter, in the full light of the whole of the evidence. * * * I rule that I am sufficiently satisfied of the declarant being a member of the family for the purpose of admitting the declarations, and I reject the evidence tendered by the plaintiffs on the voir dire."

[11] Where declarations of an alleged agent are sought to be used as admissions imputable to the principal, it is for the judge and not the jury to determine the fact of agency as a preliminary question. Dickerman v. Quincy Mut. Fire Ins. Co., 67 Vt. 609, 32 Atl. 489 (1895); Jones v. Hurlburt, 39 Barb. (N. Y.) 403 (1863).

BOYLE v. WISEMAN.

(Court of Exchequer, 1855. 11 Exch. 360.)

This was an action for a libel originally published in "The Univers," a French newspaper, and afterwards in "The Catholic Standard" and "The Tablet," two English newspapers.[12] The case was tried twice, and the Court had, after the first trial, granted a new trial on the ground of the improper reception of evidence, and also on the ground that the testimony of the defendant had been improperly rejected. The cause was tried the second time before Platt, B., at the last Spring Assizes for Surrey, when it was sought to prove the publication of the libel in "The Univers" by giving secondary evidence of the contents of a letter written by the defendant to the Abbé Cognat, a Roman Catholic priest residing in Paris, and which letter was alleged to contain admissions implicating the defendant. The Abbé Cognat had refused either to give up the letter or to attend the trial and produce it. A witness called on the part of the plaintiff was requested to state the contents of the letter from memory, whereupon the defendant's counsel handed a document to the witness and asked him whether that was not the original letter, to which the witness replied that if it was it had been altered. It was then proposed, on the part of the defendant, to give evidence to show that the document tendered was the original letter; and it was submitted, that on satisfactory proof of that fact the secondary evidence must be excluded. There had not been any notice to produce or to admit this letter. The learned Judge, however, ruled that the defendant could not at that stage of the cause give such evidence, but that he might do so when his case came on. The cause proceeded, but the defendant did not tender any evidence, and a verdict was found for the plaintiff with £1000. damages.

Shee, Serjt., had obtained a rule calling on the plaintiff to show cause why the verdict should not be set aside and a new trial had, on the ground that the evidence in question had been improperly rejected and also of the damages being excessive.

PARKE, B.[13] I am of opinion that the rule must be absolute. I entertain no doubt upon the question. On a trial at Nisi Prius, it is the sole duty of the Judge to decide any question of fact which may arise in the course of the inquiry, on which the admissibility of evidence depends. Now, the rule is, that secondary evidence is not admissible unless primary evidence cannot be procured; and before it can be admitted, it must be shown that reasonable efforts have been made, and have proved unavailing, to procure the primary evidence. Such proof was given in this case, for the plaintiff gave sufficient evidence to let in parol proof of the contents of the instrument, if the

[12] See the report of this case, 10 Exch. 647.

[13] Opinions of Platt and Martin, BB., and supplemental opinion by Alderson, B., omitted.

instrument itself had not been produced. But the defendant interposed by producing a document which he tendered as the original letter. Whether such was the fact was to be decided, for the mere statement of the defendant that it was is not sufficient, neither was the statement of the plaintiff's witness, that he saw the original letter, and that the document produced was not the original. There being these conflicting statements, the Judge was bound to hear evidence on both sides, and decide whether the document tendered by the defendant was the original. If he had decided that it was not, it would have been competent for the plaintiff to give the secondary evidence he offered, and the credit due to it would be for the jury. In such a case the Judge should hear the witnesses at length, for the purpose of deciding whether the document tendered is the original; and if he is of opinion that it is, that document alone must be read to the jury. This is the law as laid down by the Judges on the prosecution of Major Campbell, 11 M. & W. 486, where they expressed the opinion, that, on a dying declaration being tendered in evidence, it was not competent to the Judge to leave it to the jury to say whether the deceased knew, when he made it, that he was at the point of death, as such matter must be decided by the Judge and not by the jury. The authority of that case has always been acknowledged, and it is now well-settled that all these preliminary questions on which the reception of evidence depends ought not to be submitted to the jury for their consideration, but must be decided by the Judge himself.

ALDERSON, B. I am of the same opinion. There is a material difference between the question whether a document, which is an undisputed original, ought to have been received in evidence, and whether secondary evidence of a particular document ought to be received, on the ground that a document tendered as the original is not in fact the original. It appears to me that it is upon the false analogy between these cases the fallacy of the argument turns. Where a deed is received in evidence, the deed is proved in the regular way by its production, and the party seeking to alter the effect of the evidence must give his proof when his turn comes, and the whole of the evidence must go to the jury. So, in such a case as occurred yesterday, where an old lady was said to have received love letters from a person against whom she brought an action for breach of promise of marriage, there was primâ facie evidence that those letters were in the handwriting of the defendant, and they were either the originals or forgeries; but, whether they were or were not was not a question of secondary evidence, and the defendant was therefore obliged to wait till his own case came on before he could prove the falsehood of her statement, by contradicting the evidence of her witnesses who deposed to the handwriting being his. The question of the genuineness of handwriting is for the jury, as a question of primary evidence. In both those cases it is primary evidence, but here the question is what evidence are the

jury to receive, and not what evidence they are to believe. It is clear that the plaintiff was seeking to give secondary evidence of a matter that existed elsewhere. Where was that document which was the primary evidence, and without the non-production of which secondary evidence was altogether inadmissible? The plaintiff's case was that it was in France. The defendant's case, that it was there in Court. Which is right? If the plaintiff's case is right, he is entitled to give the secondary evidence. If the defendant is correct, the secondary evidence is inadmissible. Who then is to determine whether that document is to be received at all? Surely not the jury, for they are only to judge upon the evidence when it is received. It is the duty of the Judge, and he must determine whether it ought to be received; and if for that purpose it is necessary that he should determine a question of fact, he must determine that question, and the party against whom the Judge decides has his remedy by applying to the Court to correct the error, if the Judge has decided wrongly. The question of fact must be submitted, first, to the Judge, and afterwards to the Court. If he receives the evidence, and the Court are of opinion that he ought not to have received it, his decision will be overruled. But there is no question for the jury as to the reception of the evidence, for their duty does not arise until after the evidence has been received.

Rule absolute.[14]

STOWE v. QUERNER.

(Court of Exchequer, 1870. L. R. 5 Exch. 155.)

BRAMWELL, B.[15] In this case the question which was argued before us yesterday arose thus: During the trial of an action on a policy of insurance it became necessary to produce the policy, and the plaintiffs gave evidence of a duly stamped policy having been executed, and of its being in the possession of the defendant. Notice to produce had also been given. Upon its being called for, however, the defendant declined to produce it, and thereupon the plaintiffs proposed to read a document which purported to be a copy, and which they had received from the defendant's broker. The defendant objected, and offered to displace the effect of the evidence of the existence of the policy which had been given by the plaintiffs, and to render the copy inadmissible by showing that no policy had ever been executed at all. The judge refused to hear this interlocutory evidence, and allowed the document to be admitted and read. We are all of opinion that he was right. If the objection on the part of the defendant had been that there was a policy, but that it was not stamped, it would perhaps have

[14] Other preliminary questions: Bartlett v. Smith, 11 M. & W. 483 (1843), objection on account of stamp; Cleave v. Jones, 7 Exch. 421 (1852), claim of privilege for a document.

[15] Statement and opinions of Martin, Pigott, and Cleasby, BB., omitted.

been well founded. But here it was objected that there was no policy executed at all; an objection which goes to the entire ground of action, and one which, if it had prevailed, might have left the jury nothing to decide. For, suppose the judge had ruled that the copy was inadmissible on the ground that there was no original ever in existence, the plaintiffs would in fact have had no case left, and the judge would himself have decided the whole of it. The difference between this case and Boyle v. Wiseman, 10 Ex. 647, 24 L. J. (Ex.) 160, is very wide. There the plaintiff had the means, if he had chosen, of giving the alleged original in evidence, but here if the copy had been excluded the plaintiffs would have been left without any means of proof whatever. Put an illustration analogous to the present. Suppose an action to be brought for libel, and a copy of a letter which is destroyed, but which contained the libel complained of, is produced and tendered in evidence. Could the defendant say, "Stop; I will show that no letter [16] was in point of fact ever written, and I call upon you, the judge, to hear evidence upon this point, and if I satisfy you that no such letter ever existed, you ought not to admit the copy?" Surely not; for that would be getting the judge to decide what is peculiarly within the province of the jury. The distinction is really this: where the objection to the reading of a copy concedes that there was primary evidence of some sort in existence, but defective in some collateral matter, as, for instance, where the objection is a pure stamp objection, the judge must, before he admits the copy, hear and determine whether the objection is well founded. But where the objection goes to show that the very substratum and foundation of the cause of action is wanting, the judge must not decide upon the matter, but receive the copy, and leave the main question to the jury.

It was further said there was no stamped policy in existence. But the real objection, as I have already observed, was that there was no policy at all, and therefore, of course, no stamped policy. The want of stamp was not the actual point relied on, and it was in a manner merged in the other objection. We are, therefore, of opinion that this rule should be discharged.

Rule (for a new trial) discharged.[17]

[16] Compare Goodier v. Lake, 1 Atkyns, Ch. 446 (1737), in which the Lord Chancellor said: "Where an original note of hand is lost, and a copy of it is offered in evidence to serve any particular purpose in a cause, you must show sufficient probability to satisfy the court that the original note was genuine, before you will be allowed to read the copy."

See the somewhat contradictory explanation in St. Croix Co. v. Seacoast Canning Co., 114 Me. 521, 96 Atl. 1059 (1916).

[17] It is for the jury to determine whether the copy admitted is in fact a true copy of the original. Rosendorf v. Baker, 8 Or. 241 (1880).

CAIRNS v. MOONEY.

(Supreme Court of Vermont, 1890. 62 Vt. 172, 19 Atl. 225.)

Action of assumpsit. Plea, the general issue. Trial by jury at the September term, 1889, Powers, J., presiding. Verdict and judgment for the plaintiff. Exceptions by the defendant. The plaintiff sued for the price of certain apples sold by her testator to the defendant. The defendant claimed that the quality of the apples was not according to the contract, and offered to so testify himself. To his testimony the plaintiff objected, because the other party to the contract was dead. Thereupon the defendant insisted, and his evidence tended to show, that the contract was not made with the testator, but with his son, acting as his agent. The court excluded the evidence.

TAFT, J. The defendant was not a competent witness, "unless the contract in issue was originally made with a person who is [was] living and competent to testify." The defendant claimed that the contract for the apples was made with Harvey Cairns, acting as agent for the testate, and who was present at the trial, and testified. Conceding that the testimony of the defendant's witness tended to establish the fact of agency, the question was one for the court. The defendant insists that he should have been permitted to testify, and the question of agency submitted to the jury; and, if they found it established, they should then consider the testimony of the defendant upon the various points upon which he gave testimony; and, if they did not find the fact of agency proved, reject the testimony. It was a question of competency or incompetency of the defendant as a witness, and that question is always for the court, and should never be submitted to the jury. 1 Greenl. Ev. (14th Ed.) § 49, and note a; 1 Tayl. Ev. § 21; Bartlett v. Smith, 11 Mees. & W. 483; Reg. v. Hill, 5 Eng. Law & Eq. 547; Cook v. Mix, 11 Conn. 432; Holcomb v. Holcomb, 28 Conn. 177; Harris v. Wilson, 7 Wend. (N. Y.) 57; Reynolds v. Lounsbury, 6 Hill. (N. Y.) 534; Dole v. Thurlow, 12 Metc. (Mass.) 157; McManagil v. Ross, 20 Pick. (Mass.) 99. In some jurisdictions it has been held that, in doubtful cases, it is not improper to refer the existence of the facts upon which the competency depends to the jury, and in some instances it is intimated that it should be done. Insurance Co. v. Reynolds, 36 Mich. 502; Johnson v. Kendall, 20 N. H. 304; Bartlett v. Hoyt, 33 N. H. 151; Hart v. Heilner, 3 Rawle (Pa.) 407; Gordon v. Bowers, 16 Pa. 226; Haynes v. Hunsicker, 26 Pa. 58.

Questions of fact affecting the admissibility of testimony often arise, and it would be very inconvenient, if not impracticable, to submit them to the decision of a jury. The testimony, as to the competency of a witness, and that of the witness as to the issues upon trial, would all go to the jury, with directions that, if they found the witness incompetent, it would be their duty to disregard his evidence upon the

main issues, which in many instances it might be impossible to do, Having heard the illegal testimony discussed by counsel, the confusion which would probably arise in separating the legal from the illegitimate testimony would no doubt lead to the rendition of erroneous verdicts, with no relief for the unfortunate party; and certainly this should not be the rule in a jurisdiction where the admission of illegal evidence is not cured by a direction from the court to disregard it. State v. Hopkins, 50 Vt. 316; State v. Meader, 54 Vt. 126; Hall v. Jones, 55 Vt. 297; Rob. Dig. p. 700, pl. 55. In Cook v. Mix, supra, the question was whether the witness had an interest in the event of the suit, and the court said it "was a question of fact, to be determined on the evidence before the court. It is claimed, in the first place, that the judge mistook the law in not submitting this question to the jury, and this claim has been gravely urged before this court. It is sufficient to observe that the claim is as unfounded as it is novel, that it has no support either in principle or authority, and is utterly incapable of being reduced to practice."

It is not by any means true that all questions of fact in a jury trial must be left to the jury. Numerous instances where the court pass upon such questions can be readily called to mind, e. g., whether a witness is an expert; or a dying declarant entertained hopes of recovery; or a writing to be used as a test in comparison of hand-writing is proved; or a witness has sufficient mental capacity to testify, or is the husband or wife of the party; or declarations are so far a part of the res gestæ as to be admissible; or a confession was induced by threats; or a document has been duly or sufficiently stamped; or sufficient search been made for a lost document to warrant the introduction of secondary evidence. Many other instances might be given. In the beginning of a jury trial, suppose a woman is offered as a witness for the plaintiff, and the defendant objects, for that she is the wife of the plaintiff. The question is purely one of fact. Will any one claim that her testimony should be given upon the main issues, and the question of whether wife or not be left to the jury, and then, if they find her to be the wife, discard her testimony, but, if not, consider it? Conceive that in a suit in favor of several plaintiffs the question should arise in respect to each one. Well might the Connecticut court characterize the claim of the defendant as unfounded as it was novel.

The court below, not being satisfied from the evidence that the contract in issue was made with an agent of the testate, properly held the defendant incompetent. Judgment affirmed.

SEMPLE v. CALLERY et al.

(Supreme Court of Pennsylvania, 1898. 184 Pa. 95, 39 Atl. 6.)

FELL, J.[18] The court, at the time a witness was called, heard testimony on the question of the good faith of an assignment by which the witness had devested himself of all interest in the controversy, and permitted him to testify. At the close of the testimony the court was requested to submit to the jury the same question on which it had passed, and to instruct them to disregard the testimony of the witness if they found that the assignment had not been made in good faith. The sixth section of the act of May 23, 1887 (P. L. 158), provides that a person incompetent to testify as a witness because of interest, may become fully competent "by a release or extinguishment, in good faith, of his interest, upon which good faith the trial judge shall pass as a preliminary question." It was not intended by this provision to make the decision of the court subject to review by the jury, and to change the long-established rule of evidence that it is the province of the court finally to decide preliminary questions of fact upon which the admissibility of testimony depends. Whether a release has been executed in good faith is a question preliminary to the question of competency, and as such it is decided as a preliminary question; but its decision is not preliminary merely to a second decision by the jury. The competency of a witness as to questions of both fact and law is to be determined by the court. * * *

Affirmed.

BRISTER v. STATE.

(Supreme Court of Alabama, 1855. 26 Ala. 107.)

The defendant Brister and several other slaves were indicted for the murder of one John Rickard. At the trial the court admitted proof of confessions made by the defendants, though the evidence tended strongly to show that they were made under the fear of violence. The court charged the jury that they should consider the confessions and act on them if they believed them to be true, and refused to charge, as requested by defendants, that they should exclude the confessions unless they were satisfied that they were made before one of the defendants was whipped. The defendants were convicted and sued out writ of error.[19]

RICE, J. We now proceed to the consideration of the important subject of confessions. We shall treat it with becoming caution, and shall confine ourselves as much as possible to the language used by what we deem the highest and best authorities on the subject.

[18] Part of opinion omitted.

[19] Statement condensed and parts of opinion omitted.

In the first place, we shall state the general rules which should govern the judge in deciding upon the competency—the admissibility of confessions.

Before any confession can be received in evidence, in a criminal case, it must be shown that it was voluntary—that is, that it was made without the appliances of hope or fear, by any other person. Whether it was so made or not, it is for the judge (before he admits it) to determine, upon consideration of the age, condition, situation and character of the prisoner, and the circumstances under which it was made. The material inquiry is, whether the confession has been obtained by the influence of hope or fear, applied by a third person to the prisoner's mind. 1 Greenl. Ev. § 219; Wyatt v. State, 25 Ala. 9; Spence v. State, 17 Ala. 197; Seaborn and Jim v. State, 20 Ala. 15. * * *

Where promises or threats have been used, yet, if it appear to the satisfaction of the judge that their influence was totally done away before the confession was made, the evidence will be received. 1 Greenl. Ev. § 221.

In the next place, we shall state the rules which should govern the parties and the jury after confessions have been admitted by the judge.

Whenever a confession is admitted by the court, the jury must take it; they cannot reject it as incompetent; they are confined to its credibility and effect.

Either party has the right to prove to the jury the same facts and circumstances which were legally proved to the court when it was called upon to decide the question of competency, and all other circumstances applicable to the confession or having any legal bearing on its credibility or effect; and if, in view of all the facts and circumstances proved, the jury entertain a reasonable doubt as to the truth of the confession, they may disregard it, in their decision of the case, as being incredible, although they cannot reject it as incompetent. Commonwealth v. Dillon, 4 Dall. 116, 1 L. Ed. 765; Commonwealth v. Knapp, 10 Pick. (Mass.) 477–496, 20 Am. Dec. 534; State v. Guild, 5 Halst. 163; 2 Phil. Ev. 235–240, notes 205 and 207. If they entertain no such reasonable doubt, they ought not to disregard it, although they may believe it was obtained by the appliances of hope or fear to the mind of the prisoner.

The rules laid down recognize the sphere of the judge and the sphere of the jury as distinct; and, whilst they prevent the jury from invading the province of the judge, they alike prevent him from invading their province. These rules, also, preserve the great safeguard thrown around every person charged with crime—the right to claim at the hands of a jury the benefit of every reasonable doubt arising from the evidence.

A majority of the court are of opinion, that the confessions in this case, under the previous decisions of this court, were improperly received. * * *

In this connection, it is proper to say, that it follows from the rules above stated, that there was no error in the second charge given by the court, nor in refusing the second charge asked by the prisoners. If this second charge asked had been given, the jury would have been thereby forced to "exclude their confessions from their consideration entirely," although they were convinced beyond a reasonable doubt that the confessions were true—merely because they could not determine beyond a reasonable doubt that the confessions were made before the slave Bill was whipped. * * *

Judgment reversed (on other grounds).[20]

SLOTOFSKI v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, 1913. 215 Mass. 318, 102 N. E. 417.)

Action of tort by the administratrix of Joseph Slotofski for the death of said deceased alleged to have been caused by the negligence of the defendant. Verdict for defendant and plaintiff alleged exceptions.[21]

DE COURCY, J. The chief injuries received by the deceased were concussion and contusions of the brain, from which he died within 48 hours after the accident. He was insensible immediately after his fall and until after treatment by a physician in the drug store to which he was removed, was semiconscious the next day, and finally lapsed once more into insensibility. He was constantly complaining of pain in his head. A witness for the plaintiff, who understood the language of the deceased, testified that he thought the man's conversation in the drug store after he regained consciousness was incoherent.

In the absence of the jury a son and daughter of the deceased testified that certain declarations were made by him, which were in substance that the conductor started the car while he was alighting. The judge excluded this testimony and ruled that under R. L. c. 175, §

[20] Accord: Commonwealth v. Knapp, 10 Pick. (Mass.) 477, 20 Am. Dec. 534 (1830); Burton v. State, 107 Ala. 108, 18 South. 284 (1894); State v. Brennan, 164 Mo. 487, 65 S. W. 325 (1901); Ellis v. State, 65 Miss. 44, 3 South. 188, 7 Am. St. Rep. 634 (1887); State v. Monich, 74 N. J. Law, 522, 64 Atl. 1016 (1906) [dying declarations].

Contra: Wilson v. United States, 162 U. S. 613, 16 Sup. Ct. 895, 40 L. Ed. 1090 (1896), semble; Commonwealth v. Preece, 140 Mass. 276, 5 N. E. 494 (1885); State v. Phillips, 118 Iowa, 660, 92 N. W. 876 (1902), where a large number of cases are collected.

Holmes, J., in Com. v. Brewer, 164 Mass. 577, 42 N. E. 92 (1895): "When the admissibility of evidence depends upon a collateral fact, the regular course is for the judge to pass upon the fact in the first instance, and then, if he admits the evidence, to instruct the jury to exclude it if they should be of a different opinion on the preliminary matter. Commonwealth v. Preece, 140 Mass. 276, 277, 5 N. E. 494 (1885); Commonwealth v. Robinson, 146 Mass. 571, 580 et seq., 16 N. E. 452 (1888)."

[21] Statement condensed and part of opinion omitted.

66,[22] the court must find that the statements were made by the deceased before he could pass upon the question whether the statements, if made, were made in good faith; and he declined to find that they were made at all, on the ground that he did not believe that a man whose brain had been the recipient of such a concussion could or did make such statements. The plaintiff excepted to the ruling and to this exclusion of evidence.

The competency of witnesses and the admissibility of evidence that is offered is for the judge to determine. When, in order to pass upon the admissibility in law of a given piece of evidence, it becomes necessary to determine a preliminary question of fact, this also the judge necessarily must determine before he admits the evidence to the jury. During this proceeding he may direct that the jury be retired out of hearing, as was done in this case, and may hear evidence on both sides to ascertain the incidental fact. So far as his decision is of a question of fact merely, it is ordinarily conclusive unless it appears that the evidence was not sufficient to warrant the finding on which the court proceeded. Commonwealth v. Robinson, 146 Mass. 571, 16 N. E. 452; Dexter v. Thayer, 189 Mass. 114, 75 N. E. 223; 4 Wigmore on Evidence, § 2550; 8 Ann. Cas. 539 note.

The practice in this commonwealth on certain issues in criminal cases such as confessions and dying declarations is to allow the accused to reargue to the jury the preliminary question of fact where the evidence is let in against his objection.[23] Commonwealth v. Reagan, 175 Mass. 335, 56 N. E. 577, 78 Am. St. Rep. 496; Commonwealth v. Tucker, 189 Mass. 457, 76 N. E. 127, 7 L. R. A. (N. S.) 1056. But even in these exceptional cases, if the evidence is excluded that is an end of the matter unless some question of law is reserved. As was said by Holmes, J., in Commonwealth v. Bishop, 165 Mass. 148, 42 N. E. 560, "the whole purpose of the preliminary action of the judge would be lost if in all cases the evidence had to be laid before the jury so as to give them the last word."

Under the statute in question, it is a condition precedent to the admissibility of the declarations of a deceased person that the presiding judge shall determine, as a preliminary finding, that the declaration was made in good faith before the commencement of the action and upon the personal knowledge of the declarant. R. L. c. 175, § 66; Dickinson v. Boston, 188 Mass. 597, 75 N. E. 68, 1 L. R. A. (N. S.) 664; Glidden v. U. S. Fidelity & Guaranty Co., 198 Mass. 109, 84 N. E. 143; Carroll v. Boston Elevated Railway, 210 Mass. 500, 96 N. E. 1040. Where the form of the statement made by the deceased leaves

[22] "A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant."

[23] See Commonwealth v. Preece, 140 Mass. 276, 5 N. E. 494 (1885).

it doubtful whether it was a statement of fact or of opinion, it is for the court to decide in which sense it was made. Stone v. Commonwealth, 181 Mass. 438, 63 N. E. 1074; George v. George, 186 Mass. 75, 71 N. E. 85; Gray v. Kelley, 190 Mass. 184, 76 N. E. 724.

Where, as in the case at bar, the judge cannot find the existence of the alleged declaration, it is difficult to conceive how he can find good faith and the other requisites plainly required by the statute. And we cannot say that he was not justified by the evidence in coming to the conclusion that the deceased was in such a mental state, in consequence of his injuries, as to be unable to make the alleged statements. The plaintiff's exceptions relating to the preliminary inquiry must be overruled. * * *

Exceptions overruled.

CHAPTER II

WITNESSES

SECTION 1.—COMPETENCY

I. Intelligence and Religious Belief

OMICHUND v. BARKER.

(Court of Chancery, 1744. Willes, 538.)

Several persons resident in the East Indies and possessing the Gentoo religion,[1] having been examined on oath administered according to the ceremonies of their religion under a commission sent there from the Court of Chancery, it became a question whether those depositions could be read in evidence here; and the Lord Chancellor, conceiving it to be a question of considerable importance, desired the assistance of Lee, Lord Chief Justice B. R., Willes, Lord Chief Justice C. B., and the Lord Chief Baron Parker, who after hearing the case argued were unanimously of opinion that the depositions ought to be read.

The case is shortly reported in 1 Wils. 84, and more fully in 1 Atk. 21. The following opinion was delivered by

Willes, Lord Chief Justice C. B.[2] I could satisfy myself by merely saying that as to the present question I am of the same opinion as the Lord Chief Baron; but as this is in a great measure a new case, as it is a question of great importance, and as so much has been said by the counsel on both sides, I believe it will be expected that I should give my reasons for the opinion which I am going to give, though in the course of my argument I must necessarily touch upon many things that have been already better expressed by the Lord Chief Baron.

Though it be necessary only to give my opinion whether the depositions taken in the present case can be read or not, yet it may be proper in order to come at this particular question, in the first place to consider the general question, whether an infidel, I mean one who is not a Christian, for in that case Lord Coke certainly meant it, can be admitted as a witness in any case whatsoever. If I thought with my Lord Coke that he could not, I must necessarily be of opinion that the depositions in the present case could not be read as evidence. On the

[1] It appeared from the certificate of the Commissioner to the satisfaction of the court that according to this religion the witnesses believed in and worshiped a god who would reward or punish them according to their deserts.

[2] Part of opinion omitted.

other hand, if I thought that infidels in all cases and under all circumstances ought to be admitted as witnesses, the consequence would be as strong the other way, that these depositions ought to be read. But if I should be of opinion (and I shall certainly go no further) that some infidels in some cases and under some circumstances may be admitted as witnesses, it will then remain to be considered, whether these infidels, who are examined in the cause under the circumstances in which they appear in this court, are legal witnesses or not. * * *

I shall now proceed to explain the nature of an oath, which will I think contribute very much towards the determination of the general as well as the present question. If an oath were merely a Christian institution, as baptism, the sacrament, and the like, I should be forced to admit that none but a Christian could take an oath. But oaths were instituted long before Christianity was made use of to the same purposes as now, were always held in the highest veneration, and are almost as old as the creation. Juramentum (according to Lord Coke himself) nihil aliud est quam deum in testem vocare; and therefore nothing but the belief of a God and that he will reward and punish us according to our deserts is necessary to qualify a man to take the oath. We read of them therefore in the most early times. If we look into the sacred history, we have an account in Genesis, c. 26, v. 28 and 31; and again Genesis, c. 31, v. 53, that the contracts betwixt Isaac and Abimelech, and between Jacob and Laban, were confirmed by mutual oaths; and yet the contracting parties were of very different religions, and swore in a different form. It would be endless to cite the places in the Old Testament where mention is made of taking an oath upon solemn occasions, and how great a reverence was always paid to it. I shall take only notice of three, one in Numb. 30, 2. "He that sweareth an oath bindeth his soul with a bond." Another in Deut. c. 6, v. 13. "Thou shalt fear the Lord thy God, and swear by his name." And another, Psalms 15, v. 5, where a righteous man is described in this manner, "One who sweareth unto his neighbour and disappointeth him not, though it were to his own hindrance." * * *

It is very plain from what I have said that the substance of an oath has nothing to do with Christianity, only that by the Christian religion we are put still under great obligations not to be guilty of perjury; the forms indeed of an oath have been since varied, and have been always different in all countries according to the different laws, religion and constitution of those countries. But still the substance is the same, which is that God in all of them is called upon as a witness to the truth of what we say. Grotius in the same chapter, sect. 10, says, forma jurisjurandi verbis differt, re convenit. There are several very different forms of oaths mentioned in Selden, vol. 2, p. 1470; but whatever the forms are he says, that is meant only to call God to witness to the truth of what is sworn; "fit Deus testis," "fit Deus vindex," or "ita te Deus adjuvet," are expressions promiscuously made use of in Christian countries; and in ours that oath hath been frequently

varied; as "ita te Deus adjuvet tactis sacrosanctis Dei Evangeliis," "ita, etc., et sacrosancta Dei Evangelia," "ita, etc., et omnes sancti." And now we keep only these words in the oath, "So help you God," and which indeed are the only material words, and which any heathen who believes a God may take as well as a Christian. The kissing the book here, and the touching the Bramin's hand and foot at Calcutta, and many other different forms which are made use of in different countries, are no part of the oath, but are only ceremonies invented to add the greater solemnity to the taking of it, and to express the assent of the party to the oath when he does not repeat the oath itself; but the swearing in all of them, be the external form what it will, is calling God Almighty to be a witness, as is clear from these words of our Savior in Matthew, chap. 23, v. 21 and 22: "Whoso sweareth by the Temple sweareth by it and by him that dwelleth therein; and he that sweareth by Heaven sweareth by the Throne of God and by him that sitteth thereon." As to what was said by the counsel that Christianity is part of the law of England, (which is certainly true as it is here established by laws) and that therefore to admit the oath of a heathen is contrary to the law of England; it appears from what I have already laid down that there is nothing in that argument, since an oath is no more a part of Christianity than of every other religion in the world. * * *

Having now I think sufficiently shewn that Lord Coke's rule is without foundation either in scripture, reason, or law, that I may not be understood in too general a sense, I shall repeat it over again, that I only give my opinion that such infidels who believe a God and that he will punish them if they swear falsely, in some cases and under some circumstances, may and ought to be admitted as witnesses in this though a Christian country. And on the other hand I am clearly of opinion that such infidels (if any such there be) who either do not believe a God, or, if they do, do not think that he will either reward or punish them in this world[8] or in the next, cannot be witnesses in any case nor under any circumstances, for this plain reason, because an oath cannot possibly be any tie or obligation upon them. I therefore entirely disagree with what is reported to have been said by Lord Chief Justice Ley in 2 Rol. Rep. 346, Tr. 21 Jam. I, B. R., that in the trials of matters arising beyond sea we ought to allow such proofs as they beyond the sea would allow. This would be leaving this point on so very loose and uncertain a foot, that I cannot come into it; for if this rule were to hold, considering in what a strange manner justice is administered in some foreign parts, God knows what evidence must be admitted. * * * Before I conclude this head I must beg leave again to take notice of what is said by Lord Hale,

[8] See Atwood v. Welton, 7 Conn. 66 (1828), for an elaborate opinion that a witness is incompetent who does not believe that there is any punishment after this life.

that it must be left to the jury what credit must be given to these infidel witnesses. For I do not think that the same credit ought to be given either by a court or a jury to an infidel witness as to a Christian, who is under much stronger obligations to swear nothing but the truth. The distinction between the competency and credit of a witness is a known distinction, and many witnesses are admitted as competent to whose credit objections may be afterwards made. The rule of evidence is that the best evidence must be given that the nature of the thing will admit. The best evidence which can be expected or required according to the nature of the case must be received, but if better evidence be offered on the other side, the other evidence, though admitted, may happen to be of no weight at all. To explain what I mean: Suppose an examined copy of a record (as it certainly may) be given in evidence; if the other side afterwards produce the record itself, and it appears to be different from the copy, the authority of the copy is at an end. To come nearer to the present case: Supposing an infidel who believes a God and that he will reward and punish him in this world, but does not believe a future state, be examined on his oath (as I think he may), and on the other side to contradict him a Christian is examined, who believes a future state and that he shall be punished in the next world as well as in this, if he does not swear the truth, I think that the same credit ought not to be given to an infidel as to a Christian, because he is plainly not under so strong an obligation. * * *

The only objection that remains against admitting this evidence is that these witnesses will not be liable to be indicted for perjury; because they are not sworn supra sacrosancta Dei Evangelia, which words, as was insisted, are necessary in every such indictment, and therefore they are not under the same obligations to swear truly as Christian witnesses are. But this objection has been in a great measure already answered by the Chief Baron, and it may receive two plain answers; first, that these words "supra sacrosancta Dei Evangelia," or "tactis sacrosanctis Dei Evangeliis," are not necessary to be in an indictment for perjury. They have been omitted in many indictments against Jews, of which several precedents have been laid before us; and they are not in the precedents of such indictments which I find in an ancient and very good book, entitled West's Simboleography; but it is only said there "supra sacramentum suum dixit et deposuit" or "affirmavit et deposuit." Besides this argument, if it prove anything, proves a great deal too much; for if there were anything in it, many depositions even of Christians have been admitted, and many more must be admitted or else there will be a manifest failure of justice, where the witnesses are certainly not liable to be indicted; for when the depositions of witnesses are taken in another country, it frequently happens that they never come over hither, or if they cannot be indicted for perjury because the fact was committed in another

country. Those therefore who are plainly not liable to be indicted for perjury have often been, and for the sake of justice must be, admitted as witnesses; and so there is an end of this objection.

From what I have said it is plain that my opinion is that these depositions ought to be read in evidence.[4]

THE KING v. WHITE.

(Commissioners of Oyer and Terminer, 1786. Leach, Cr. Cas. 430.)

On the trial of an indictment at the Old Bailey for horse-stealing, in October Session, 1786, Thomas Atkins was called as a witness to support the prosecution.

Being examined on the voir dire,[5] he said, that he had heard there was a God, and believed that those persons who tell lies would come to the gallows, but acknowledged that he had never learned the Catechism, was altogether ignorant of the obligations of an oath, a future state of reward and punishment, the existence of another world, or what became of wicked people after death.

THE COURT rejected him, as being incompetent to be sworn; for that an oath is a religious asseveration, by which a person renounces the mercy, and imprecates the vengeance, of heaven, if he do not speak the truth; and therefore a person who has no idea of the sanction which this appeal to heaven creates, ought not to be sworn as a witness in any Court of Justice.

REX v. TRAVERS.

(Court of King's Bench, 1726. 1 Strange, 699.)

The defendant was indicted the last summer assizes, for a rape upon the body of a child, then little more than six years old. And because the Lord Chief Baron Gilbert refused to admit the child as an evidence against him, he was acquitted.

But at the same assizes an indictment was found against him for an assault with an intent to ravish the said child. And this indictment

[4] For the other opinions delivered in this case, see 1 Atk. Ch. Rep. 21.

[5] The practice of examining a witness on his voir dire as to his religious belief was approved in Madden v. Catanach, 7 H. & N. 360 (1861). For the contrary view, see Com. v. Smith, 2 Gray (Mass.) 526, 61 Am. Dec. 478 (1854). Lack of religious belief may also be shown by prior declarations of the witness. Thurston v. Whitney, 2 Cush. (Mass.) 104 (1852).

coming now to be tried before Raymond, C. J., the same objection was now taken by Comyns and Darnall, Serjeants, viz. that the girl being now but seven years of age, could not be a witness: they insisted that it had formerly been held, that none under twelve years of age could be admitted to be a witness, and said that a child of six or seven years of age, in point of reason and understanding, ought to be considered as a lunatic or madman.

On the other side it was said, that in capital cases, which concerned life, this objection might be allowed; but in cases of misdemeanor only, as this was, such a witness might be admitted: they insisted, that the objection went only to the credit of the witness; and Hale's P. C. says, that the examination of one of the age of nine years has been admitted: and a case at the Old Bailey 1698, was cited, where upon such an indictment as this, Ward, Chief Baron, admitted one to be a witness, who was under the age of ten years, after the child had been examined about the nature of an oath, and had given a reasonable account of it.

But RAYMOND, C. J., held, that there was no difference betwixt offences capital and lesser offences, in this respect. And that a person who could not be a witness in the one case, could not in the other. The reason why the law prohibits the evidence of a child so young is, because the child cannot be presumed to distinguish betwixt right and wrong: no person has ever been admitted as a witness under the age of nine years, and very seldom under ten. At the Old Bailey in 1704 this point was thoroughly debated in the case of one Steward, who was indicted upon two indictments for rapes upon children. The first was a child of ten years and ten months, and yet that child was not admitted as a witness, before other evidence was given of strong circumstances, as to the guilt of the defendant, and before the child had given a good account of the nature of an oath. The second indictment against Steward was attempted to be maintained by the evidence of a child of between six and seven years of age: but it was unanimously agreed, that a child so young could not be admitted to be an evidence, and the child's testimony was rejected, without inquiring into any circumstances to give it credit. And it was merely upon the authority of Hale's P. C. where it is said, that a child of ten years of age may be a witness, that the other child of that age was admitted to be a witness in the first indictment. And in the present case, the child was refused to be admitted a witness. And there not being evidence sufficient without her, the defendant was acquitted.[6]

[6] In 1789, the following rule was announced in Brazier's Case, Leach, Crown Cases, 237: "No testimony whatever can be legally received except upon oath; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath, for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the dan-

HRONECK v. PEOPLE.

(Supreme Court of Illinois, 1890. 134 Ill. 139, 24 N. E. 861, 8 L. R. A. 837, 23 Am. St. Rep. 652.)

BAKER, J.[1] The plaintiff in error, John Hroneck, was indicted with Frank Chapek, Frank Chleboun, and Rudolph Sevic for violation of an act of the legislature of this state entitled "An act to regulate the manufacture, transportation, use, and sale of explosives, and to punish an improper use of the same," approved June 16, 1887, and in force July 1, 1887. Rev. St. 1889, c. 38, §§ 54h–54n. The first count charged the defendants with unlawfully making dynamite, with the unlawful intention of destroying the lives of certain persons therein named; and in the five remaining counts the defendants were charged successively in such several counts with manufacturing, compounding, buying, selling, and procuring dynamite, with the same unlawful purpose and intent. The defendant Hroneck was alone put upon trial, and that trial resulted in a verdict of guilty, and fixing his punishment at 12 years' imprisonment in the penitentiary. Motions for a new trial and in arrest of judgment were severally overruled, and the said defendant was sentenced on the verdict. Numerous grounds are urged for reversal, which we shall consider, substantially, in the order they are made. * * *

Objection is made to the competency of Frank Chleboun, a witness for the people, who was permitted to testify over the objection of the defendant. He was examined upon his voir dire, and avowed his belief in the existence of God and "a hereafter;" that he believed, if he swore falsely, he would be punished under the criminal laws of the state; that he had never thought seriously of whether God would punish him either in this world or the next, and had never considered the question whether he would be punished for false swearing in any other way than by that inflicted by the law. He had, it seems, no religious belief or conviction of his accountability to the Supreme Being, either in this world or in any after life. The test of the competency of a witness in respect to religious belief, as generally held, is, does the witness believe in God, and that he will punish him if he swears falsely? It is stated by Rapalje in his Law of Witnesses (section 11) that "the great weight of authority in this country now is that it is immaterial whether the witness believes God's vengeance will overtake him before or after death."

This doctrine was approved in Railroad Co. v. Rockafellow, 17 Ill.

ger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent to take an oath, their testimony cannot be received. They (the judges) determined, therefore, that the information of the infant, which had been given in evidence in the present case, ought not to have been received."

[1] Parts of opinion omitted.

541, where, after a consideration of the authorities, it was held that all persons are competent to be sworn as witnesses who believe there is a God, and that he will punish them, either in this world or the next, if they swear falsely, and that a want of such belief rendered them incompetent to take an oath as witnesses. This case, seemingly, overruled the doctrine of the earlier case of Noble v. People, Breese, 54. Without pausing here to determine whether the court erred in subjecting the witness to an examination touching his religious belief, (Rap. Wit. § 12, and cases cited,) it may be said that the better practice, and that which now prevails, forbids the examination of the witness in respect thereof on his voir dire. If there was error in this regard, it was committed at the instance of the defendant, and in his interest; and he cannot complain.

Returning to the question of the competency of the witness, the rule seems to be as above stated, unless changed by constitutional provision or legislative enactment. The tendency of modern times by the courts and in legislation is towards liberalizing the rule, and in many jurisdictions incompetency for the want of religious belief has been abolished. See Rap. Wit. § 13, and Whart. Ev. § 395. Has the rule announced by this court in Railroad Co. v. Rockafellow been changed in this state? By section 3 of article 2 of the constitution of 1870, it would seem that a radical change was effected in respect to the matter under consideration. This section guaranties non-interference of the state with the religious faith of its citizens. In Chase v. Cheney, 58 Ill. 509, 11 Am. Rep. 95, it was said: "The only exception to uncontrolled liberty is that acts of licentiousness shall not be excused, and practices inconsistent with the peace and safety of the state shall not be justified." The section provides: "No person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the state."

No religious belief is required to qualify a citizen to take an oath, and no citizen can be excused from taking an oath or affirmation because of his religious belief. The liberty of conscience secured by the constitution is not to be construed as dispensing with oaths or affirmations in cases where the same are required by law. No man, because of his religious belief, is to be excused from taking the prescribed oath of office before entering upon the discharge of the public duty; nor can he be permitted to testify because of such religious belief or opinion except upon taking the oath, or making the affirmation, required by law. Now, as before the adoption of this provision, oaths are to be taken, and affirmations made, whenever required by law; but the right to take such oath or make such affirmation, if such right be a civil right, privilege, or capacity, cannot be denied to any citizen. It

is said that one who holds proscribed religious opinions is incompetent —that is, has not the legal capacity—to testify. The incapacity, if it exists, grows out of, and is based upon, his failure to hold certain religious beliefs and opinions in accord with the prevailing religious opinions of the people; and the contention is that he should not, by reason of such incapacity, be permitted to testify, however great and important the interest at stake to himself, his family, his neighbor, or the state.

It is clear from the authorities that the rule contended for does not apply when the witness is testifying in his own behalf; but if the life, liberty, reputation, or property of his family or neighbor be involved, or his testimony be necessary to the protection of society, he is, under such rule, to be excluded from the privilege of testifying in courts of justice because of such incapacity. If it exists at all, the incapacity is created by law, and it is therefore a civil incapacity. The constitution provides that no person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions. In Bouvier's Law Dictionary, capacity is defined to be "ability, power, qualification, or competency of persons, natural or artificial, for the performance of civil acts depending on their state or condition as defined or fixed by law." It is also defined as follows: "Power; competency; qualification; ability, power, or qualification to do certain acts." 2 Amer. & Eng. Cyclop. Law, 722. The obvious meaning of the provision in the constitution is that whatever civil rights, privileges, or capacities belong to or are enjoyed by citizens generally, shall not be taken from or denied to any person on account of his religious opinions.

As said by the supreme court of Kentucky in construing a similar provision of the constitution of that state in Bush v. Com., 80 Ky. 244: "It is a declaration of an absolute equality, which is violated when one class of citizens is held to have the civil capacity to testify in a court of justice because they entertain a certain opinion in regard to religion, while another class is denied to possess that capacity because they do not conform to the prescribed belief." It is manifest that, if the legislature may prescribe the test of belief in rewards and punishments, they may impose any other test or qualification that, in the judgment of those entertaining the dominant belief, may be necessary to afford the requisite sanction. In Perry's Case, 3 Grat. (Va.) 632, a like conclusion was reached in construing a constitutional provision that "all men shall be free to profess, and by argument maintain, their opinions in matters of religion; and the same shall in no wise affect, diminish, or enlarge their civil capacities."

We are of the opinion that the effect of this constitutional provision is to abrogate the rule which obtained in this state prior to the constitution of 1870, and that there is no longer any test or qualification in respect to religious opinion or belief, or want of the same, which af-

fects the competency of citizens to testify as witnesses in courts of justice. It follows that there was no error in permitting the witness to testify. * * *

Judgment affirmed.[8]

REX v. WILLIAMS.

(Court of King's Bench at Nisi Prius, 1836. 7 Car. & P. 320.)

The prisoner was indicted for the murder of William Williams, her husband.

On the part of the prosecution, Priscilla Williams, a daughter of the deceased and of the prisoner, aged eight years, was called as a witness; and on her examination by the learned Judge, it appeared that before the death of the deceased, which took place about sixteen weeks before the trial, the death being on the 3rd of April, and the trial on the 23rd of July, the witness never heard of God, or of a future state of rewards and punishments; and that she never prayed, nor knew the nature of an oath; but that since the death of the deceased she had been visited twice by a reverend clergyman, who had given her some instruction as to the nature and obligation of an oath. She said she should go to hell if she told a lie, and that hell was under the kitchen grate; but she had still no intelligence as to religion or a future state.

John Evans, for the prisoner. I submit that this witness ought not to be examined; for if it were sufficient that a witness should understand the nature of an oath merely from information recently communicated, a clergyman might always be called to instruct a witness as to the nature of an oath when the witness came into the box to be examined on the trial.

Chilton, for the prosecution. It is every day's practice to put off a trial in order that a witness may be instructed as to the nature of an oath; and this was held in the case of Rex v. Wade, R. & M. C. C. 86.

PATTESON, J. I must be satisfied that this child feels the binding obligation of an oath from the general course of her religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions, confined to the nature of an oath, recently communicated to her for the purposes of this trial; and as it appears that, previous to the happening of the circumstances to which this witness comes to speak, she had had no religious education whatever, and had

[8] In most of the states this disqualification has been expressly removed by statute. For the present state of the law in the various jurisdictions, see note to State v. Washington, 42 L. R. A. 553 (1897).

never heard of a future state, and now has no real understanding on the subject, I think that I must reject her testimony.

The child was not examined.

Verdict—Not guilty.[9]

WHEELER v. UNITED STATES.

(Supreme Court of United States, 1895. 159 U. S. 523, 16 S. Ct. 93, 40 L. Ed. 244.)

Mr. Justice BREWER [10] delivered the opinion of the court.

On January 2, 1895, George L. Wheeler was by the Circuit Court of the United States for the Eastern District of Texas adjudged guilty of the crime of murder, and sentenced to be hanged; whereupon he sued out this writ of error. * * *

The remaining objection is to the action of the court in permitting the son of the deceased to testify. The homicide took place on June 12, 1894, and this boy was five years old on the 5th of July following. The case was tried on December 21, at which time he was nearly five and a half years of age. The boy, in reply to questions put to him on his voir dire, said, among other things, that he knew the difference between the truth and a lie; that if he told a lie, the bad man would get him, and that he was going to tell the truth. When further ask-

[9] Dent, J., in State v. Michael, 37 W. Va. 565, 16 S. E. 803, 19 L. R. A. 605 (1893):

"The judge appears to have purposely avoided any reference to a future state, or of God, or any other question that would make known the religious sentiment or feeling of the child, if she had any. And on the witness stand, in answer to the question if her mother had ever taught her anything about God or Christ, she replies, 'No,' and says, further, that she knows nothing about God, except that he makes babies, and throws them down to the doctors—a falsehood that had evidently been taught to her, as her only light on the existence of her Creator.

"Now in these, as in all her answers, she simply gives vent to her childish prattle, and such things as have been told her to say. From none of her answers can her religious or moral accountability for falsehood be gathered. She knows nothing about God, nothing about Christ, has had no religious training or instruction, is only five years of age, has never been to school, can not read, does not know the letters of the alphabet, and seems to have been greatly neglected by her parents, who are from the humbler walks of life. And the prosecution, by failing to ask her questions concerning the distinguishing element of the crime charged, admit her incompetency to testify concerning the same.

"They certainly recognized her incapacity to answer such question, and for the same reason she was not a competent subject for a rigid cross-examination.

"Unless we throw open the doors to any child, however young, who can talk and answer questions of simple form, and leading, and assume that every child, from birth, knows the sanctity of an oath, we must draw the line of incompetency, somewhere, and that line, as indicated by the wisdom of many decisions founded upon reason and justice, is that, where a child is of such tender years and feeble intelligence as to have no conception of the religious or moral significance of an oath, it is not competent to testify."

[10] Part of opinion omitted.

ed what they would do with him in court if he told a lie, he replied that they would put him in jail. He also said that his mother had told him that morning to "tell no lie," and, in response to a question as to what the clerk said to him when he held up his hand, he answered, "Don't you tell no story." Other questions were asked as to his residence, his relationship to the deceased, and as to whether he had ever been to school, to which latter inquiry he responded in the negative. As the testimony is not all preserved in the record, we have before us no inquiry as to the sufficiency of the testimony to uphold the verdict, and are limited to the question of the competency of this witness.

That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review, unless from that which is preserved it is clear that it was erroneous.

These rules have been settled by many decisions, and there seems to be no dissent among the recent authorities. In Brasier's Case, 1 Leach, Crown Cas. 199, it is stated that the question was submitted to the twelve judges, and that they were unanimously of the opinion "that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath; for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence, but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court." See, also, 1 Greenl. Ev. § 367; 1 Whart. Ev. §§ 398–400; 1 Best, Ev. §§ 155, 156; State v. Juneau, 88 Wis. 180, 59 N. W. 580, 24 L. R. A. 857, 43 Am. St. Rep. 877; Ridenhour v. Railway Co., 102 Mo. 270, 13 S. W. 889, and 14 S. W. 760; McGuff v. State, 88 Ala. 147, 7 South. 35, 16 Am. St. Rep. 25; State v. Levy, 23 Minn. 104, 23 Am. Rep. 678; Davidson v. State, 39 Tex. 129; Com. v. Mullins, 2 Allen (Mass.) 295; Peterson v. State, 47 Ga. 524; State v. Edwards, 79 N. C. 648; State v. Jackson, 9 Or. 457; Blackwell v. State, 11 Ind. 196.

These principles and authorities are decisive in this case. So far as can be judged from the not very extended examination which is found in the record, the boy was intelligent, understood the difference be-

tween truth and falsehood, and the consequences of telling the latter, and also what was required by the oath which he had taken. At any rate, the contrary does not appear. Of course, care must be taken by the trial judge, especially where, as in this case, the question is one of life or death. On the other hand, to exclude from the witness stand one who shows himself capable of understanding the difference between truth and falsehood, and who does not appear to have been simply taught to tell a story, would sometimes result in staying the hand of justice.

We think that, under the circumstances of this case, the disclosures on the voir dire were sufficient to authorize the decision that the witness was competent, and therefore there was no error in admitting his testimony. These being the only questions in the record, the judgment must be affirmed.

Judgment affirmed.[11]

HARTFORD v. PALMER.

(Supreme Court of New York, 1819. 16 Johns. 143.)

In error, on certiorari to a Justice's Court.

In this case a verdict and judgment were rendered for the defendant below, on which the plaintiff below brought a certiorari; and the only question arising on the return was, whether the justice ought to have refused to swear a witness, who was, when offered to testify, in a state of intoxication.

PER CURIAM. We are of opinion, that the justice decided correctly in refusing to swear the witness. Peake lays down this general proposition, which cannot fail to command the assent of all mankind: "That all persons who are examined as witnesses, must be fully possessed of their understanding, that is, such an understanding as enables them to retain in memory the events of which they have been witnesses, and gives them a knowledge of right and wrong; that, therefore, idiots and lunatics, while under the influence of their malady, not possessing this share of understanding, are excluded." This principle, necessarily, excludes persons from testifying, who are besotted with intoxication, at the time they are offered as witnesses; for it is a temporary

[11] See State v. Washington, 49 La. Ann. 1602, 22 South. 841, 42 L. R. A. 553 (1897), discriminating between intelligence and religious belief in the case of a young child.

Under most of the statutes it is sufficient if a child has the necessary intelligence and appreciates the moral duty to tell the truth. He need not fully understand the nature of an oath, or have any particular religious belief. Clark v. Finnegan, 127 Iowa, 644, 103 N. W. 970 (1905); Com. v. Furman, 211 Pa. 549, 60 Atl. 1089, 107 Am. St. Rep. 594 (1905); State v. Reddington, 7 S. D. 368, 64 N. W. 170 (1895).

A child, who did not understand the nature of an oath or the consequences of falsehood, was held incompetent in State v. Greenberg, 87 N. J. Law, 120, 93 Atl. 684 (1915).

derangement of the mind; and it is impossible for such men to have such a memory of events, of which they may have had a knowledge, as to be able to present them, fairly and faithfully, to those who are to decide upon contested facts. A present and existing intoxication, to a considerable degree, utterly disqualifies the person so affected, to narrate facts and events in a way at all to be relied on. It would, we think, be profaning the sanctity of an oath, to tender it to a man who had no present sense of the obligations it imposed. Indeed, it would be a scandal to the administration of justice, to allow, for a moment, the rights of individuals to be jeopardized by the testimony of any man laboring under the beastly sin of drunkenness. The return does not state the degree of intoxication which the justice considered sufficient to exclude the witness; but we are to presume, that it was evident and palpable; and every court must necessarily have the power to decide, from their own view of the situation of the witness offered, whether he be intoxicated to such a degree, as that he ought not to be heard; nor can this lead to any improper consequences; for if the witness was not so intoxicated, the justice would be responsible in an action for a false return. We cannot withhold our approbation of the firmness which the magistrate has evinced on this occasion, in refusing to administer an oath to a witness thus circumstanced.

Judgment affirmed.

REG. v. HILL.

(Court of Criminal Appeals, 1851. 5 Cox, Cr. Cas. 259.)

This prisoner was tried before me, assisted by my Brother Cresswell, at the last February Sittings of the Central Criminal Court, for the manslaughter of Moses James Barnes. He was convicted, but a question was reserved for the opinion of the Court of Appeal as to the propriety of having admitted a witness of the name of Richard Donelly on the part of the prosecution.

The deceased and the witness were both lunatic patients in Mr. Armstrong's Asylum, at Camberwell, at the time of the supposed injury, and they were at that time placed in a ward called the infirmary. It appeared that a single sane attendant (the prisoner) had the charge of this ward, in which as many as nine patients slept, and that he was assisted by three of the patients of whom the witness Donelly was one. * * *

Donelly was then called, and, before being sworn, was examined by the prisoner's counsel. He said "I am fully aware I have a spirit, and 20,000 of them; they are not all mine. I must inquire. I can where I am. I know which are mine. Those that ascend from my stomach and my head, and also those in my ears. I don't know how many they are. The flesh creates spirits by the palpitation of the nerves and the rheumatics; all are now in my body and round my

head; they speak to me incessantly, particularly at night. That spirits are immortal I am taught by my religion from my childhood. No matter how faith goes, all live after my death, those that belong to me and those that do not. Satan lives after my death and so does the living God."

After more of this kind he added: "They speak to me instantly; they are speaking to me now; they are not separate from me; they are round me speaking to me now; but I can't be a spirit, for I am flesh and blood. They can go in and out through walls and places which I cannot. I go to the grave; they live hereafter; I do not, unless, indeed, I've a gift different from my father and mother that I don't know. After death my spirit will ascend to Heaven or remain in Purgatory. I can prove Purgatory. I am a Roman Catholic. I attended Moorfields, Chelsea Chapel, and many other chapels round London. I believe Purgatory; I am taught that in my childhood and infancy. I know what it is to take an oath. My catechism, taught me from my infancy, tells me when it is lawful to swear; it is when God's honour, our own or our neighbor's good require it. When man swears he does it in justifying his neighbor on a prayer book or obligation. My ability evades me while I am speaking, for the spirit ascends to my head. When I swear I appeal to the Almighty. It is perjury, the breaking of a lawful oath or taking an unlawful one; he that does it will go to hell for all eternity."

He was then sworn, and gave a perfectly collected and rational account of a transaction which he reported himself to have witnessed. He was in some doubt as to the day of the week on which it took place, and on cross-examination said, "These creatures insist upon it it was Tuesday night, and I think it was Monday," whereupon he was asked, "Is what you have told us what the spirits told you, or what you recollected without the spirits?" and he said, "No; the spirits assist me in speaking of the date. I thought it was Monday, and they told me it was Christmas Eve, Tuesday; but I was an eye-witness, an ocular witness to the fall to the ground."

The question for the opinion of the court is, whether this witness was competent. Sentence has not been passed, but is postponed until this question has been decided, and the prisoner remains in custody.

J. T. Coleridge.

April 25, 1851.

* * * * * * * *

LORD CAMPBELL, C. J.[12] I am glad this case has been reserved, for the matter is of great importance, and ought to be decided. However, after a very learned argument, which I have heard with a great deal of pleasure, I entertain no doubt that the rule is as was laid down by Parke, B., in the unreported case that has been referred to, that wherever a delusion of an insane character exists in any person who

[12] Statement condensed.

is called as a witness, it is for the judge to determine whether the person so called has a sufficient sense of religion in his mind, and sufficient understanding of the nature of an oath, for the jury to decide what amount of credit they will give to his testimony. Various authorities have been referred to, which lay down the law, that a person non compos mentis is not an admissible witness. But in what sense is the expression non compos mentis employed? If a person be so to such an extent as not to understand the nature of an oath, he is not admissible. But a person subject to a considerable amount of insane delusion, may yet be under the sanction of an oath, and capable of giving very material evidence upon the subject-matter under consideration. The just investigation of the truth requires such a course as has been pointed out to be pursued, and in the peculiar circumstances of this case, I should have adopted the course which was taken at the trial. Nothing could be stronger than the language of the medical witnesses in this case, to show that the lunatic might safely be admitted as a witness. It has been contended that the evidence of every monomaniac must be rejected. But that rule would be found at times very inconvenient for the innocent as well as for the guilty. The proper test must always be, does the lunatic understand what he is saying, and does he understand the obligation of an oath? The lunatic may be examined himself, that his state of mind may be discovered, and witnesses may be adduced to show in what state of sanity or insanity he actually is; still, if he can stand the test proposed, the jury must determine all the rest. In a lunatic asylum, the patients are often the only witnesses to outrages upon themselves and others, and there would be impunity for offences committed in such places, if the only persons who can give information were not to be heard.

ALDERSON, B. I quite agree that it is for the judge to say whether the person called as a witness understands the sanction of an oath, and for the jury to say whether they believe his evidence. Here the account of the lunatic himself, and the evidence of the medical witnesses, show that he was properly received as a witness.

COLERIDGE, J. This is an important case. We have been furnished, during the argument, with rules drawn from the older authorities against the admissibility of a lunatic witness, which are stated without any qualification. It was not necessary for the decision of those cases that the rule should be qualified, and in former times the question of competency was considered upon much narrower grounds than it is at present. The evidence in this case left the matter thus; there was a disease upon the mind of the witness, operating upon particular subjects, of which the transaction of which he came to speak was not one. He was perfectly sane upon all other things than the particular subject of his delusion. As far as memory was concerned, he was in the position of ordinary persons, and upon religious matters he was remarkably well instructed, so as to understand perfectly the

nature and obligation of an oath. If it had appeared, upon his evidence, that his impressions of external objects were so tainted by his delusion that they could not be acted upon, that would have been a ground for the jury to reject or give little effect to his evidence. But this was a matter for them to determine.

PLATT, B., concurred.

TALFOURD, J. If the proposition, that a person suffering under an insane delusion cannot be a witness, were maintained to the fullest extent, every man subject to the most innocent unreal fancy would be excluded. Martin Luther believed that he had had a personal conflict with the devil; Dr. Johnson was persuaded that he had heard his mother speak to him after death. In every case the judge must determine, according to the circumstances and extent of the delusion. Unless judgment and discrimination be applied to each particular case, there may be the most disastrous consequences.

Conviction affirmed.[13]

II. INFAMY[14]

CLANCEY'S CASE.

(House of Lords, 1696. Fortes. 208.)

Upon a debate in the House of Lords December 15, 1696, relating to the bill for attainting Sir John Fenwick of high treason, the opinion of all the Judges then present, viz. Holt, Chief Justice of the King's Bench, Treby, Chief Justice of the Common Pleas, Ward, Chief Baron of the Exchequer, Justice Turton, Justice Powell, Justice Samuel Eyre, Baron Powys, and Baron Blencow, was asked whether Clancey (hav-

[13] Same rule applied in District of Columbia v. Armes, 107 U. S. 519, 2 Sup. Ct. 840, 27 L. Ed. 618 (1882); Coleman v. Commonwealth, 25 Grat. (Va.) 865, 18 Am. Rep. 71 (1874); State v. Herring, 268 Mo. 514, 188 S. W. 169 (1916).

For instances where the witness was held to be too lacking in understanding, see Udy v. Stewart, 10 Ontario, 591 (1886); State v. Meyers, 46 Neb. 152, 64 N. W. 697, 37 L. R. A. 423 (1895).

Some courts incline to the view that the competency of a witness is to be determined by his mental condition at the time he is offered, and that the state of his mind at the time of the transaction which he relates affects his credibility rather than his competency. Sarbach v. Jones, 20 Kan. 497 (1878).

For the presumption arising from an adjudication of insanity, see State v. Herring, 268 Mo. 514, 188 S. W. 169 (1916).

[14] This disqualification has been removed by statute in many of the states, e. g., N. Y. Code of Civil Procedure, § 832: "A person, who has been convicted of a crime or misdemeanor, is, notwithstanding, a competent witness in a civil or criminal action or special proceeding; but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record or by his cross-examination, upon which he must answer any question relevant to that inquiry; and the party cross-examining him is not concluded, by his answer to such a question."

ing been convicted of an high misdemeanor, of which the record [15] was produced) in actually giving George Porter 300 guineas, and promising more, to withdraw himself into France, thereby to prevent his further evidence against the Lord Aylesbury, the Lord Montgomery and Sir John Fenwick, for which he had judgment to stand in the pillory (and did so stand), might be admitted a witness, either

First, to confront George Porter in his evidence before the House of Lords.

Secondly, or to be admitted a witness in any other case.

As to the first, we were all of opinion he could not, it being utterly improper to permit him, after his conviction, to come and confront and give evidence against the very person, upon whose evidence he was before convicted by verdict, and to purge himself of that very crime of which he was so convicted.

And as to the second, we were all of opinion (except Holt, Chief Justice, who did somewhat hesitate, yet said upon further consideration he might also agree) that Clancey could never after be admitted a witness in any case; for that he was become infamous, not that merely standing in the pillory or judgment so to stand, did of itself make a man infamous to such a degree as never after to be admitted a witness (tho' Co. Lit. 6 b, does seem to intimate as much); for, if a Judge should sentence a man to stand in the pillory for a trespass, a riot, a libel, or seditious words, and he should so stand, yet this would not make him infamous, so as never to be admitted a witness; because the crimes in their own nature are not perfectly infamous, but rather exorbitant in point of rashness and misbehaviour: but he that has been convicted of, or stood in the pillory for perjury or forgery, is truly infamous. And so is this Clancey; for his crime was a base and clandestine endeavour to obstruct the publick justice of the kingdom, not by discoursing or arguing with a witness, or endeavouring to convince him with reason; but by downright bribing and corrupting him with money: which no man would attempt but a base, mean and in-

[15] In Rex v. Inhabitants of Castell Careinion, 8 East, 77 (1806), the court below had rejected a witness on his admission in court that he had been convicted of a felony.

Lord Ellenborough, C. J.: "We must take it upon this case that the evidence was objected to at the sessions by the party interested in repelling it, and there cannot be the least doubt that the objection was well founded. The evidence went to affect the rights of third persons, namely, the litigant parishes; for the pauper himself is no party to the cause in court. Whether or not the witness were convicted of the felony would appear by the record: and it cannot be seriously argued that a record can be proved by the admission of any witness. He may have mistaken what passed in court, and may have been ordered on his knees for a misdemeanor: This can only be known by the record: and there is no authority for admitting parol evidence of it."

Lawrence, J.: "The books are uniform in requiring the production of the record to prove a witness convicted of an offense. 2 Hawk. c. 46, § 20; 3 Com. Dig. Evidence, 280; 5 Com. Dig. Testmoigne, 516; Bull. N. P. 292."

And so in Commonwealth v. Green, 17 Mass. 515 (1822), where the question arose on a motion for a new trial.

famous rascal; and that to prevent the discovery and punishment of certain criminals, who had been conspiring against the publick safety of the kingdom, as Porter had before upon his oath affirmed. And this was a crime not merely of misbehaviour, like a riot or libel, but even of corruption relating to evidence and testimony, and it were against reason to admit that man as a good witness, who has been convicted of bribing and corrupting of a witness as such.[16]

PENDOCK v. MacKENDER.

(Court of Common Pleas, 1755. 2 Wils. 18.)

This is an ejectment for lands in Kent; the substance of the case reserved at the assises for the opinion of the court is shortly this: That J. M. being seised of the lands in question, by his will executed in September, 1750, devised the lands to the defendant; that there were three witnesses to the will, viz. Thomas Turner, Jos. Jeffery, and another; that Jos. Jeffery, one of the witnesses before the time of attestation thereof, was indicted, tried and convicted for stealing a sheep, and was found guilty to the value of ten pence, and had judgment of whipping.

The plaintiff claims as heir at law to the testator, and therefore the single question is, whether one convicted and whipped for petit larceny be a competent witness, within the statute of frauds and perjuries.

After three arguments at the bar the whole court were clearly of opinion that Joseph Jeffery was not a competent witness, and laid it down as a rule, that it is the crime that creates the infamy, and takes away a man's competency, and not the punishment for it; and it is absurd and ridiculous to say it is the punishment that creates the infamy.

The pillory has always been look'd upon as infamous, and to take away a man's competency as a witness; but to put one case (amongst many that might be put) to shew this is a very absurd notion, is sufficient: If a man was convicted upon the Stat. 4 W. & M. against deer-stealing, there is a penalty of £30. to be levied by distress, and if he has no distress, he is to be put in the pillory; so that if the pillory be infamous, the person convicted (according to this notion) will be so, if he has not £30. but if he has £30. he will not be infamous.

In the present case both the crime and punishment are infamous; and he that steals a penny has as wicked a mind as he that steals a larger sum, if not a more wicked mind, for he has the less tempta-

[16] The affidavit of an infamous person may be received, where required for his own protection, but not to support a charge by him. Rex v. Davis, 5 Mod. 74 (1696); Walker v. Kearney, 2 Strange, 1148 (1741).

tion; petit larceny is felony, 1 Hawk. 95, § 36. And no case has been cited where a person convicted thereof was ever admitted to be a witness. Judgment for the plaintiff per totam curiam.

THE KING v. PRIDDLE.

(Nisi Prius, 1787. Leach, Cr. Cas. 442.)

William Priddle, Robert Holloway, and Stephen Stephens, were convicted at the Old Bailey in April Session, 1787, of conspiracy; and sentenced to pay a fine of 6s. 8d. each, and to be imprisoned in his Majesty's gaol of Newgate, viz. William Priddle for the term of two years, and Robert Holloway and Stephen Stephens for the term of eighteen months.

During the course of their confinement George Crossley, against whom they had been convicted of conspiring, was indicted at Hick's Hall for wilful and corrupt perjury; and the indictment being removed into the Court of King's Bench, came on to be tried before Mr. Justice Buller, at the sittings at Westminster after Trinity Term 1787.

At the trial, William Priddle was produced as a witness on the part of the prosecution; and being examined on the voir dire, he acknowledged that he had been convicted of the conspiracy abovementioned, and was then brought up under a habeas corpus from his confinement for that offence.

The defendant's counsel, objected to his being examined, and submitted to the Court that a conviction of conspiracy rendered the party infamous, and destroyed his competency as a witness.

Mr. Justice BULLER. Conspiracy is a crime of a blacker dye than barratry, and the testimony of a person convicted of barratry has been rejected. It is now settled, that it is the infamy of the crime which destroys the competency, and not the nature or mode of punishment. A conviction therefore of any offence which is comprehended under the denomination of crimen falsi, destroys the competency of the person convicted, as perjury, forgery by the common law, &c.

The testimony of the witness was rejected.[17]

[17] Sir William Scott, in Ville de Varsovie, 2 Dodson, 174 (1817): "The crimen falsi has nowhere been accurately defined; nor the species of it authoritatively enumerated. There are chasms in the law that must be filled up by those to whom the law has more immediately confided a discretionary judgment upon such points. If I find an actual case in which a conspiracy to cheat has been held to carry with it this consequence, it is my duty to apply it to one that falls directly under the same class, though not resembling it in all circumstances. But I find no such actual case (and certainly I have not been able to do so), then looking to what has been the inclination of the courts in later times, rather to narrow the ancient incapacity of witnesses than to open the door still wider; looking to the variation which the law seems to have undergone in the consideration of very eminent judges, at the cautious hesitation of opinion with which this subject has been treated by the highest authorities, I do not find myself en-

FAUNCE v. PEOPLE.

(Supreme Court of Illinois, 1869. 51 Ill. 311.)

Mr. Justice WALKER [18] delivered the opinion of the Court:

The record shows that plaintiff in error was indicted jointly with Mrs. Stephens, for receiving stolen goods. There are no questions presented upon the pleadings in the case, but a number of errors are assigned on the various rulings of the court. It is first urged, that the court below erred in permitting Moore, who had been convicted of stealing the goods, which the accused were charged with concealing, but who had not been sentenced, to testify against plaintiff in error. Plaintiff's attorney admits, that at the common law there must be a verdict of guilty followed by a judgment, to render a party incompetent to testify, but insists that the rule has been changed by our statute. The 235th section of the criminal code, (Gross' Stat. 218) declares, that each and every person convicted of any of the crimes therein enumerated, of which larceny is one, shall be deemed infamous, and shall forever thereafter be rendered incapable of holding any office of honor, trust or profit, of voting at any election, of serving as a juror and of giving testimony.[19]

This presents the question, what is a conviction? Is it the verdict of guilty, or is it the sentence or judgment rendered on such a verdict? So far as our knowledge of the practice extends under this section since its adoption, the construction has been uniform, that it is the judgment on the verdict of guilty which renders the accused infamous and disqualifies him from testifying as a witness. And such long and uniform construction by the courts and the bar, is entitled to no small weight in the consideration of such a question. Had serious doubts of the correctness of such a construction existed, we must conclude that the question would long since have been presented to this court for determination.

A reference to the eighth section, art. 4, of our constitution, will show the construction the framers of that instrument placed on the term "conviction." After conferring upon the governor the power to grant reprieves, commutations and pardons after conviction, for all offenses except treason and cases of impeachment, it declares that "he shall, biennially, communicate to the general assembly each case of reprieve, commutation or pardon granted, stating the name of the convict, the crime for which he was convicted, the sentence and its

titled to say that the affidavit of this person ought to be rejected in this court, as being clearly inadmissible in all courts whatsoever."

See, also, Schuylkill v. Copley, 67 Pa. 386, 5 Am. Rep. 441 (1871).

[18] Part of opinion omitted.

[19] For the present statute removing the disability, see section 426, c. 38, Hurd's Rev. St. 1913.

date, and the date of commutation, pardon or reprieve." This provision manifestly contemplates a judgment or sentence as necessary to a conviction, or why require, in each case of conviction and reprieve, commutation or pardon, to report the sentence and its date? If the verdict of guilty constituted the conviction, they would not have required in every case the sentence and its date to have been communicated to the general assembly. They, no doubt, acted upon the uniform construction given to the statute above referred to, which was then and had long been in force.

An examination of the adjudged cases in the various states of the Union, where substantially the same laws are in force, will show that it is not the commission of the crime, nor the verdict of guilty, nor the punishment, nor the infamous nature of the punishment, but the final judgment of the court that renders the culprit incompetent. It is true, that writers and judges have loosely said, that a party is convicted on the finding of a verdict against him. It is true, in a sense, that he has been convicted by the jury, but not until the judgment is rendered is he convicted by the law; and the statute only, like the common law, refers to the conviction imposed by the law. We can discover from this section no intention to change the common law rule. And in a matter of such grave import we should have to see such intention reasonably well expressed before we could give the construction contended for by plaintiff in error. * * *

Judgment affirmed.[20]

LOGAN v. UNITED STATES.

(Supreme Court of the United States, 1892. 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429.)

Error to the Circuit Court of the United States for the Northern district of Texas to review a conviction on a charge of murder.

Mr. Justice GRAY.[21] * * * In support of the objection to the competency of the two witnesses who had been previously convicted and sentenced for felony,—the one in North Carolina, and the other in Texas,—the plaintiffs in error relied on article 730 of the Texas Code of Criminal Procedure of 1879, which makes incompetent to testify in criminal cases "all persons who have been or may be convicted of felony in this state, or in any other jurisdiction, unless such convic-

[20] Lord Mansfield in Lee v. Gansel, 1 Cowper, 1 (1774): "An affidavit of Lee was offered to be read. Objected, that he stood convicted of perjury, and the conviction was produced. But, per Lord Mansfield, a conviction upon a charge of perjury is not sufficient, unless followed by a judgment. I know of no case, where a conviction alone has been an objection; because, upon a motion in arrest of judgment, it may be quashed."

So an unconvicted accomplice is not disqualified: Rex v. Teal, 11 East, 307 (1809); Byrd v. Com., 2 Va. Cas. 490 (1826), leading case in United States.

[21] Statement and part of opinion omitted.

tion has been legally set aside, or unless the convict has been legally pardoned for the crime of which he was convicted."

By an act of the congress of the republic of Texas of December 20, 1836, § 41, "the common law of England, as now practiced and understood, shall, in its application to juries and to evidence, be followed and practiced by the courts of this republic, so far as the same may not be inconsistent with this act, or any other law passed by this congress." 1 Laws of Republic of Texas, (Ed. 1838,) 156. That act was in force at the time of the admission of Texas into the Union, in 1845. The first act of the state of Texas on the incompetency of witnesses by reason of conviction of crime appears to have been the statute of February 15, 1858, c. 151, by which all persons convicted of felony in Texas or elsewhere were made incompetent to testify in criminal actions, notwithstanding a pardon, unless their competency to testify had been specifically restored. Gen. Laws 7th Leg. Tex. 242; Oldham & W. Dig. 640. That provision was afterwards put in the shape in which it stands in the Code of 1879, above cited.

The question whether the existing statute of the state of Texas upon this subject is applicable to criminal trials in the courts of the United States held within the state depends upon the construction and effect of section 858 [22] of the Revised Statutes of the United States. * * *

For the reasons above stated, the provision of section 858 of the Revised Statutes, that "the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law and in equity and admiralty," has no application to criminal trials; and, therefore, the competency of witnesses in criminal trials in the courts of the United States held within the state of Texas is not governed by a statute of the state which was first enacted in 1858, but, except so far as congress has made specific provisions upon the subject, is governed by the common law,[23] which, as has been seen, was the law of Texas before the passage of that statute, and at the time of the admission of Texas into the Union as a state.

At common law, and on general principles of jurisprudence, when not controlled by express statute giving effect within the state which enacts it to a conviction and sentence in another state, such conviction and sentence can have no effect, by way of penalty, or of personal disability or disqualification, beyond the limits of the state in which the judgment is rendered. Wisconsin v. Insurance Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239; Com. v. Green, 17 Mass. 515; Sims v. Sims, 75 N. Y. 466; Trust Co. v. Gleason, 77 N. Y. 400, 33 Am. Rep.

[22] This statute has been so amended as to expressly limit it to civil cases. See post, p. 169.

[23] For the reasoning by which this conclusion was reached, see omitted parts of the opinion and United States v. Reid, 12 How. 361, 13 L. Ed. 1023 (1851).

632; Story, Confl. Laws, § 92; 1 Greenl. Ev. § 376. It follows that the conviction of Martin in North Carolina did not make him incompetent to testify on the trial of this case.[24]

The competency of Spear to testify is equally clear. He was convicted and sentenced in Texas; and the full pardon of the governor of the state, although granted after he had served out his term of imprisonment, thenceforth took away all disqualifications as a witness, and restored his competency to testify to any facts within his knowledge, even if they came to his knowledge before his disqualification had been removed by the pardon. Boyd v. United States, 142 U. S. 450, 12 Sup. Ct. 292, 35 L. Ed. 1077; United States v. Jones, (before Mr. Justice Thompson,) 2 Wheeler, Crim. Cas. 451, 461; Hunnicutt v. State, 18 Tex. App. 498, 51 Am. Rep. 330; Thornton v. State, 20 Tex. App. 519.

Whether the conviction of either witness was admissible to affect his credibility is not before us, because the ruling on that question was in favor of the plaintiffs in error. * * *

Judgment reversed (on other grounds).

ROSEN et al. v. UNITED STATES.

PAKAS v. SAME.

(Supreme Court of the United States, 1918. 245 U. S. 467, 38 Sup. Ct. 148, 62 L. Ed. 406.)

Mr. Justice CLARKE[25] delivered the opinion of the Court.

These two cases present precisely the same questions for decision. They were argued and will be decided together.

In No. 365 Rosen and Wagner were indicted in the District Court of the United States for the Eastern District of New York with one Broder for conspiring to buy and receive certain checks and letters which had been stolen from "duly authorized depositories of United States mail matter," and which were known to the accused to have been so stolen. Broder pleaded guilty, and when he was afterwards called as a witness for the government the objection was made that he was not competent to testify for the reason that, as was admitted by the government, he had theretofore pleaded guilty to the crime of forgery in the second degree, in the Court of General Sessions, in the county and state of New York, had been sentenced to imprisonment, and had served his sentence. The objection was overruled and Broder was permitted to testify. This ruling was assigned as error in the

[24] That the conviction of a person by a federal court sitting in the same state does not disqualify him as a witness in the state court, see Samuels v. Com., 110 Va. 901, 66 S. E. 222, 19 Ann. Cas. 380 (1909).

[25] Part of opinion omitted.

Circuit Court of Appeals, where it was affirmed, and it is now assigned as error in this court. * * *

For the validity of the claim that Broder was disqualified as a witness by his sentence for the crime of forgery, the plaintiffs in error rely upon United States v. Reid et al., 12 How. 361, 13 L. Ed. 1023, decided in 1851. In that case it was held that the competency of witnesses in criminal trials in United States courts must be determined by the rules of evidence which were in force in the respective states when the Judiciary Act of 1789 was passed, and the argument in this case is, that by the common law as it was administered in New York in 1789 a person found guilty of forgery and sentenced, was thereby rendered incompetent as a witness until pardoned, and that, therefore, the objection to Broder should have been sustained.

While the decision in United States v. Reid, supra, has not been specifically overruled, its authority must be regarded as seriously shaken by the decisions in Logan v. United States, 144 U. S. 263–301, 12 Sup. Ct. 617, 36 L. Ed. 429, and in Benson v. United States, 146 U. S. 325, 13 Sup. Ct. 60, 36 L. Ed. 991.

The Benson Case differed from the Reid Case only in that in the former the witness whose competency was objected to was called by the government while in the latter he was called by the defendant. The testimony of the witness was admitted in the one case but it was rejected in the other, and both judgments were affirmed by this court —however forty years had intervened between the two trials. In the Benson Case, decided in 1891, this court, after determining that the Reid Case was not decisive of it, proceeded to examine the question then before it "in the light of general authority and of sound reason," and after pointing out the great change in the preceding fifty years in the disposition of courts to hear witnesses rather than to exclude them, a change "which was wrought partially by legislation and partially by judicial construction," and how "the merely technical barriers which excluded witnesses from the stand had been removed," proceeded to dispose of the case quite without reference to the common-law practice, which it was claimed should rule it.

Accepting as we do the authority of the later, the Benson Case, rather than that of the earlier decision, we shall dispose of the first question in this case, "in the light of general authority and of sound reason."

In the almost twenty years which have elapsed since the decision of the Benson Case, the disposition of courts and of legislative bodies to remove disabilities from witnesses has continued, as that decision shows it had been going forward before, under dominance of the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent, with

the result that this principle has come to be widely, almost universally, accepted in this country and in Great Britain.

Since the decision in the Benson Case we have significant evidence of the trend of congressional opinion upon this subject in the removal of the disability of witnesses convicted of perjury, R. S. 5392 (Comp. St. 1916, § 10295), by the enactment of the federal Criminal Code in 1909 with this provision omitted and section 5392 repealed. This is significant, because the disability to testify, of persons convicted of perjury, survived in some jurisdictions much longer than many of the other common-law disabilities, for the reason that the offense concerns directly the giving of testimony in a court of justice, and conviction of it was accepted as showing a greater disregard for the truth than it was thought should be implied from a conviction of other crime.

Satisfied as we are that the legislation and the very great weight of judicial authority which have developed in support of this modern rule, especially as applied to the competency of witnesses convicted of crime, proceed upon sound principle, we conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here, and that the ruling of the lower courts on this first claim of error should be approved. * * *

Affirmed.

Mr. Justice VAN DEVANTER and Mr. Justice MCREYNOLDS dissent from so much of the opinion as departs from the rule settled in United States v. Reid and Logan v. United States, which they think is in no way modified by what actually was decided in Benson v. United States.

III. INTEREST

(A) At Common Law

THE QUEEN v. MUSCOT.

(Court of Queen's Bench, 1714. 10 Mod. 192.)

A question was started in an indictment for a judicial perjury, whether one produced as an evidence for the Queen might not be examined upon a voir dire, as the common usage is in civil actions?

It was insisted, by the counsel for the Queen, that the question should not be put, because the consequence would be, that no such prosecutions could ever go on; for there is scarcely any prosecutor but if asked whether he be interested in the event of a cause, must say he is. For example: Where the owner prosecutes an indictment of felony for stolen goods he is concerned in interest, for he will be intitled to restitution, and yet his evidence is admitted. So likewise, where an indictment is removed by certiorari from the sessions into the Court of King's Bench, notwithstanding the prosecutor in that case, if the defendant be convicted, is, by the statute of 5 and 6 Will.

& Mary, c. 11, intitled to his costs, yet he is allowed as a witness. So likewise there are several cases where, though a man will, in case of conviction, be intitled to forty pounds, yet his evidence shall be received. And as to the cases of The Queen v. Duke of Leeds, and The Queen v. Cobham, where the informer was refused to be an evidence, there is this difference between those and the present case, that there it appeared upon the face of the record that the parties produced as witnesses were interested. In hue and cry, the evidence of the person robbed is always allowed as evidence.

PARKER, Chief Justice.[26] It is a principle of the common law, that every man shall be tried by a fair jury, and that evidence shall be given by persons disinterested. The law gives the party tried his election to prove a person offered as evidence interested two ways, viz. either by bringing other evidence to prove it, or else by swearing the person himself upon a voir dire; but though he may do either, he cannot have recourse to both. It was never objected before, that a person should not be sworn upon a voir dire; nor will it, I hope, ever hereafter. Objections have indeed been started as to the nature of those questions, that shall be put to a witness upon taking such an oath. As to the case of robbery, that is founded upon the necessity of it, and that only. As to the cases put upon the statutes where forty pounds reward, &c. they admit of this answer, that the intention of those Acts will be quite defeated, if the reward were to take off their evidence. The same answer likewise may serve to the cases put upon an indictment of felony for stolen goods, and where the indictment is removed by certiorari, &c.; for who, in the first case, but the owner can prove the property of the goods? and in the second, if the giving of costs should take off the evidence of the prosecutor, that Act of Parliament, which was designed to discountenance the removing of suits by certiorari, would give the greatest encouragement to them that is possible. As for the distinction taken between the interest of the witness appearing upon record, and its appearing some other way, it is an irrational distinction, and a reflection, upon the wisdom of the law. As to the objection taken from the inconvenience of putting the general and common question, because probably he must answer it in the affirmative, there is nothing in it, for he may be asked to explain the nature of his interest, that so the Court may be judge, whether his interest is such as ought to exclude his evidence.[27]

He was accordingly sworn upon a voir dire. * * *

[26] Part of opinion omitted.

[27] That the person injured by the perjury is a competent witness for the prosecution, see Rex v. Boston, 4 East, 572 (1804). A contrary rule appears to have obtained in the forgery cases. Watt's Case, Hardres, 331 (1664), and dicta in Rex v. Boston. For an extended discussion of the competency of the informer, or of the person injured, in criminal prosecutions, see Rex v. Williams, 9 B. & C. 549 (1829); United States v. Murphy, 16 Pet. 203, 10 L. Ed. 937 (1842), under a statute giving a part of the fine to the injured person.

PEOPLE v. BILL.

(Supreme Court of New York, 1813. 10 Johns. 95.)

This was an indictment for an assault and battery, tried at the Delaware sessions in January, 1812, on which the defendant was found guilty.

By consent, the judgment of the court of sessions was suspended, in order to take the opinion of this court, on a question of law, arising upon the trial; and the following case was submitted to the court:

The defendant was indicted jointly with another person, for an assault and battery upon J. P. The defendants each pleaded not guilty. This defendant elected to be tried separately, and his trial came on first. The prosecutor, and the two defendants, were the only persons present at the time of the affray. After the testimony for the people had been produced, the defendant offered to prove his defense by the other person named in the indictment. The district attorney objected to the witness, on the ground that he was named jointly in the indictment, and for the same cause; and the witness was excluded.

PER CURIAM. It appears to be a technical rule of evidence, and one well settled, that a party in the same suit or indictment, cannot be a witness for his co-defendant, until he has been first acquitted, or, at least, convicted. Whether the defendants be tried jointly, or separately, does not vary the rule. It is his being a party to the record that renders him incompetent, and the practice is, when nothing appears against one of the defendants, for the court to direct his immediate acquittal, so that the other defendant may use him as a witness. 1 Hale's P. C. 306; Peake's Ev. 100, note; 6 Term Rep. 623. In the case of Rex v. Fletcher, Stra. 633, where two were indicted for an assault, and one submitted, and was fined, and paid it, the chief justice allowed him to be a witness, "the matter then being at an end, as to him." But in the late case of Rex v. Lafone and others, 5 Esp. N. P. 155, Lord Ellenborough would not allow a co-defendant, on a joint indictment for a misdemeanor, to be a witness for the other, though he had let judgment go by default, for he said that one defendant, in that case, might always protect the other, and he had never known that evidence offered.

The witness in the present case was, therefore, legally excluded.[28]

[28] Accord: Com. v. Marsh, 10 Pick. (Mass.) 57 (1830); United States v. Reid, 12 How. 361, 13 L. Ed. 1023 (1851).

REGINA v. WINSOR.

(Court of Queen's Bench, 1865. 10 Cox, Cr. Cas. 276.)

The prisoner, Charlotte Winsor, was jointly indicted with Mary Harris for murder. They were tried jointly, but the jury disagreed. The prisoner was then tried separately and convicted, largely on the testimony of Mary Harris, against whom the indictment was still pending.[29]

COCKBURN, C. J. * * * "On the second [trial] it was proposed, on the part of the prosecution, to sever the trial with the view to the one prisoner becoming a witness against the other. No doubt that state of things which the resolution of the judges, as reported in Lord Holt's time, was intended to prevent, did place the prisoner under this disadvantage, that whereas, upon the first trial, most important evidence could not be given against her, it was given against her upon the second trial, so that the discharge of the jury produced to her that prejudice. I equally felt the force of what Mr. Folkard said about the fellow prisoner coming forward to give evidence without having been first acquitted, or convicted and sentence passed. I think that was much to be lamented. In all such cases, if it be thought necessary, where two persons are in the same indictment, and it is thought desirable to separate them in their trials, in order that the evidence of the one may be taken against the other, I think, in order to ensure the greatest possible amount of truthfulness on the part of the person who is coming to give evidence under such remarkable circumstances, it would be far better that a verdict of not guilty should be taken first, or if the plea of not guilty is withdrawn and a plea of guilty taken, sentence should be passed, in order that the person coming forward to give evidence may do so with the mind free of all the corrupt influence which the fear of impending punishment and the desire to obtain immunity at the expense of the prisoner might otherwise be liable to produce in the mind of the witness. We are not dealing with that question now. It cannot be brought before us in a Court of Error. Evidence is not set forth upon the record; it can only in a civil case be taken advantage of on a bill of exceptions. It does not otherwise come upon the record so as to constitute a matter before us in error here. It does not appear on the record at all, therefore we cannot take it into consideration. Whether these circumstances should have any influence elsewhere is a matter that it is not for us to refer to, or in

[29] Statement condensed and parts of the opinion omitted.

any way to pronounce an opinion upon. The only course that is open to us is to pronounce judgment for the Crown and in favour of the validity of this conviction.

Judgment for the Crown.

February 8, 1866.

In this case the counsel for the prisoner presented a petition to the Home Secretary, setting forth that the other prisoner Harris was admitted as a witness without any verdict being taken either for or against her, and that the learned judge at the trial had refused to reserve the point for the Court of Criminal Appeal. The Home Secretary upon this submitted the point as to the evidence of Harris to the fifteen judges for their opinion. They met, and the subjoined is an extract of their opinion. The point was not argued before the judges, but their opinion was given merely to inform the conscience of the Home Secretary, who inclosed the extract, and expressed his regret that he could not, under the circumstances, consistently with his public duty, recommend the convict to the mercy of the Crown:

"We think that the evidence of the witness Harris was legally admissible, although she was jointly indicted with the convict, and had not been previously convicted or acquitted. With reference to this particular case, we, in common with the learned judge who tried the case, and by whom all the circumstances have been brought before us, are of opinion that no injustice or irregularity occurred of which the convict can properly complain."[80] * * *

McKENZIE v. STATE.

(Supreme Court of Arkansas, 1867. 24 Ark. 636.)

COMPTON, J.[81] The appellant was convicted in the circuit court of Randolph county of murder in the first degree, and was sentenced to be hanged. The motion of the appellant for a new trial was overruled, and he appealed to this court.

The record presents several questions for our consideration, which we will proceed to determine in the order in which they have been argued in this court.

1. The bill of exceptions shows that the accused offered to introduce Jahu Bremage as a witness in his behalf, which the court refused to permit upon the ground that he was the identical person who, by the name of John Bremage, was jointly indicted with the accused, and as to whom a nolle prosequi was entered and against whom a sep-

[80] Accord: Benson v. United States, 146 U. S. 325, 13 Sup. Ct. 60, 36 L. Ed. 991 (1892). A co-indictee is competent for the prosecution after the case is disposed of as to him by a plea of guilty. Com. v. Smith, 12 Metc. (Mass.) 238 (1847).

[81] Statement and part of opinion omitted.

arate indictment, for the same offence, was subsequently preferred, which then remained undetermined. This was error. It is true that it was decided by this court, in Moss v. State, 17 Ark. 327, 65 Am. Dec. 433, and again, at the present term, in Brown v. State, 24 Ark. 620, that one of several defendants in an indictment, still pending against him for the same offence, is not a competent witness for his co-defendants, but such is not the question here presented. Bremage, as we have seen, had been discharged from the joint indictment, was no longer a party to the record in that case, and the fact that he stood indicted separately for the same offence, did not disqualify him as a witness for the accused. Whar. Crim. Law, p. 303; United States v. Henry, 4 Wash. C. C. 428, Fed. Cas. No. 15,351; 1 Hale, p. 305, (in Marg.;) 1 Chit. Crim. Law, p. 603, (in Marg.)

2. The bill of exceptions also shows that the accused offered to introduce James C. Winters as a witness, which the court refused to permit, because it was made to appear that he was an accomplice. In this the court also erred. This witness was not indicted at all, and his being an accomplice did not make him incompetent. Brown v. State, decided at the present term. See also authorities cited. * * *

Reversed.

HOPKINS v. NEAL et al.

(Nisi Prius, 1736. 2 Strange, 1026.)

The plaintiff sued as an infant by her father the prochein amy, for an assault and battery: and the father was refused to be a witness by Lord Hardwicke at Nisi prius in Middlesex, he being liable to the costs.

——— v. FITZGERALD.

(Court of Chancery, 1742. 9 Mod. 330.)

An action was brought upon a policy of insurance by the trustee, the trust being declared upon the policy itself; and it was now moved, that the trustee, though a plaintiff in the action, might be received as a witness upon the trial at law.

HARDWICKE, Lord Chancellor. Where policies of insurance have been made to A. to the use of B. the legal interest being judged to be in B. A. the trustee has been admitted to be a witness; but where the trustee has the legal estate, and the action has been brought in his name, he can never, to be sure, be admitted as a witness upon any of the principles of law. A defendant in this Court, no doubt, can apply in this Court to have the plaintiff's trustees examined in the cause; but I am afraid it is not so where the plaintiff comes to have

himself examined, though he is a trustee.[82] This should have been mentioned at the hearing of the cause; and then if I had been told that you must bring actions upon the policy, and should have occasion to examine the trustees, I would have directed an issue, and have given liberty to have the trustees admitted as witnesses; but I cannot do this upon motion, when the cause is out of Court.

It was then moved, that the depositions of several witnesses examined in this cause, and now abroad, might be received as evidence at law. And his Lordship said, it was now the constant practice in the Courts of Law to admit such depositions in evidence, where the witnesses were abroad.

NORDEN et al. v. WILLIAMSON.

(Court of Common Pleas, 1808. 1 Taunt. 378.)

The declaration in this case was for work and labour done, and materials furnished by the plaintiffs, who were partners in trade. At the trial of this cause, at the Westminster Sittings after the last term, before Mansfield, C. J., evidence was given that the defendant had issued orders to the plaintiffs to execute the work. To rebut this evidence, the defendant called, among other witnesses, the plaintiff Twibill, who proved that the orders for the work were received by himself, and were not given by the defendant. And upon this evidence the jury found a verdict for the defendant.

Cockell, Serjt., on this day moved for a new trial, upon the ground that Twibill's testimony was inadmissible. There is no case in the books where a plaintiff is permitted to take an oath as witness, except that of an action against the hundred, where it is done under the especial directions of an act of Parliament. When a plaintiff enters the witness box, it cannot be known to what effect he will give his testimony.

MANSFIELD, C. J. This is a new case. I never before remember a plaintiff to have been called as a witness, and perhaps the same thing may rarely occur again. Since the decision in Lord Melville's case it is no longer law that a man cannot be compelled to answer against his civil interests, but supposing that decision will not extend to compel a plaintiff to answer in his own cause, at least, I know no reason why, if the defendant is willing to admit him, and the plaintiff is willing to give evidence against himself, he should not be suffered to do so. If his evidence proves adverse, the consequence must fall on the defendant, who ventures to call him. If the plaintiff had made

[82] In Bauerman v. Radenius, 7 Term Rep. 663 (1798), it is assumed as a matter of course that a nominal plaintiff was incompetent. But see Heath v. Hall, 4 Taunt. 326 (1812), suggesting the competency of the assignor of a chose in action.

a declaration out of court that he had never been employed by the defendant, evidence of that declaration would be admissible. How is the proof less credible, if the plaintiff comes into court and declares the same thing upon his oath?

CHAMBRE, J. The defendant may waive the objection to the plaintiff's testimony, if he will.[88]

Rule refused.

BLACKETT v. WEIR.

(Court of King's Bench, 1826. 5 Barn. & C. 385.)

Assumpsit for goods sold and delivered. Plea, the general issue. At the trial before Bayley, J., at the Northumberland Summer assizes, 1825, it appeared that the action was commenced to recover the price of a cargo of coals sold and delivered to a steam yacht company. In order to prove that the defendant had a share in the concern, one Gilson was called, who admitted on the voir dire that he also was a partner, and it was thereupon objected for the defendant that the witness was incompetent. The learned Judge overruled the objection, and the plaintiff obtained a verdict, the defendant having leave to move to enter a nonsuit. In Michaelmas term, a rule nisi for that purpose was obtained by F. Pollock, who cited Bland v. Ansley, 2 N. R. 331; Brown v. Brown, 4 Taunt. 752; Mant v. Mainwaring, 8 Taunt. 139.

ABBOTT, C. J. I am of opinion that the evidence of Gilson, was properly received. On the motion for this rule cases were cited which show that one joint contractor, having suffered judgment by default, cannot be called as a witness. To that position I accede; it is founded upon the rule that a party to the record cannot in general be examined. It is said that the witness had an interest; he had so; but it was his interest to defeat the plaintiff, for in the event of his recovery, the defendant would be entitled to contribution from the witness. In actions of trespass, witnesses apparently open to a much stronger objection are constantly admitted. In that action a recovery against one of several co-trespassers is a bar to an action against the others; and yet scarcely a circuit passes without an instance of a person who has committed a trespass being called to prove that he did it by the

[88] And so in Worrall v. Jones, 7 Bingham, 395 (1831), where one of the defendants who had suffered a default was examined on behalf of the plaintiff. But a defendant may have such an interest as will disqualify him for the plaintiff, as in Brown v. Brown, 4 Taunt. 752 (1813), where it was to the interest of one defendant to make the other liable; or he may be disqualified to testify for either plaintiff or a codefendant, as in Mant v. Mainwaring, 8 Taunt. 139 (1818), where if called by the plaintiff it might have been to his interest to make his codefendant jointly liable, or, if called by the other defendant, he might have relieved himself by proof that there was no joint liability. If the interest of the witness was equal either way, he was not disqualified. Ilderton v. Atkinson, 7 D. & E. 480 (1798).

command of the defendant. In that case a verdict for the plaintiff would operate as a discharge to the witness, there being no contribution in actions of tort. Here, on the contrary, it brought a liability upon him.

Rule discharged.[34]

REEVES v. SYMONDS.

(Nisi Prius, 1714. 10 Mod. 291.)

This was an action brought by Reeves for a quantity of stockings sold to Symonds.

The defence of Symonds, that it was not he that bought the stockings, but his son, who sent them to France in the way of trade.

To prove this he would have called his son.

PARKER, Chief Justice. He cannot be an evidence; because here is an advantage made by way of trade; and to whom this advantage shall accrue depends entirely upon this question, who made this contract? and now one comes to swear, that he made the contract himself.

Darnell, Serjeant. He may be a witness; because he will neither get nor lose by the event of this cause; for what is now given in evidence cannot be given in evidence in another action.

PARKER, Chief Justice. This you have often said, and I as often answered. If an action be brought by a commoner for his right of common, shall another person that claims a right of common upon the same title be allowed to give evidence? No; and yet it is certain that he can neither get nor lose in that cause; for the event of that cause will no way determine his right. But though he is not interested in that cause, he is interested in that question upon which the cause depends; and that will be a bias upon his mind. It is not his swearing the thing to be true that gives him any advantage, but it is the thing's being true; and the law does judge, that it is not proper to admit a man to swear that to be true which is plainly his interest should be true.[35]

[34] Concurring opinions of Bayley, Holroyd, and Littledale, JJ., omitted.

[35] And so in a long opinion about the same period in Lock v. Hayton, Fortesque, 246.

LEWIS v. FOG.

(At Nisi Prius, 1733. 2 Strange, 944.)

In an action by the master for the defendant's dog's biting his apprentice, per quod servitium amisit, the Chief Justice allowed the apprentice to be a witness.[86]

COMMINS v. MAYOR AND BURGESSES OF OAKHAMPTON.

(Court of King's Bench, 1752. Sayer, 45.)

Upon a rule to shew cause, why a new trial should not be had in an action upon the case, it appeared: that the action was, for refusing to admit the plaintiff to the freedom of the corporation of Oakhampton; that at the trial of the cause the chief question was, whether there was a certain custom in the borough, under which the plaintiff claimed a right of being admitted? And that the father of the plaintiff, who had obtained his freedom by servitude, was not admitted to prove this custom.

The question was, whether the father was an admissible witness to prove this custom?

It was holden that he was.

And by LEE, C. J. The person, to whom the remainder of an estate is, after the determination of a particular estate limited by a will, cannot be admitted to prove the will; because he has, although it be remote, a vested interest in the matter in question: but it has been always holden: that the son of the person, to whom a particular estate is devised by a will, may be admitted to prove the will; because, although he may be under a bias, he has not a vested interest in the matter in question. Mere relationship, how near soever the relation may be, does not go to the competency of a witness, unless there be a vested interest in the matter in question. The bias, which a father is presumed to be under in giving testimony in favour of his son, does certainly go to his credit: but a father is, in all cases, a competent witness for his son, if he have not a vested interest in the matter in question. In the present case, the father was not immediately interested in the matter in question; nor could he at any future time become interested therein: the freedom of a corporation not being transmissible.

It was, on the contrary, clearly against the interest of the father, who was himself a freeman, to prove this custom; for by the establishment of a custom, under which others as well as his son might obtain their freedom, his own franchise would have been rendered less valuable.

[86] See, also, Rex v. Huggins, Fitz-Gibbon, 80 (1730), where a witness, interested in the question, was admitted, because the verdict would not be evidence in his favor.

GREEN v. NEW RIVER CO.

(Court of King's Bench, 1792. 4 Term R. 589.)

This was an action for consequential damage to the plaintiff's horse by reason of the bursting of a pipe belonging to the New River works, owing to the negligence of the defendants. A witness was called at the trial before Lord Kenyon at Westminster to prove the negligence, which his lordship held to be necessary to support the action, and that witness swore that he had some hours before the bursting of the pipe, and the consequent accident, informed the turncock, one of the defendants' servants, of the ouzing of the water, which intelligence (if it had been attended to in time) would have enabled him to provide against the mischief. In answer to this the defendants' counsel offered to call the turncock himself, to disprove the evidence of the other witness; which the plaintiff objected to without a release; and none such being prepared, his Lordship was of opinion that the turncock was an incompetent witness, as he came to disprove his own negligence, which if established by the verdict would be the ground of an action against himself by his employers. And the jury having found for the plaintiff,

Erskine moved to set aside the verdict for the rejection of the witness, contending first that he was not interested in the event of the suit, inasmuch as the verdict could not be given in evidence in any action which the defendants might bring against him. And even admitting him to be interested, yet he was a witness from necessity, on the same ground that coachmen and sailors are admitted to give evidence to disprove their own negligence in actions against their masters and employers for damage done in their several occupations, or that on which a servant of a tradesman is permitted to prove the delivery of goods. But

PER CURIAM. The last instance cited is an exception to the general rule; such a person is admitted to give evidence, merely from necessity. But the exception does not extend to the two other cases mentioned of the coachman and the sailor; the verdicts against the proprietors of those may be respectively given in evidence in actions to be brought by them against their servants, as to the quantum of damages, though not as to the fact of the injury. So the verdict in this case may be given in evidence in an action by the defendants against the witness; and therefore he is an incompetent witness without a release.[37]

Rule refused.

[37] Accord: Martin v. Henrickson, 2 Ld. Raymond, 1007 (1706).

That the plaintiff's servant is incompetent to disprove his own contributory negligence in an action for a negligent injury to property in the servant's charge, see Morish v. Foot, 8 Taunt. 454 (1818). But see Nix v. Cutting, 4 Taunt. 18 (1811), where, in an action of trover for the conversion of

SMITH qui tam v. PRAGER.

(Court of King's Bench, 1796. 7 Term R. 60.)

This was an action for usury, tried before Lord Kenyon, C. J., at Guildhall. In order to prove the case, Bromer the borrower of the money was called as a witness; and he gave in evidence that on the 17th of September, 1795, he borrowed of the defendant £900. to be repaid on the 3d of October following, for which he was to pay £11. as interest. That on the 13th October, 1795, he borrowed of the defendant £2000. more, to be repaid on the 26th of the same month, for the loan of which he was to pay £42. and both the principal sums and interest were repaid at the stipulated times by Bromer's drafts on his banker, which were duly honoured. That he was still indebted to the defendant in the sum of £4000. on a running account for this and other loans of money. Bromer had before the trial become a bankrupt, and had not obtained his certificate. It was objected at the trial that he was not a competent witness, on the ground of interest; but Lord Kenyon, C. J., over-ruled the objection, and the plaintiff obtained a verdict on the counts, stating the two transactions above mentioned, there being other usurious transactions stated in other counts which were not proved.

A rule having been obtained on a former day, calling on the plaintiff to shew cause why the verdict should not be set aside, and a new trial had on this ground. * * *

LORD KENYON, Ch. J. The case of Bent v. Baker [3 Term R. 27] laid down a clear and certain rule by which I have ever since endeavoured to regulate my opinion in causes coming before me at Nisi Prius, though probably I may not have decided properly in every instance, when called upon to form an opinion on the sudden. The rule there laid down was, that no objection could be made to the competency of a witness upon the ground of interest, unless he were directly interested in the event of the suit, or could avail himself of the verdict in the cause, so as to give it in evidence on any future occasion in support of his own interest. We are now called upon to review that decision; and the case of Abrahams v. Bunn [4 Burr. 2251] has been cited. The report of the latter in Burrow is a very full one; but I have a MS note of it something fuller. Lord Mansfield there stated the great doubt and contradiction which had long prevailed in the cases upon the distinction between objections which went to the competency and such as went to the credit only of a witness. That the Courts had long been

a horse, it was held that a person who had sold the horse to the defendant under an alleged authority from the plaintiff was a competent witness for the defendant to prove that fact.

For an early case of disqualification because of possible liability over, see Wicks v. Smallbrook, 1 Sid. 51 (1662).

misled by the authority of Lord Holt in deciding the case of the King v. Whiting, Salk. 283, where upon an indictment for a cheat in obtaining a person's subscriptions to a note of £100. instead of £5., he rejected the evidence of the maker of the note; because if the defendant were convicted, Lord Holt said the verdict would be sure to be heard of in an action on the note to influence the jury. That this decision was followed by Lord Hardwicke in the King v. Nunez, 2 Stra. 1043; but that in the King v. Bray, Rep. temp. Hardw. 358, his Lordship had an opportunity of reviewing his own opinion and that of Lord Holt, and was then satisfied that the objection went only to the credit and not to the competency of the witness; and that, as to hearing of the verdict, he, sitting as a judge, could only hear of it judicially; and if it could not be afterwards given in evidence for the witness it was no objection to his competency. Lord Mansfield also observed that since the King v. Whiting great light had been thrown upon the subject by three decided cases; those of R. v. Bray, the East India Company v. Gosten, and Bailie v. Wilson before the delegates. And he laid it down as a rule that the objection to a witness on the ground of future interest only went to his credit, unless the judgment could be given in evidence for him in any other suit. Now that was the very point decided in Bent v. Baker; and therefore the authority of that case stands fully confirmed. Upon the authority therefore of all these cases I am clearly of opinion that Bromer was a competent witness in this case; and that the objection to the situation in which he stood went only to his credit, of which the jury alone were to judge.

The other Judges assenting,

Rule discharged.

BENJAMIN v. PORTEUS.

(Court of Common Pleas, 1796. 2 H. Bl. 590.)

In this action for goods bargained and sold, brought to recover the price of a quantity of indigo, which was sold for three shillings a pound weight; one Bennett, the broker who was employed by the plaintiff was called as a witness to prove the contract, and being examined on the voir dire, stated that by this agreement with the plaintiff he was to have for his own profit whatever sum he could get for the indigo above half a crown for the pound, which price the plaintiff had fixed for himself, but not an allowance of so much per cent. on the sale by way of commission in the usual way. The Lord Chief Justice at the trial thought this was an objection to the competence of the witness on the score of interest, and that as he did not come within the description of a broker or factor, the exception to the general rule made in favour of their testimony being admissible to prove contracts made by them was not applicable to him, and as he refused to release, the plaintiff was in consequence non suited.

LORD CHIEF JUSTICE EYRE. The inclination of my opinion is, that this evidence ought to have been rejected. The principle is admitted, that where a witness has a direct interest in the event of a cause, his testimony cannot be received. But from necessity an exception has been introduced in the case of factors and brokers, because from the nature of the transactions in which they are engaged, the contracts they make for other persons cannot be proved without them. It is true indeed, there is no magic in the term "factor" or "broker," and that every man who makes a contract for another comes, in some sort, within the description. But here it was not simply a contract that Bennett made for another, but for another and himself. He was to have all the profit which could be made upon the sale of the indigo above, 2s. 6d. on every pound weight, the stated sum that was to be paid to his principal. His profit therefore was not to arise from the profit of the principal, but was collateral to and beyond it. He cannot wrong the principal, but he may wrong the person with whom he deals, by screwing him up beyond the real value of the goods, for the sake of his own profit, and therefore he has a separate interest to establish a particular contract which he comes to prove. It is true that an ordinary broker has an interest, but it is not such as to outweigh the necessity of his testimony being received. If he is to have £5. per cent. commission on the sale, where he gets one shilling for himself he gets nineteen for his employer, and his gain arises out of the gain of his employer. But here the agent takes a profit in fact as a principal, with only 2s. 6d. for his employer. A regular broker must take care of his employer's interest as well as his own, and has not such a temptation to raise the price of the commodity to the buyer. Besides, I think the employing persons to transact business upon such terms as these is neither necessary nor convenient, but on the contrary is extremely mischievous in commerce, and not to be encouraged. Brokers are men acting in a known established character, of known description and responsibility, and therefore more fit to be trusted and employed in commercial transactions.

HEATH, J. With great respect for my Lord Chief Justice, I think this witness was admissible. I cannot distinguish him from a broker: he must, I think, be considered as a broker, and not as principal; he is only paid for his trouble in a particular manner. The reason for admitting him is the necessity of the thing, for it is often for the benefit of trade that bargains of this kind shall be kept secret. It appears to me to be equally the interest of a broker, who is to have a percentage to screw up the price, as it was of this person. It is indeed his duty to screw up the buyer; he must tell the whole truth respecting the commodity, but having done that, it is his duty to ask the highest possible price. I cannot consider a broker as the agent for both parties; he appears to me to be solely the agent of the vendor.

ROOKE, J. I agree with my Brother HEATH in thinking this evi-

dence ought to have been admitted. I see no difference in point of interest, between a person who sells upon commission, and one who is to have a share of the profit: nor can I make a distinction between this witness and a common broker. He is an agent who makes a bargain between two others, and whose evidence is admissible from necessity, which is a necessity created by the parties themselves.

LORD CHIEF JUSTICE. My Brothers have stated it as a principle, upon which they rest their opinions, that there is no difference between an agent taking to himself a part of the price for which he bargains, and taking a commission from his employer upon that price. If this principle can be supported, I agree that the evidence ought to have been received. Let there be a new trial.

Rule absolute.[88]

DOE dem. MAYOR AND BURGESSES OF STAFFORD et al. v. TOOTH.

(Court of Exchequer, 1829. 3 Younge & J., 19.)

Ejectment to recover certain property leased by the corporation to the defendant. One of the burgesses, after releasing his interest in the property in question, was admitted to prove the notice to quit. The plaintiff had a verdict and the defendant obtained a rule nisi to set it aside.[89]

GARROW, B. This case depends entirely upon the question whether the evidence of Tildesley was that of a person who was a competent witness, which question is disposed of by a simple statement of facts. If the corporation obtain a verdict, they will thereby be entitled to certain property, which, added to the general stock of the corporation, will become a fund distributable amongst the members of the corporation, of which the witness is one. In that view of the case, therefore, he would clearly be disqualified, because his evidence tends to increase a fund in which he has a direct interest. But it may be said he has released all claim to this specific property. It must be admitted, without reference to this property, that he is interested in the general funds of the corporation, and if that be so, there is a second mode in which that interest may be affected, viz. by decreasing that general fund by the amount of the costs, which must come out

[88] See, also, Martin v. Horrell, 1 Strange, 647 (1726), a case of an agent proving an overpayment by himself to the defendant in an action by the principal to recover back; Dixon v. Cooper, 3 Wilson, 40 (1769), like principal case, except that the broker had a per cent. commission; Moses v. Boston & M. R. R., 24 N. H. 71, 55 Am. Dec. 222 (1851), where a drayman was held competent to prove delivery to a carrier, though he would have been liable to the plaintiff if he had misdelivered or failed to deliver.

In Theobald v. Tregott, 11 Mod. 261 (1710), in an action by a master against a servant for money collected, the debtor was held incompetent to prove the payment.

[89] Statement condensed and opinion of Hullock, B., omitted.

of that fund in the event of the verdict being found against the corporation. In either view of the case, therefore, he was an incompetent witness, and the consequence will be that the verdict must be set aside, and the rule made absolute.

VAUGHAN, B. I concur in the opinion expressed by my learned Brothers. In the case of Weller v. The Governors of the Foundling Hospital, P. N. P. 153, the witnesses were admitted because they were mere trustees,[40] and had not the least personal interest. That is not the case here, and wherever it is once admitted that a witness has an actual and direct interest in a fund which may be affected by the verdict, he is thereby rendered incompetent.

Rule absolute.

PAULL v. BROWN.

(Nisi Prius, 1806. 6 Esp. 34.)

Trover, for a quantity of household furniture claimed by the plaintiff, as having belonged to the intestate.

To prove property in part of the articles claimed, a witness was called. He was asked on his voir dire, if he was not a creditor of the intestate? and it being answered that he was, Garrow objected to his competency, on the ground that he was coming to increase the estate of the intestate, which was the fund out of which his debt was to be paid. He instanced the case of a commission of bankruptcy, in which in an action by the assignees of a bankrupt, a creditor cannot be admitted as a witness, to prove property belonging to the bankrupt estate.

It was answered by Shepherd, Serjt. That there was no difference in this case, and that wherein the intestate himself was plaintiff, in which latter case it was very clear, there could be no objection, to a man to whom he owed money, and who so was his creditor being called as a witness. The right of the representative was the same: That the case of bankruptcy differed, for there there was a presumed insolvency, so that the witness bettered his situation, and the effect of his evidence was to increase the fund from whence the payment of his debt was to be made. That a creditor, under a bankruptcy, was entitled to a certain share of the sum recovered, which, under an administration, he might not have, as his share of the money recovered might depend on there being no other debts of a higher nature, or the preference of the administrator; besides, too, he might be deemed a party, as the bankrupt's property was by the choice of all the creditors conferred on the assignees, and they brought action only with the consent of all the other creditors, so that they thereby became as parties.

[40] For the case of a trustee without interest as to costs, see Lowe v. Joliffe, 1 Wm. Blackstone, 365 (1762).

MACDONALD, Chief Baron, ruled, that the witness was admissible. It was not distinguishable in principle, from the case put of an action of the party himself. The administrator represented the testatrix herself, and it never was heard of, that a person being a creditor to a party, made him objectionable as a witness, and yet the effect of his testimony was to increase his debtor's ability to pay; such interest was too remote.

In the case of bankruptcy, all the property of the bankrupt belonged to the creditors, though nominally by operation of law vested in the assignees. A creditor therefore came to give evidence for himself. The witness was admitted.

Verdict for the plaintiff.[41]

DOE dem. LORD TEYNHAM v. TYLER.

(Court of Common Pleas, 1830. 6 Bing. 390.)

This ejectment was brought to try the validity of a recovery suffered by the father of the lessor of the plaintiff in 1789.

The lands in question had, by a deed bearing date in 1756, been settled on the father of the lessor of the plaintiff in tail male; remainder among others to Philip Roper, uncle of the lessor of the plaintiff, in tail male.

The objection to the recovery was, that the father of the lessor of the plaintiff, at the time of suffering it, was of unsound mind, or at least so imbecile as to be liable to be practised on.

At the trial before Tindal, C. J., Middlesex sittings after Michaelmas term, the evidence of Philip Roper, the uncle of the lessor of the plaintiff, and ninety years old, was tendered, and rejected on the ground that the witness had an interest in the result of the cause, although the lessor of the plaintiff had sons and grandsons.

A verdict having been given for the defendant,

Jones, Serjt., moved for a new trial, on the ground of the exclusion of this evidence, and the admission of other evidence which he alleged ought to have been excluded; but the objections on this latter head are not stated now, as the decision on them was deferred.[42]

TINDAL, C. J. This rule has been moved for on two grounds: first, on the exclusion of evidence which ought to have been admitted; secondly, on the admission of evidence which ought to have been rejected.

The question as to the first ground of exception is this,—Whether the evidence of the remainder-man in tail is admissible on the part of a

[41] So a legatee may be a competent witness for the executor. Nowell v. Davies, 5 B. & Ad. 368 (1833). But not a residuary legatee. Yardley v. Arnold, 10 M. & W. 141 (1842). Nor the creditor of a bankrupt. Shuttleworth v. Bravo, 1 Strange, 507 (1722).

[42] Statement condensed.

prior tenant in tail who has brought ejectment to try the validity of a common recovery, on the ground of the incompetency of the tenant in tail by whom it was suffered; and as to this objection, we are of opinion, both upon principle and on the authority of decided cases, that such evidence is not admissible.

The general rule upon which the incompetency of witnesses is founded, is laid down by Chief Baron Gilbert, in his Law of Evidence, p. 106, in these terms: "The law looks upon a witness as interested, when there is a certain benefit or disadvantage to the witness attending the consequence of the cause one way." Now this benefit may arise to the witness in two cases: First, where he has a direct and immediate benefit from the event of the suit itself; and, secondly, where he may avail himself of the benefit of the verdict in support of his claim in a future action: and where the case falls within the first description, in which the interest is more immediate and direct, there is no occasion to have recourse to the second principle, where the interest is one degree removed.

Cases daily occur in which the witness is rejected upon the first ground. An executor brings an action for a debt due to his testator's estate: the residuary legatee is not an admissible witness. Not because this verdict would be evidence for or against him in any future suit, for he can neither be plaintiff nor defendant in an action relating to this debt; but because he receives an immediate benefit by a verdict for the plaintiff. So, the tenant in possession, in ejectment, could not be called to prove the title of the defendant under whom he claims to hold; nor could the landlord be called to prove the title of the tenant who defended the possession. Nor in ejectment, after a prima facie case is made out against the defendant, could a witness be called to prove himself a real tenant, and the defendant his bailiff; for the verdict and judgment in this very action would have the effect of turning him out of possession immediately.

In all these cases the witness is excluded, not because the verdict would be evidence for or against him in a future action, but on account of the immediate benefit or injury he would receive by the determination of the very cause itself.

Now the present case falls within this principle. If Lord Teynham recovers in this ejectment, he will be in as of his former right. Nothing is better established than that the lessor of the plaintiff, when he recovers in an ejectment, is in, not merely as of the term which he has granted to John Doe, but as of the right and title which he has proved in himself. If he has only a chattel interest, he is in as of that term; but if he has a freehold, he is in as of that freehold; if tenant in tail, he is in as such tenant in tail. (See the judgment of Lord Mansfield in Taylor v. Horde, 1 Burr. 114.)

Lord Teynham, therefore, if he should have recovered a verdict, would have been tenant in tail in possession under the settlement

of 1756. But, by the very same verdict, Philip Roper, the proposed witness, would have acquired a vested interest in the remainder in tail under the same settlement.

The seisin of the tenant in tail in possession is the seisin of the remainder-man; the estate in possession, and the estate in remainder being for this purpose but one estate. It seems, therefore, to us, that, upon principle, the witness had a direct and immediate interest in procuring a verdict which should have the effect of revesting his own remainder in tail. And, upon authority, besides the cases which have been referred to in 1 Salk. 283, and 1 Ld. Raym. 730, there is an opinion of Lord Chief Justice Lee in the case of Commins v. The Mayor of Oakhampton, Say. Rep. 45: "The person to whom the remainder of an estate is, after the determination of a particular estate, limited by a will, cannot be admitted to prove the will; because he has, although it be remote, a vested interest in the matter in question."

We therefore think, that this rule to show cause ought not to be granted upon the first ground of objection; but with respect to the second, without giving any opinion upon the result of the rule, we grant a rule to show cause.

Rule granted upon the second objection.

DOE dem. NIGHTINGALE v. MAISEY.

(Court of King's Bench, 1830. 1 Barn. & Adol. 439.)

Ejectment for a cottage and land. At the trial before Park, J., at the Summer assizes for the county of Gloucester, it appeared that the lessor of the plaintiff had been in possession of the premises under a conveyance to him from Elizabeth Maisey, made about three years ago, but the defendant had obtained possession thereof from a tenant of the lessor of the plaintiff. Elizabeth Maisey had been in possession of the premises for upwards of thirty years, when she sold them for a valuable consideration to Nightingale. The defendant proved that his grandfather (whom his father survived) was possessed of the premises, having enclosed them on the side of a road, and gave them up to his daughter Elizabeth Maisey, upon a family agreement that she was to have them for her life for taking care of them; or, in other words, that Elizabeth Maisey never had any adverse possession. To prove that the defendant was heir to his father, and also to prove that the possession of Elizabeth Maisey was under the family arrangement, the defendant called his mother. It was objected by the plaintiff, that she was incompetent, because she came to prove a seisin in law in her husband, and thus her evidence would go towards es-

tablishing that she was entitled to dower. The learned Judge overruled the objection, and received the evidence, and the defendant had a verdict.

Godson, on a former day in this term, moved for a new trial. The witness was incompetent, inasmuch as she by her own evidence alone proved a seisin in law in her husband. The title of the lessor of the plaintiff being one of possession under a conveyance from Elizabeth Maisey, if it remained uncontradicted there never could be a time at which the witness's husband was seised in law of the premises. She at least assisted her case for dower by her evidence; for if the defendant continued in possession, she had only to prove that he took by descent, and her case would be complete; whereas, if her evidence were rejected, and the lessor of the plaintiff were in possession, then she would be bound to prove aliunde, that her husband was ever seised in law, and it did not appear that any such evidence was in existence.

LORD TENTERDEN, C. J., now delivered the judgment of the Court. The question in this case was, whether the mother of the defendant was an incompetent witness, inasmuch as she would be entitled to dower if her husband was seised. On consideration, we are all of opinion she was competent. She had no interest, of which the law as to evidence takes notice, in the event of the suit. The judgment in the action would be no evidence of the husband's seisin. If he was seised, she is equally entitled to dower, whether the premises be in the hands of the defendant or the lessor of the plaintiff.

Rule refused.[43]

(B) Under Modern Statutes

UNITED STATES COMPILED STATUTES 1913.

§ 1464.[44] (R. S. § 858, as amended, Act June 29, 1906, c. 3608.) *Competency of Witnesses in Civil Cases to be Determined by Laws of State.*—The competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the state or territory in which the court is held.

[43] See, also, Doe v. Clarke, 3 Bingham, New Cases, 429 (1832).

[44] This section, as enacted in the Revised Statutes, was as follows: "In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: Provided, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the state in which

§ 1465.[45] (Act March 16, 1878, c. 37.) *Competency as Witnesses of Defendants in Criminal Cases.*—In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors, in the United States courts, territorial courts, and courts-martial, and courts of inquiry, in any state or territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him. (20 Stat. 30.)

NEW YORK CODE OF CIVIL PROCEDURE.[46]

§ 828. *No Witness to be Excluded by Reason of Interest, etc.*—Except as otherwise specially prescribed in this title, a person shall not be excluded or excused from being a witness, by reason of his or her interest in the event of an action or special proceeding; or because he or she is a party thereto; or the husband or wife of a party thereto, or of a person in whose behalf an action or special proceeding is brought, prosecuted, opposed, or defended.

§ 829. [Am'd 1877, 1881.] *When Party, etc., Cannot be Examined.*—Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested per-

the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty."

It was amended to read as set forth here by Act June 29, 1906, c. 3608, cited above.

All persons within the jurisdiction of the United States are entitled to the same right to give evidence as are white citizens, by Rev. St. § 1977.

[45] Taney, C. J., in United States v. Reid, 12 How. 361, 13 L. Ed. 1023 (1851): "Nor is there any act of Congress prescribing in express words the rule by which the courts of the United States are to be governed, in the admission of testimony in criminal cases. But we think it may be found with sufficient certainty, not indeed in direct terms, but by necessary implication, in the acts of 1789 and 1790, establishing the courts of the United States, and providing for the punishment of certain offenses. And the law by which, in the opinion of this court, the admissibility of testimony in criminal cases must be determined, is the law of the state, as it was when the courts of the United States were established by the Judiciary Act of 1789. The subject is a grave one, and it is therefore proper that the court should state fully the grounds of its decision."

In Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429 (1892), a similar rule was applied where the question arose in one of the states admitted at a later period. But see Rosen v. United States, 245 U. S. 467, 38 Sup. Ct. 148, 62 L. Ed. 406 (1918), ante, page 148.

[46] The statutes of the various states differ more or less in wording and in detail, so that it is impracticable to attempt any extensive comparison. The cases following in this subsection are merely intended to illustrate some of the main features. The student must necessarily be left to work out the exact rule in any given jurisdiction, from a construction of the particular statute involved.—*Editor.*

son derives his interest or title, by assignment or otherwise shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor, administrator, or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic, except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication. A person shall not be deemed interested for the purpose of this section, by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding, or interested in the event thereof.

PETERSON v. MERCHANTS' ELEVATOR CO.

(Supreme Court of Minnesota, 1910. 111 Minn. 105, 126 N. W. 534, 27 L. R. A. [N. S.] 816, 137 Am. St. Rep. 537.)

BROWN, J.[47] Defendant was engaged in operating a grain elevator in the city of Minneapolis. Plaintiff's intestate was in its employ as a laborer, and was killed while in the discharge of his duties by coming in contact with an uncovered dangerous machine, and this action was prosecuted by his personal representative in behalf of the next of kin. A verdict was returned for plaintiff, and defendant appealed from an order denying its alternative motion for judgment notwithstanding the verdict or a new trial. * * *

Defendant called as a witness one of its stockholders, J. C. Hensey, superintendent in charge of the elevator, and elicited from him the fact that some time prior to the accident he had a conversation with decedent in reference to the motor and the uncovered cogwheels, and he was asked the question, "What was the conversation?" Upon the fact appearing that the witness was a stockholder in defendant corporation, the court sustained plaintiff's objection to the question, based upon section 4663, Rev. Laws 1905, which prohibits the giving in evidence by a party or person interested in an action a conversation with a deceased party or person. The subject was referred to again later in the examination of the witness, and he was asked whether he said anything to decedent about oiling the motor, and the court again sustained plaintiff's objection. Again, at the close of the trial, counsel interrogated the witness further in reference to a conversation with decedent, the last question being, "But you did have some talk with him after the hood had been taken off the gear?" To which the witness

[47] Parts of opinion omitted.

answered in the affirmative. Upon objection being made to further evidence along that line, counsel offered to show that the witness warned decedent of the dangers of working about the motor when the cover was off and instructed him how safely to oil it. The court sustained plaintiff's objection, and the ruling is assigned as error.

The fact that the witness was a stockholder in the corporation was not disputed, and the question presented is whether he came within the provisions of the statute respecting the admissions of evidence of conversations with a deceased person. The question does not require extended discussion. That the witness was an interested party, within the meaning of the statute, cannot be seriously questioned. He was a stockholder and pecuniarily interested in the result of the action—a direct, and not a remote or speculative, interest. The case of Perine v. Grand Lodge, 48 Minn. 82, 50 N. W. 1022, is not in point. The defendant in that case was a mutual benefit association, and the person called as a witness for the purpose of giving a conversation with a deceased member, upon whose certificate of membership the action was founded, was not a member of the association at the time the conversation took place, and, though he was such when called as a witness, he did not become a member until after the death of the certificate holder, and not until the rights of the parties thereunder had become fully vested. His interest in the result of that action was extremely remote, and not such as to come within the meaning of the statute.

We need not stop to inquire whether in an action of this kind a stockholder of a corporation, who is also its superintendent and manager, may be heard to testify to the fact that in his capacity as manager or superintendent he warned an employé, since dead, of the dangers of his employment, and which dangers were the cause of his death. Robbins v. Legg, 80 Minn. 419, 83 N. W. 379. Such is not the question here presented. The examination of the witness upon this subject clearly indicated to the court below that the warning, if any was given, was the result of a conversation with decedent. The witness, on the occasions when the subject was under inquiry, was asked whether he had a conversation or talk with decedent, and, upon an affirmative answer being given, finally made the offer to show the warning; and though at one point in the examination of the witness counsel stated that he did not intend to show a conversation, it is clear that the "warning" was in fact a part of a conversation and was properly excluded. * * *

Order affirmed.[48]

[48] Accord: Albers Com. Co. v. Sessel, 193 Ill. 153, 61 N. E. 1075 (1901); Cronin v. Supreme Council Royal League, 199 Ill. 228, 65 N. E. 323, 93 Am. St. Rep. 127 (1902), member of a mutual benefit society.

Compare Talbot v. Laubheim, 188 N. Y. 421, 81 N. E. 163 (1907), where the remote interest of a corporation not a party did not disqualify an officer of such corporation.

MERRIMAN v. WICKERSHAM.

(Supreme Court of California, 1904. 141 Cal. 567, 75 Pac. 180.)

HENSHAW, J.[49] Plaintiff is the assignee of the Burnham & Marsh Company, a corporation, real estate brokers. The action is for commissions due upon an alleged sale for F. A. Wickersham. Suit was commenced against Wickersham in his lifetime. He suffered default. Plaintiff afterwards consented that his default might be set aside. His death following, his executrix was substituted as defendant. * * *

The Burnham & Marsh Company is a corporation. Mr. Marsh, vice president and one of its principal stockholders, was allowed to testify to matters and facts in issue. It is contended that the evidence was improperly admitted, in violation of section 1880 of the Code of Civil Procedure, which provides that "the following persons cannot be witnesses: * * * Parties, or assignors[50] of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator, upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person." At common law interest disqualified any person from being a witness. That rule has been modified by statute. In this state interest is no longer a disqualification, and the disqualifications are only such as the law imposes. Code Civ. Proc. § 1879.

An examination of the authorities from other states will disclose that their decisions rest upon the wordings of their statutes, but that generally, where interest in the litigation or its outcome has ceased to disqualify, officers and directors of corporations are not considered to be parties within the meaning of the law. In example, the statute of Maryland (Pub. Gen. Laws, art. 35, § 2) limits the disability to the "party" to a cause of action or contract, and it is held that a salesman of a corporation, who is also a director and stockholder, is not a party, within the meaning of the law, so as to be incompetent to testify in an action by the company against the other party, who is insane or dead. Flach v. Gottschalk Co., 88 Md. 368, 41 Atl. 908, 42 L. R. A. 745, 71 Am. St. Rep. 418.

To the contrary, the Michigan law expressly forbids "any officer or agent of a corporation" to testify at all in relation to matters which, if true, must have been equally within the knowledge of such deceased person. Howell's Ann. St. Mich. § 7545. The Supreme Court of Michigan, in refusing to extend the rule to agents of partnerships, said: "It is conceded that this testimony does not come directly with-

[49] Parts of opinion omitted.

[50] As to the competency of an assignor when not expressly disqualified by statute, see Clendennin v. Clancy, 82 N. J. Law, 418, 81 Atl. 750, 42 L. R. A. (N. S.) 315 (1911), where the cases are collected.

in the wording of the statute, but it is said there is the same reason for holding the agent of a partnership disqualified from testifying that there is in holding the agent of a corporation. This is an argument which should be directed to the legislative rather than to the judicial department of government. * * * The inhibition has been put upon agents of corporations, and has not been put upon agents of partnerships. We cannot, by construction, put into the statute what the Legislature has not seen fit to put into it." Demary v. Burtenshaws' Estate, 131 Mich. 329, 91 N. W. 648.

In New York the statute provides that against the executor, administrator, etc., "no party or person interested in the event, or person from, through, or under whom such party or interested person derives his interest or title shall be examined as a witness in his own behalf or interest." This is followed by the exception that a person shall not be deemed interested by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding or interested in the event thereof. Ann. Code Civ. Proc. N. Y. § 829. Here it is apparent that the interest of the witness is made a disqualification, and it is of course held that stockholders and officers of corporations other than banking corporations are under disqualification. Keller v. West Bradley Mfg. Co., 39 Hun (N. Y.) 348.

To like effect is the statute of Illinois, which declares that no party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify under the given circumstances. Under this statute it is held that stockholders are interested, within the meaning of the section, and are incompetent to testify against the representatives of the deceased party. Albers Commission Co. v. Sessel, 193 Ill. 153, 61 N. E. 1075. The law of Missouri disqualifies "parties to the contract or cause of action," and it is held that a stockholder, even though an officer of the bank, is not disqualified by reason of his relation to the corporation when he is not actually one of the parties to the making of the contract in the interest of the bank.

Our own statute, it will be observed, is broader than any of these. It neither disqualifies parties to a contract nor persons in interest, but only parties to the action (Code Civ. Proc. §§ 1879, 1880); and thus it is that in City Savings Bank v. Enos, 135 Cal. 167, 67 Pac. 52, it has been held that one who is cashier and at the same time a stockholder of a bank was not disqualified, it being said: "To hold that the statute disqualifies all persons from testifying who are officers or stockholders of a corporation would be equivalent to materially amending the statute by judicial interpretation." It is concluded, therefore, that our statute does not exclude from testifying a stockholder of a corporation, whether he be but a stockholder, or whether, in addition thereto, he be a director or officer thereof.

The examination of the witness Page undoubtedly discloses that he had an interest in the outcome of the litigation, but that fact did not

bring his testimony within the inhibition of the law. It was not established that he was a person "in whose behalf the action was prosecuted," and his testimony was therefore properly admitted.

For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

WHITHED v. WOOD et al.

(Supreme Judicial Court of Massachusetts, 1870. 103 Mass. 563.)

Contract on a promissory note made by James M. Wood, one of the defendants, under date of July 25, 1866, for $400 payable, with interest, four months from date, to Henry W. Dresser, the other defendant, or his order, and indorsed in blank by Dresser. Writ dated March 15, 1867. Trial, and verdict for the plaintiff, in the superior court, before Rockwell, J., who allowed a bill of exceptions of which the following is the material part:

"Dresser did not defend the action, but was defaulted at the first term, and died after said first term and before the trial. Wood defended the action, and, being a witness at the trial, called by his counsel, admitted that the signature to the note was his, but offered to prove, by his own testimony, that the words, 'with interest,' were added to the note by Dresser after it was signed and delivered to Dresser and without the consent or knowledge of Wood, and that the note including the words so added was in the handwriting of Dresser. To this testimony the plaintiff's counsel objected, and the judge excluded the evidence and refused to admit the testimony thus offered, and to these rulings Wood excepted."

GRAY, J. The contract in issue and on trial was a promissory note made by Wood to Dresser, and by him indorsed to the plaintiff. Dresser, one of the original parties to that contract, was dead, and Wood, the other party, was therefore rightly not permitted to testify in his own favor. Gen. St. 1860, c. 131, § 14;[51] Byrne v. McDonald, 1 Allen, 293.

[51] Section 14, c. 131, Gen. St. Mass. 1860: "Parties in civil actions and proceedings, including probate and insolvency proceedings, suits in equity, and divorce suits, (except those in which a divorce is sought on the ground of alleged adultery of either party,) shall be admitted as competent witnesses for themselves or any other party; and in any such case in which the wife is a party or one of the parties, she and her husband shall be competent witnesses for and against each other, but they shall not be allowed to testify as to private conversations with each other: provided, that where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party shall not be admitted to testify in his own favor; and where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify, except as to such acts and contracts

The bill of exceptions does not show any waiver of the objection to his competency; for it is at least ambiguous upon the point whether his admission of his signature was not made as party and not as witness, and the objection taken before he had begun to testify.

Exceptions overruled.

BANKING HOUSE OF WILCOXSON & CO. v. ROOD.

(Supreme Court of Missouri, 1896. 132 Mo. 256, 33 S. W. 816.)

MACFARLANE, J.[52] Plaintiff, a banking corporation, presented to the probate court for allowance against the estate of N. P. Rood, deceased, a note for $515. On appeal to the circuit court, plaintiff recovered judgment, and defendant appealed. On the trial, James M. Wilcoxson and Harrison Wilcoxson, both stockholders in the bank,—the former its cashier, and the latter its president,—were permitted to testify as witnesses. Defendant objected to their competency, on the ground that they were both interested in the result of the suit, and Rood, the other party to the note, was dead. These witnesses testified that the name signed on the note was the proper signature of deceased, and also that they saw him write it. In the opinion of the Kansas City court of appeals, to which the appeal was first taken, these witnesses were incompetent to testify to any fact, on account of their interest; but one of the judges being of the opinion that the decision is in conflict with the decision in the case of Bates v. Forcht, 89 Mo. 121, 1 S. W. 120, the appeal was certified to this court.

There can be no doubt that these witnesses would have been incompetent under the general rule at common law. The rule is correctly given in the opinion of the court of appeals, which is sustained by the authorities therein cited. * * * A class of cases excepted out of the general rule, on the ground of convenience and necessity, "is that of agents, carriers, factors, brokers, and other servants, when offered to prove the making of contracts, the receipt or payment of money, the receipt or delivery of goods, and other acts done in the scope of their employment." 1 Greenl. Ev. § 416. Under this exception, the opinion in the Bates Case, supra, includes a cashier and teller of a bank, and holds that at common law they were competent witnesses "to charge the defendant on a promissory note, or for money lent or unpaid, or obtained from the officer without the security he should have received." It is questionable, as seen, whether the exemption would apply at common law in case the cashier was also a stockholder in the corporation, and directly interested in the result of the litiga-

as have been done or made since the probate of the will, or the appointment of the administrator."

The proviso in this statute appears to have served as a model for several of the Western states; e. g., Rev. St. Mo. 1909, § 6354.

[52] Part of opinion omitted.

tion. "But," says the court, "whatever the rule at common law as to the interest of a witness disqualifying him, it is superseded by section 4010, Rev. St. 1879 (now section 8918, Rev. St. 1889), which declares that no person shall be disqualified as a witness by reason of his interest in the event of the suit, as a party or otherwise. The rejected evidence was clearly competent under our statute, if not under the rule at common law." As the witness in the Bates Case was not only the cashier of the bank, but also a stockholder therein, it is clear that the opinion of the court of appeals is directly in conflict with that decision.

But counsel challenge the correctness of the decision in Bates v. Forcht, and claim that it is not consistent with subsequent decisions of this court. The statute declares that no person shall be disqualified as a witness in any civil suit by reason of his interest in the event of the same, as a party or otherwise: "provided, that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead * * * the other party to such contract or cause of action shall not be admitted to testify." This court has ever undertaken to conform its decisions to the spirit, rather than to the strict letter, of this statute. Orr v. Rode, 101 Mo. 398, 13 S. W. 1066. The primary object and purpose of the law, evidently, was to remove the disabilities by which parties to the record and parties interested were at common law rendered incompetent to testify. The exception was intended to prevent the injustice that would arise in permitting one party to the contract or cause of action to testify when the lips of the other are sealed in death. This equitable construction has been applied in a variety of cases. Stanton v. Ryan, 41 Mo. 510; Williams v. Edwards, 94 Mo. 447, 7 S. W. 429; Orr v. Rode, supra; Leach v. McFadden, 110 Mo. 587, 19 S. W. 947; Bank v. Payne, 111 Mo. 296, 20 S. W. 41; Miller v. Wilson, 126 Mo. 54, 28 S. W. 640.

It will be observed that the proviso does not exclude the testimony of one party in interest when the other party in interest is dead, but confines the exclusion to a party to the contract or cause of action, while the body of the statute removes the disability of a person caused by his interest in the suit. The exclusion of the proviso is not as broad as the inclusion of the body of the act. Hence an examination of the cases will show that a "party to the contract" has been construed to mean the person who negotiated [58] the contract, rather than

[53] For the contrary view, that the negotiating agent of a corporation is not a party to the contract within the meaning of the statute, see Flach v. Gottschalk Co., 88 Md. 368, 41 Atl. 908, 42 L. R. A. 745, 71 Am. St. Rep. 418 (1898).

In Missouri the negotiating agent of a natural person is not disqualified by the death of the other party. Clark v. Thias, 173 Mo. 628, 73 S. W. 616 (1903).

The death of the negotiating agent, however, disqualifies the adverse party as to transactions between them. Wendover v. Baker, 121 Mo. 273,

the person in whose name and interest it was made. Thus, though one party in interest be dead, the other party will be a competent witness, if the contract in issue was negotiated by an agent of deceased who is living at the time of the trial. Miller v. Wilson, supra. If both parties to a contract be living, one of them will not be permitted to testify, if the agent who acted for the other is dead. Williams v. Edwards, supra. If one member of a partnership be dead, the other party to a partnership contract would only be excluded from testifying to transactions with the deceased partner. Stanton v. Ryan, supra. A principal in a bond, though not a party to the suit against his sureties, is not a competent witness to prove payments to an agent of plaintiff who is dead. Leach v. McFadden, 110 Mo. 588, 19 S. W. 947. It will be seen from these decisions that the statements or dicta found in some of the decisions, that when one party to a contract or cause of action is dead the common law is in full force as to the competency of the survivor as a witness in his own behalf, is not strictly correct under all circumstances. His interest does not exclude him as at common law. He is excluded because he and deceased are both parties to the contract or cause of action.

The declaration in the Bates Case, therefore, that no person is disqualified as a witness by reason of his interest in the event of the suit, under the construction given the statute by this court, is not open to the criticism counsel makes against it. The witnesses in that case testified that the name written upon the note was the signature of deceased. The testimony was to an independent fact, which was in no manner connected with the transaction upon which the attempt was made to charge the firm of which deceased was a member. In a case somewhat analogous, this court, speaking through Brace, J., said: "They [the witnesses who were interested in the suit] were permitted to testify merely to a physical fact, the existence of which was independent of any and all contracts between the parties,—a fact not peculiarly within the knowledge of the defendants and any agent of the bank, arising from a transaction between them and such agent, but of which they obtained cognizance by their sense of sight, and which was open to the cognizance of any other witness to whom an opportunity was afforded, at the time, of inspecting the note in suit, and concerning which one of the plaintiff's officers, who had such opportunity, testified, and but for whose evidence as to such fact the plain-

25 S. W. 918 (1894). Likewise the death of the negotiating agent disqualifies the surviving agent of a corporation as to transactions between them. Ham & Ham Lead & Zinc Inv. Co. v. Catherine Lead Co., 251 Mo. 721, 158 S. W. 369 (1913).

In actions for death, the statute is not construed as disqualifying the survivor. Entwhistle v. Feighner, 60 Mo. 214 (1875). But the death of a servant for whose tort the master is sued disqualifies the plaintiff. Leavea v. Southern Ry. Co., 266 Mo. 151, 181 S. W. 7, L. R. A. 1916D, 810, Ann. Cas. 1918B, 97 (1915).

tiff would have made out no case against the defendant." Bank v. Payne, supra.

Our conclusion, therefore, is that the stockholders of a corporation are not incompetent, on account of interest, to testify as witnesses in a case involving a contract with the corporation, though the other party to the contract be at the time dead. His competency depends upon the character of the evidence offered. He will be incompetent to testify in regard to transactions and negotiations between himself, as agent of the corporation, and deceased. In regard to independent facts, he will be competent. It follows that the witnesses were competent to testify to the genuineness of the signature, from their knowledge of it or as experts. Whether they were competent to testify that they saw deceased sign the note, would depend upon circumstances. Signing the note by deceased was a part of the transaction which resulted in the contract in issue, and the agent of the corporation who conducted the negotiations, whether a stockholder or not, could no more testify to that fact than to any other fact connected with the negotiation. It does not expressly appear with which officer of the bank deceased dealt, in making the contract which is the basis of this suit. The circumstances are sufficient to admit of the inference that it was with the cashier. This witness only testified in chief that the name written on the note was the signature of deceased. The court refused to permit him to testify that the note was a renewal of one then held by the bank. The evidence of the witness that he saw deceased sign the note was called out by a direct question put to him on cross-examination. Defendant is not in a situation to complain of the answer he himself invoked. Especially is this so as no exception was taken to the answer. It does not appear what, if any, part Harrison Wilcoxson took in the negotiations which resulted in making the note in suit. He was an officer of the corporation, and was present in the bank at the time his testimony tends to prove the note was made. Presumably, he had power to make the contract. His competency depends upon the part he took in making it. As the trial court held him competent for all purposes, prejudicial error may have been committed.

We think, therefore, that the case should be retried, in accordance with the views herein expressed. The judgment of the circuit court is reversed, and the cause remanded.

HURLBUT v. MEEKER.

(Supreme Court of Illinois, 1882. 104 Ill. 541.)

CRAIG, J.[54] This was an action brought by Samuel E. Hurlbut, for the use of Eben Higgins, against Elizabeth Meeker, executrix of the estate of Joseph Meeker, deceased, to recover the amount due on a promissory note executed June 23, 1865, by Hurlbut Bros. & Co., payable to the order of S. E. Hurlbut, amount $405.40, due on demand, after date. It was claimed by the plaintiff that Joseph Meeker was a member of the firm of Hurlbut Bros. & Co. at the time the note was executed, and hence his liability as one of the makers of the instrument. On the trial of the cause in the circuit court, before a jury, a judgment was rendered in favor of the defendant. This judgment, on appeal, was affirmed in the Appellate Court.

As to the controverted questions of fact involved on the trial in the circuit court we have no concern. The affirmance of the judgment of the circuit court by the Appellate Court was a final settlement of these matters in favor of the defendant, which cannot be reviewed here.

On the trial of the cause in the circuit court, appellant called J. B. Hurlbut as a witness, and also offered the deposition of D. N. Hurlbut as evidence. The offered evidence having been objected to, on the ground that the two witnesses were both members of the firm of Hurlbut Bros. & Co., and hence interested in the result of the suit, the court sustained the objection, and refused to allow the witness to testify or the deposition to be read to the jury, and this decision is assigned as error. Under section 2, chapter 51, Rev. Stat. 1874, a party to a civil action, or person directly interested in the event thereof, is not a competent witness where the adverse party sues or defends as executor, administrator, heir, legatee or devisee of any deceased person, with certain specified exceptions named in the act, in none of which does the present case fall. Under this statute, we are satisfied that neither J. D. Hurlbut nor D. N. Hurlbut was a competent witness for the plaintiff. They were not made defendants in the action, but were directly interested in the event of the suit. They were members of the firm of Hurlbut Bros. & Co. at the time the note was executed, and were makers of the note in suit, and hence had a direct interest in the result of the pending action. Langley v. Dodsworth, Ex'x, 81 Ill. 86, is a case in point, and the same principle which governed the decision of that case must control here.

It is also said the witness J. B. Hurlbut was called by defendant, and examined at length by her, and plaintiff was deprived of the right to cross-examine the witness by the court. If this statement was correct the decision of the court would clearly be erroneous; but an ex-

[54] Part of opinion omitted.

amination of the record will show that the witness was called by the defendant simply to prove a handwriting, and the court confined the cross-examination, as it should have done, to the examination in chief. When a witness is called to prove a single fact, the opposite party, under the guise of a cross-examination, can not enter upon a general examination of the witness, but the cross-examination must be confined to the examination in chief. This rule, we apprehend, is well established by the authorities. * * *

As no substantial error appears in the record, the judgment will be affirmed.

Judgment affirmed.[55]

CLIFT v. MOSES et al.

(Court of Appeals of New York, 1889. 112 N. Y. 426, 20 N. E. 392.)

Appeal from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 20, 1886, which affirmed a judgment in favor of plaintiff entered upon a verdict. (Reported below, 44 Hun, 312.)

This action was brought by plaintiff, as survivor of the firm of C. Pardee & Co., upon four promissory notes made by the firm of Dodge & Moses, composed of defendants. Defendant Moses, who alone appeared and answered, among other things, alleged payment of the notes.

The facts, so far as material, are stated in the opinion.

ANDREWS, J.[56] * * * The theory of the defense, therefore, as developed by the testimony of Mrs. Moses, was that the notes were paid by the transfer by Moses to Pardee of his interest in the dredge property, and that they were delivered up to him by Pardee in consideration of such transfer. The defendant Moses was called as a witness in his own behalf, immediately after the conclusion of his wife's testimony. He was first interrogated directly as to transactions between himself and Mr. Pardee, and the questions were excluded, and the correctness of those rulings is not now assailed. These were followed by a series of questions, put in a great variety of forms, of

[55] Accord: Charlotte Oil & Fertilizer Co. v. Rippy, 124 N. C. 643, 32 S. E. 980 (1899), in which there is an extended discussion of the interest of the witness in this class of cases.

The bare possibility of an action over against the witness is not sufficient to disqualify. Franklin v. Kidd, 219 N. Y. 409, 114 N. E. 839 (1916).

The modern cases do not appear to recognize the liability of a servant to his master as sufficient to disqualify him as a witness in an action by the representative of a deceased person against the master for the act of such servant. Nearpass v. Gilman, 104 N. Y. 506, 10 N. E. 894 (1887); Feifl v. Chicago City Ry. Co., 211 Ill. 279, 71 N. E. 991 (1904); O'Toole v. Faulkner, 34 Wash. 371, 75 Pac. 975 (1904). But in such cases, if the servant is joined with the master, he is disqualified as a party. Sullivan v. Corn Products Refining Co., 245 Ill. 9, 91 N. E. 643 (1910).

[56] Part of opinion omitted.

which the following are samples: "Have you ever had the notes in suit in your possession?" "Did you see the notes in suit in November or December, 1875?" "Did you ever see the notes in the possession of your wife when Mr. Pardee was not present, or in your wife's hands when Mr. Pardee was not present?"

The questions were objected to as inadmissible under section 829 of the Code, and were excluded, and, we think, properly. The plaintiff was the survivor of a deceased person within section 829. Green v. Edick, 56 N. Y. 613. The defendant Moses could not, therefore, be examined as a witness in his own behalf or interest "concerning a personal transaction or communication" between himself and Pardee, unless the plaintiff had been examined in his own interest "concerning the same transaction or communication." Section 829. The primary question is whether the evidence sought to be elicited by the questions put to Moses, touching the possession of the notes prior to Pardee's death, was evidence concerning a personal transaction between the witness and Pardee. The evidence was very material upon the issue of payment. If the notes were in the possession of Moses prior to Pardee's death, the presumption of payment would be very strong, and if he saw them in the possession of his wife, in 1875, or 1876, or subsequently during Pardee's life-time, it would be a strong circumstance in corroboration of her testimony.

The questions do not on their face call for a disclosure of a personal transaction of the witness with Pardee, and if it be the true construction of section 829, that a party may be a witness against the representative of a deceased party as to any fact which is not a narrative of an occurrence between the witness and the deceased, or if any fact may be proved by the survivor which does not involve on its face a direct statement of a transaction or communication between himself and the deceased, then the evidence of Moses was improperly excluded. But this literal construction of the section has not been adopted by the courts. It has been held with general uniformity that the section prohibits, not only direct testimony of the survivor that a personal transaction did or did not take place, and what did or did not occur between the parties, but also every attempt by indirection to prove the same thing, as by negativing the doing of a particular thing by any other person than the deceased, or by disconnecting a particular fact from its surroundings, and testifying to what on its face may seem an independent fact, when in truth it had its origin in, or directly resulted from, a personal transaction. It may be too broad to say that where the ultimate fact cannot be proved under this section by a witness, he cannot testify to any of a series of facts from which the ultimate fact may be inferred; but if there is introduced into this statement the qualification that he cannot testify as to any of the subsidiary facts which originated in a personal transaction with the deceased, or which proceeded from such transaction as a cause, the statement so qualified may be substantially correct.

Reference to a few of the decided cases will illustrate the general rule of construction to which we have adverted. In Grey v. Grey, supra [47 N. Y. 552], the action was by an administrator on a note made by the son of the intestate, the defendant in the action. The note was in possession of the son, who claimed that it had been delivered to him by his father before his death, and he was permitted to prove this by his own testimony, under objection, and also to testify that he received it from no one else. The court held that the objection was well taken, Peckham, J., saying: "The witness was incompetent to testify that he received it from his father. If he could not testify to that directly, he was equally incompetent to prove it indirectly by stating in substance that he received it from no one else." In Koehler v. Adler, 91 N. Y. 657, the question was whether a check given by the plaintiff to the defendant's intestate was a personal transaction between them, or a transaction in which the plaintiff acted for the Stonewall Oil Company. The plaintiff offered himself as a witness on the trial, and was asked by his counsel whether the check had anything to do with the affairs of the oil company. The question was objected to under section 839, and excluded. This court sustained the ruling on the ground that it was an indirect attempt to show that the check was a personal transaction between the plaintiff and the intestate. * * *

To permit Moses to testify to his possession of the notes prior to Pardee's death, or that he saw them in his wife's hands, was equivalent, under the circumstances, to permitting him to testify that he received the notes from Pardee, and, as he could not be permitted to testify directly to that fact, he was equally incompetent to testify to a possession which was the inseparable incident and result of a personal transaction. The statute cannot be evaded by framing a question which on its face relates to an independent fact, when it is disclosed by other evidence that the fact had its origin in, and directly resulted from, a personal transaction. * * *

Affirmed.[57]

[57] Compare Pinney v. Orth, 88 N. Y. 451 (1882), that a survivor might testify that a third person was not present. For a collection of the cases, see Blount v. Blount, 158 Ala. 242, 48 South. 581, 21 L. R. A. (N. S.) 755, 17 Ann. Cas. 392 (1909).

See Griswold v. Hart, 205 N. Y. 384, 98 N. E. 918, 42 L. R. A. (N. S.) 320, Ann. Cas. 1913E, 790 (1912), that a survivor cannot testify to a conversation by the deceased, though witness took no part in it. For a collection of cases on this latter point, see notes to Griswold v. Hart, 42 L. R. A. (N. S.) 320 (1912), and Wall v. Wall, 45 L. R. A. (N. S.) 583 (1913). See, also, Helbig v. Citizens' Ins. Co., 234 Ill. 251, 84 N. E. 897 (1908).

IV. MARITAL RELATIONSHIP [58]

MARY GRIGGS' CASE.

(Court of King's Bench, 1660. T. Raym. 1.)

Mary Griggs was indicted upon the statute of 1 Jac. 1, cap. 11, for that she the 28th of February, 1653, was married to one Nicholas Coats, and that she afterwards, viz. the 10th of October, 1659, the first husband being then alive, married Edward Cage, &c. Upon not guilty pleaded, the first husband was produced at the trial as a witness to prove the first marriage; but the Court totally refused to admit of his testimony, and said, that a wife could not be admitted to give evidence against her husband, nor the husband against his wife in any case, excepting treason, because it might occasion implacable dissention, according to 1 Inst. 6 b. And they denied the Lord Audley's Case in Hutton, 116, to be law; so the prosecutor having no other considerable witness, the jury brought in the prisoner not guilty.

ANONYMOUS.

(Court of Queen's Bench, 1710. 11 Mod. 224.)

In an action of assault and battery brought by the husband against the defendant for an intent to ravish his wife, she was admitted a witness.

HOLT, Chief Justice, said, it was because the wife cannot give any consent, though it be not felony.

HOLT, Chief Justice, held, that A. having laid five pounds on the event of the cause, was no objection to the wife of A. being admitted to be a witness, because it shall not be in the power of a third person to disqualify one who otherwise would be a good witness;

And thereupon she was admitted to give evidence.[59]

[58] The rule disqualifying one spouse from testifying against the other is based on an entirely different policy from that which excludes the one as a witness for the other. The latter rule is based on much the same notions as those excluding a party or interested witness from testifying in his own favor, that is, a bias rendering the testimony untrustworthy.

The exclusion of one spouse from testifying against the other is based on a theory of preserving marital harmony and confidence, and so blends into the privilege for certain communications between husband and wife.

The questions of incompetency and of privilege growing out of the marital relation are so closely connected that it appeared advisable to treat them together.—*Editor.*

[59] There are a few other instances where the wife has been admitted on the ground of necessity; e. g., to prove the contents of a lost trunk. Illinois Cent. Ry. Co. v. Taylor, 24 Ill. 323 (1860). Under modern statutes the wife is frequently made competent to testify to transactions carried on by her as agent for the husband.

REX v. AZIRE.

(Court of King's Bench, 1725. 1 Strange, 633.)

On indictment against the husband for an assault upon the wife, the Chief Justice allowed her to be a good witness for the King, and cited Lord Audley's Case, State Trials, vol. 1.[60]

WILLIAMS v. JOHNSON.

(Nisi Prius, 1722. 1 Strange, 504.)

The plaintiff brought this action against the daughter's husband for her wedding cloaths; and the defence was, that the goods were furnished on the credit of the father; and to prove this the mother who was present at the chusing the goods was called to charge her husband, and allowed.

REX v. FREDERICK et al.

(Court of King's Bench, 1725. 2 Strange, 1095.)

The defendants were indicted for a joint assault. And at the trial in Middlesex, it was insisted to examine the wife of the defendant Tracy as a witness for the other defendant: but there having been material evidence given against the husband, and it being a joint trespass, and impossible to separate the cases of the two defendants in the account to be given of the transaction; the Chief Justice refused to let her be examined.[61]

BENTLEY v. COOKE.

(Court of King's Bench, 1784. 3 Doug. 422.)

This was an action of assumpsit by a woman suing as a feme sole tried before Buller, J. After the plaintiff had proved her case, the defendant called one James Ramsden, who proved that he was married to the plaintiff, and produced a copy of the marriage register. On his

[60] But the wife is not competent on a charge of assault on her by the husband prior to the marriage. State v. Evans, 138 Mo. 116, 39 S. W. 462, 60 Am. St. Rep. 549 (1897); Norman v. State, 127 Tenn. 340, 155 S. W. 135, 45 L. R. A. (N. S.) 399 (1913). See, also, State v. Winnett, 48 Wash. 93, 92 Pac. 904 (1907), where, on a similar charge, it was thought that the rule was violated by exhibiting the wife to the jury, who could observe her appearance.

[61] And so in a civil case. Hawksworth v. Shawler, 12 M. & W. 45 (1843). The wife of a defendant who has been convicted is competent against another defendant, though she hopes by her testimony to obtain a pardon for her husband. Rudd's Case, 1 Leach, 135 (1775).

cross-examination, he stated, that he and his wife had been long separated by agreement without deed, and that the plaintiff maintained herself, and allowed him a certain sum yearly. The plaintiff having been nonsuited on the ground of the coverture, a rule for a new trial was obtained on the incompetency of the husband as a witness.

Lee and Peckham showed cause. The husband was competent. He was, in fact, speaking against his own interest, for whatever his wife recovered in that action would become his property. It is said, however, that a husband or wife cannot be a witness for or against each other; but the true reason why the wife is incompetent is that she is supposed to be under restraint. The objection, in this case, cannot be stated, without being answered, "You reject the witness because he is the plaintiff's husband. If he is the plaintiff's husband she cannot maintain the action." The husband was only called to prove the copy of the register, which any person may prove, and the Court will not, under such circumstances, put the plaintiff to the expense of a new trial.

LORD MANSFIELD. There never has been an instance either in a civil or criminal case where the husband or wife has been permitted to be a witness for or against the other, except in case of necessity, and that necessity is not a general necessity, as where no other witness can be had, but a particular necessity, as where, for instance, the wife would otherwise be exposed without remedy to personal injury. I think the husband was not a competent witness.

WILLES and ASHURST, Justices, of the same opinion.

BULLER, Justice. If this case is to be determined by the abstract general rule that husband and wife cannot be witnesses for or against each other, the witness was certainly incompetent. But if that rule be grounded on the principle of interest, then I think the husband was a competent witness. How is the husband's interest affected here? He is interested to disprove the marriage, because he is liable to maintain his wife. He is interested to disprove the marriage on this occasion, because, if the wife should recover, all that she recovers will be his. In proving the marriage, therefore, he is speaking against his own interest. I cannot think that the verdict in this action would be a bar to another action by the husband for the same cause. Suppose that a wife gets possession of her husband's effects, and sells them, shall she recover the price and her husband be barred? I think the true ground in these cases is laid down in Abraham v. Bunn, B. R. 4 Burr, 2251, that the interest to exclude must be an interest in the question. As to the general rule, I find it only in criminal cases, and then where the marriage is admitted. Where the marriage is in question, as here, every motive of interest is certainly the other way, because the husband may hurt himself, but cannot do himself any good. However, if the rule is a general one, to be sure it must prevail.

Rule absolute.

DAVIS v. DINWOODY.

(Court of King's Bench, 1792. 4 Durn. & E. 678.)

This was an action by the executrix of a surviving trustee under a marriage settlement of J. Lewis in 1780, by which certain household goods, mentioned in a schedule annexed to the deed, were settled to the sole and separate use of Lewis's wife; and it was brought against the defendant, sheriff of Monmouthshire, to recover back the value of some of those articles, which had been seized and sold by him under an execution against Lewis. At the trial at Monmouth before Grose, J., J. Lewis was called as a witness to prove the identity of the goods: the defendant's counsel objected to his competency, and it was said that he was interested; to which it was answered that he came to speak against his interest; for that if these goods, which had been seized, were not his own and could not be taken to pay his debt, he would be liable afterwards. Whereas, if they could be taken in execution, his debt would be discharged. The learned judge admitted the witness, but reserved the point.

Adair, Serjt., having obtained a rule to shew cause why the verdict for the plaintiff should not be set aside, and a new trial had.

LORD KENYON, C. J. (stopping Adair Serjt. and Caldecott, contra). Independently of the question of interest, husbands and wives are not admitted as witnesses either for or against each other: from their being so nearly connected, they are supposed to have such a bias upon their minds that they are not to be permitted to give evidence either for or against each other.

BULLER, J. It is now considered as a settled principle of law that husbands and wives cannot in any case be admitted as witnesses either for or against each other.

Rule absolute.

THE KING v. THE INHABITANTS OF BATHWICK.

(Court of King's Bench, 1831. 2 Barn. & Adol. 639.)

Upon an appeal against an order of two justices, whereby Elizabeth, the wife of William Joliffe Cook, was removed from the parish of Bathwick, in the county of Somerset, to the parish of St. Pancras, in the county of Middlesex, the sessions quashed the order, subject to the opinion of this Court on the following case:

The respondents proved by the testimony of the said William Joliffe Cook, his settlement in St. Pancras, and his marriage with the pauper at Bath in 1829, and he stated her to be now his wife. The appellants insisted that the marriage was void, the said Wm. Joliffe Cook having been previously married in Dublin in 1826, to Mary Byrne; and, to

prove their case, they called the said Mary, to whose competency the respondents objected.[62]

LORD TENTERDEN, C. J., now delivered the judgment of the Court.

First, we are of opinion that the witness Mary, assuming her to be the first and lawful wife of W. J. Cook, was a competent witness.

The question arose on the settlement of another woman, considered to be the wife of Cook. Cook was examined, and proved his marriage with this woman; but he was not asked, and did not say, that he had not been previously married to the witness Mary. The witness, Mary, was afterwards called to prove her previous marriage with this person. In deposing to this marriage, she did not contradict anything that he had said. I notice this fact; but we do not mean to say that, if she had been called to contradict what he had sworn, she would not, in a case like this, have been a competent witness to do so. It is not necessary to decide that question at present; but it may well be doubted whether the competency of a witness can depend upon the marshalling of the evidence, or the particular stage of the cause at which the witness may be called. In the present case, however, the witness not having been called to contradict her husband, and her testimony not being inconsistent with the fact to which he had deposed, her incompetence, if it can be established, can be so only upon the authority of the case of The King v. The Inhabitants of Cliviger, 2 T. R. 263. The authority of that case was much shaken by the decision of the case in The King v. The Inhabitants of All Saints, Worcester, 6 M. & S. 194, in which Lord Ellenborough said, "The objection rests only on the language of The King v. Cliviger, that it may tend to criminate him; for it has not an immediate tendency, inasmuch as what she stated could not be used in evidence against him. The passage from Lord Hale (P. C. 301) has been pressed upon us, where it is said the wife is not bound to give evidence against another in a case of theft, if her husband be concerned, though her evidence be material against another, and not directly against her husband. Admitting the authority of that passage, it assumes that the husband was under the criminal charge; that he was included in the simul cum aliis. But if we were to determine, without regard to the form of proceeding whether the husband was implicated in it or not, that the wife is an incompetent witness as to every fact which may possibly have a tendency to criminate her husband, or which, connected with other facts, may perhaps go to form a link in a complicated chain of evidence against him, such a decision, as I think, would go beyond all bounds; and there is not any authority to sustain it; unless, indeed, what has been laid down, as it seems to me, somewhat too largely, in Rex v. Cliviger may be supposed to do so."

The decision in the case of Rex v. The Inhabitants of Cliviger appears to have been founded on a supposed legal maxim of policy, viz.

[62] Statement condensed and part of opinion omitted.

that a wife cannot be a witness to give testimony in any degree to criminate her husband. This will undoubtedly be true in the case of direct charge and proceeding against him for any offence; but in such a case she cannot be a witness to prove his innocence of the charge. The present case is not a direct charge or proceeding against the husband. It is true, that if the testimony given by both be considered as true, the husband, Cook, has been guilty of the crime of bigamy; but nothing that was said by the wife in this case, nor any decision of the court of session, founded upon her testimony, can hereafter be received in evidence to support an indictment against him for that crime. This is altogether res inter alios acta; neither the husband nor the wife has any interest in the decision of the question, and the interest of the parish of Pancras required that the illegality of the second marriage should be established, if it was in fact illegal. * * *

Order of sessions confirmed.

MILES v. UNITED STATES.

(Supreme Court of the United States, 1880. 103 U. S. 304, 26 L. Ed. 481.)

Mr. Justice WOODS [68] delivered the opinion of the court.

Section 5352 of the Revised Statutes of the United States declares:

"Every person having a husband or wife living, who marries another, whether married or single, in a territory or other place over which the United States has exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than five hundred dollars and by imprisonment for a term not more than five years."

The plaintiff in error was indicted under this section in the Third District Court of Utah, at Salt Lake City. He was convicted. He appealed to the Supreme Court of the Territory, where the judgment of the District Court was affirmed.

That judgment is now brought to this court for review upon writ of error. * * *

The plaintiff in error lastly claims that the court erred in allowing Caroline Owens, the second wife, to give evidence against him touching his marriage with Emily Spencer, the alleged first wife; and in charging the jury that they might consider her testimony, if they found from all the evidence in the case that she was a second and plural wife.

This assignment of error, we think, is well founded.

The law of Utah declares that a husband shall not be a witness for or against his wife, nor a wife for or against her husband.

The marriage of the plaintiff in error with Caroline Owens was charged in the indictment and admitted by him upon the trial. The

[68] Part of opinion omitted.

fact of his previous marriage with Emily Spencer was, therefore, the only issue in the case, and that was contested to the end of the trial. Until the fact of the marriage of Emily Spencer with the plaintiff in error was established, Caroline Owens was prima facie his wife, and she could not be used as a witness against him.

The ground upon which a second wife is admitted as a witness against her husband, in a prosecution for bigamy, is that she is shown not to be a real wife by proof of the fact that the accused had previously married another wife, who was still living and still his lawful wife. It is only in cases where the first marriage is not controverted, or has been duly established by other evidence, that the second wife is allowed to testify, and she can then be a witness to the second marriage, and not to the first.

The testimony of the second wife to prove the only controverted issue in the case, namely, the first marriage, cannot be given to the jury on the pretext that its purpose is to establish her competency. As her competency depends on proof of the first marriage, and that is the issue upon which the case turns, that issue must be established by other witnesses before the second wife is competent for any purpose. Even then she is not competent to prove the first marriage, for she cannot be admitted to prove a fact to the jury which must be established before she can testify at all.

Witnesses who are prima facie competent, but whose competency is disputed, are allowed to give evidence on their voir dire to the court upon some collateral issue, on which their competency depends, but the testimony of a witness who is prima facie incompetent cannot be given to the jury upon the very issue in the case, in order to establish his competency, and at the same time prove the issue.

The authorities sustain these views.

Upon a prosecution for bigamy under the statute of 1 Jac., c. 11, it was said by Lord Chief Justice Hale: "The first and true wife is not allowed to be a witness against her husband, but I think it clear the second may be admitted to prove the second marriage, for she is not his wife, contrary to a sudden opinion delivered in July, 1664, at the Assizes in Surrey, in Arthur Armstrong's case, for she is not so much as his wife de facto." 1 Hale, P. C. 693.

So in East's Pleas of the Crown the rule is thus laid down: "The first and true wife cannot be a witness against her husband, nor vice versa; but the second may be admitted to prove the second marriage, for the first being proved she is not so much as wife de facto, but that must be first established." 1 East, P. C. 469. The text of East is supported by the following citation of authorities: 1 Hale, P. C. 693; 2 M. S. Sum. 331; Ann Cheney's Case, O. B. May, 1730, Sergt. Foster's Manuscript.

In Peake's Evidence (Norris) 248, it is said: "It is clearly settled that a woman who was never legally the wife of a man, though she

has been in fact married to him, may be a witness against him; as in an indictment for bigamy, the first marriage being proved by other witnesses, the second wife may be examined to prove the marriage with her, for she is not de jure his wife."

Mr. Greenleaf, in his work on Evidence, volume 3, section 206, says: "If the first marriage is clearly proved and not controverted, then the person with whom the second marriage was had may be admitted as a witness to prove the second marriage, as well as to other facts not tending to defeat the first or legalize the second. There it is conceived she would not be admitted to prove a fact showing that the first marriage was void,—such as relationship within the degrees, or the like,—nor that the first wife was dead at the time of the second marriage, nor ought she to be admitted at all if the first marriage is in controversy."

The result of the authorities is that, as long as the fact of the first marriage is contested, the second wife cannot be admitted to prove it. When the first marriage is duly established by other evidence, to the satisfaction of the court, she may be admitted to prove the second marriage, but not the first, and the jury should have been so instructed.

In this case the injunction of the law of Utah, that the wife should not be a witness for or against her husband, was practically ignored by the court. After some evidence tending to show the marriage of plaintiff in error with Emily Spencer, but that fact being still in controversy, Caroline Owens, the second wife, was put upon the stand and allowed to testify to the first marriage, and the jury were, in effect, told by the court that if, from her evidence and that of other witnesses in the case, they were satisfied of the fact of the first marriage, then they might consider the evidence of Caroline Owens to prove the first marriage.

In other words, the evidence of a witness, prima facie incompetent, and whose competency could only be shown by proof of a fact which was the one contested issue in the case, was allowed to go to the jury to prove that issue and at the same time to establish the competency of the witness.

In this we think the court erred.

It is made clear by the record that polygamous marriages are so celebrated in Utah as to make the proof of polygamy very difficult. They are conducted in secret, and the persons by whom they are solemnized are under such obligations of secrecy that it is almost impossible to extract the facts from them when placed upon the witness stand. If both wives are excluded from testifying to the first marriage, as we think they should be under the existing rules of evidence, testimony sufficient to convict in a prosecution for polygamy in the territory of Utah is hardly attainable. But this is not a consideration by which we can be influenced. We must administer the law as we find it. The remedy is with Congress, by enacting such a change in the law

of evidence in the territory of Utah as to make both wives witnesses on indictments for bigamy.

For the error indicated the judgment of the Supreme Court of the territory of Utah must be reversed and the cause remanded to that court, to be by it remanded to the District Court, with directions to set aside the verdict and judgment and award a venire facias de novo.

So ordered.

STAPLETON v. CROFTS.

(Court of Queen's Bench, 1852. 18 Adol. & El. N. S. 367.)

Assumpsit for goods sold and delivered. Plea, Non assumpsit. Issue thereon.

On the trial before Erle, J., at the sittings at Westminster in last term, the defendant's wife was called as a witness for the defendant. The evidence was objected to; but the learned Judge admitted it. Verdict for the defendant.

In the ensuing term Huddleston obtained a rule nisi for a new trial, on the ground of the improper reception of evidence.

WIGHTMAN, J.[64] It is contended that the objection to the admissibility of the wife is removed by Stat. 14 & 15 Vict. c. 99. That Act, however, in its terms applies only to "the parties" to any suit. Now the wife of a party is not herself a party to the suit; and the terms of the Act do not embrace this case. But, independently of the terms of the Act, I think that the object appears to have been to complete the removal of objections on the ground of interest: and the objection to admitting the wife of a party is not merely on the ground of her identity in interest with her husband, but depends upon a broader view of the relation of husband and wife, and on the interest which the public have in the preservation of domestic peace and confidence between married persons.[65]

CROMPTON, J. * * * It is said that the ground on which the wife is rejected is the identity in interest between her and her husband, the party to the record. If that were so, it would not follow that because the one was enabled to be a witness the other was. The ground of objection, the interest, remains; but the Legislature has by express enactment said that it shall no longer be an objection to the admissibility of the party: the objection to the admissibility of the wife is left untouched. The Legislature might have taken away the objection to both; but they have not chosen to do so: and, there being no words enacting that the wife shall be admissible, I think she continues inadmissible.

[64] Part of opinions of Crompton and Erle, JJ., omitted.

[65] Accord: Hopkins v. Grimshaw, 165 U. S. 342, 17 Sup. Ct. 401, 41 L. Ed. 739 (1897).

ERLE, J. I am of opinion that Stat. 13 & 14 Vict. c. 99, § 2, rendering parties to a suit competent witnesses, has rendered the wives of parties also competent.

The law relating to exclusion of evidence on account of interest gave effect to the principle of uniting the interest of husband and wife. If the husband was excluded on account of interest, so was also the wife on account of her united interest; and, if the capacity of the husband was restored, the wife became thereby also capable. Although the wife had no direct interest during coverture in personal property, she was taken to have an indirect interest derivative from that of her husband.

The party to a suit was both excluded and exempted on account of his interest. For the same reason and from the same union of interest the wife of a party was also exempted and excluded. If capacity was restored to the parties by judgment by default, by nolle prosequi or otherwise, the capacity of the wife was also restored thereby. It seems to me to follow that, when the incapacity of parties is taken away by statute, the incapacity of the wives of parties should also cease, and the union of capacity or incapacity be still maintained.

This brings me to the question whether there was any other principle for excluding the wife of a party besides this union of interest and privilege between husband and wife. Upon the affirmative side, authorities are cited for exclusion of the wife with a view to preserving the peace of families; they are collected in Taylor on Evidence, vol. 2, p. 899, where it is said the admission of such testimony would lead to dissension and unhappiness, and probably to perjury, and because the confidence subsisting between husband and wife should be sacredly cherished.

There is no doubt that the law most carefully protects the interests connected with marriage, and established the union of interest above mentioned for the purpose of domestic union, and excluded the testimony of the wife, where the husband was excluded, on account of this union; and the expressions above cited, if confined to the exclusion of the wife when the husband is excluded, have a definite meaning, capable of a practical application: but, if they are carried beyond this limit, and are supposed to introduce tendency to domestic discord as a ground of exclusion, they will be found to be contrary to known principles of evidence, and to be incapable of being consistently applied. For, if this ground of exclusion existed, it would apply to other witnesses, as well as to parties, their domestic peace being equally important. But it is clear with respect to witnesses, not parties, that they cannot refuse to be examined on any ground derived from marriage, and that husbands and wives may mutually contradict and discredit each other upon matters full of family dissension, as freely as if the marriage was null.

Even if it could be supposed that the law regarded only the domestic

peace of parties, and protected their confidence, still the supposed ground of exclusion is not consistently applied; for, if a husband is assaulted or libelled, he may seek redress either by action or indictment. In either form he is in substance the party. If he proceeds by action, he and his wife were incompetent. If by indictment, both are admissible either to corroborate, or contradict or discredit each other. Now, if the principle of excluding the wives of parties was protection of domestic peace and confidence, the wife ought to be excluded equally in both cases: but she was excluded only in the action, where, as the husband was also incompetent, it seems better reasoning to attribute her exclusion to the uniform principle of union, than to suppose a regard for domestic peace in the civil Court, to be neglected in the criminal Court.

With respect to the protection of confidential communications between husband and wife, there seems good reason for such protection at all times; but no such principle has been brought into practice.

The decisions excluding the wives of parties have been accompanied with general declarations in favour of such protection. But, as the exclusion extended to all the testimony of the wives of parties, whether it was confidential or not, and as no protection was given to conjugal confidence in respect of the wives of witnesses, not parties, who are as much within the reason of the rule, if it existed, as the first-mentioned class, I think the rule has not yet been established. * * *

If the question may be considered with reference to the interest of truth, it is clear the exclusion of essential information as a means for finding truth is absurd. It is not doubted that wives often possess essential information as to matters within the usual province of a wife, and as to those conducted by her as agent for her husband, and as to those which she has happened to witness.

If essential witnesses are excluded, there is the certain evil of deciding without knowledge, and there is the probable evil of shaking confidence in the law: these evils are certain; and, if the notion of a compensating good in the promotion of domestic happiness by rendering the wife powerless as a witness be analyzed, I believe it will be found illusory. The idea that husbands generally would suborn their wives to perjury, and persecute them if they spoke truth, is, to my mind, unworthy of the time; there is no reason for supposing that wives, if admitted, would be worse treated in respect of their testimony than in respect of any other part of their conduct, or be more prone to untruth than any other class of witnesses: and, if, by reason of the exclusion of the wife, the husband has to suffer an adverse judgment contrary to truth, and the consequent loss, he would dissent with much reason from the zealous declarations that such a mean for protecting the peace of his family and the sanctity of his marriage was better than administering the law according to truth.

These observations apply to the present case; for the husband was examined, and did not understand the matters in question, which had

been managed by his wife. If she had been excluded the verdict would have been for the plaintiff, and the defendant would have been made liable to a demand contrary to the truth. As these considerations were in my mind before the judgment of the Exchequer in Barbat v. Allen, 9 Exch. 609, and as they refer entirely to the effect of the second section, which was not much discussed in that case, I trust I am not wanting in deference if I say that my opinion is not changed.[66]

Rule absolute.

MAVERICK v. EIGHTH AVE. R. CO.

(Court of Appeals of New York, 1867. 36 N. Y. 378.)

Action by Augustus Maverick and Ellen G., his wife, for damages on account of personal injuries sustained by the wife while a passenger on the defendant's car. The plaintiffs recovered a judgment for $1215.00, which was affirmed by the General Term, and the defendant appealed.[67]

SCRUGHAM, J. The testimony of the plaintiff, Augustus Maverick, was properly received.

The question is, not whether he can be a witness for his wife, but whether, being a party, he must be debarred from testifying in his own behalf because his wife is also a party to the action. If the result of the action could only affect his wife or her separate property, and he was merely a nominal plaintiff, having no pecuniary interest whatever in the result, and he should be offered as a witness, the question as to his inadmissibility on account of his marital relation to the real plaintiff in interest would be presented. As having no interest in the result of the action he could not be considered as a party offering to testify in his own behalf or in any other character than as a witness for or against his wife.

But in cases like this before us, the husband has a direct pecuniary interest in the result.

The action was commenced and the judgment rendered before the passage of the act of 1861 giving to the married woman the right to maintain an action in her own name, and as if she were a feme sole, for injuries to her person; and declaring that the moneys recovered on a judgment in such action shall be her sole and separate property. As the law stood at the time of the injury on account of which this action was brought, and of the judgment, the husband was entitled to the money which should be recovered in his life-time for injuries to the

[66] The omitted parts of this opinion review Bentley v. Cooke, 3 Doug. 422 (1784); Davis v. Dinwoody, 4 D. & E. 678 (1792); Hawkesworth v. Showler, 12 M. & W. 45 (1843); Broughton v. Harper, 2 Ld. Raymond, 752 (1703); Rex v. Cliviger, 2 D. & E. 263 (1788); Rex v. All Saints, 6 M. & S. 194 (1817); Rex v. Bathwick, 2 B. & Ad. 639 (1831); O'Connor v. Majoribanks, 4 M. & G. 435 (1842).

[67] Statement condensed and part of opinion omitted.

person of his wife; and the necessity for making the wife a party to such actions arose from the fact that the damages would survive to the wife if the husband died before they were recovered. The interest of the husband in the recovery was direct and immediate, while that of the wife was uncertain and contingent. He had the right as a real party in interest to be examined as a witness in his own behalf,[68] and the circumstance that his wife might be benefited by his testimony if he should die before recovery, is merely incidental and would not justify the exclusion of his testimony. * * *

Judgment affirmed.

WOOD v. BROADLEY.

(Supreme Court of Missouri, 1882. 76 Mo. 23, 43 Am. Rep. 754.)

HENRY, J.[69] The plaintiff, Elizabeth, is the daughter of Nicholas D. Broadley, deceased, and her co-plaintiff is her husband. On the 25th day of February, 1875, said Nicholas by deed conveyed to his wife, defendant Elizabeth, all the lands he owned, about 300 acres, for the expressed consideration of $2,000, which was never paid by her, and which it was not the intention of said Nicholas that she should pay. The grantee was his second wife, and the plaintiff, Elizabeth, is the only living child of the first marriage. His second marriage occurred in 1849, and his death in 1876. The defendant Virginia is the only child of the last marriage. The object of this suit is to set aside said deed, on the ground that Nicholas Broadley, when it was executed and delivered, was old and infirm and had not mental capacity to make the deed. * * *

[The finding was for the defendants and the plaintiffs appealed.]

The only remaining question which we deem it necessary to notice, is that growing out of the exclusion of John Wood as a witness. We do not think that the court erred therein. In Joice v. Branson, 73 Mo. 28, which was a suit by husband and wife for an assault and battery committed on the wife, the court remarked that "the husband was properly joined with the wife as co-plaintiff, and this because the statute requires it. The wife, however, was the substantial party to the suit. * * * The husband was clearly incompetent as a witness, and error was committed in permitting him to testify." In Paul v. Leavitt, 53 Mo. 595, the suit was on the promissory note of the wife, to enforce payment thereof out of her separate estate, and it was held that being only a nominal party, the husband was not a competent witness. So in Haerle v. Kreihn, 65 Mo. 202, it was held that the

[68] The statute at this time provided that no person should be excluded on account of interest in the event, and that a party might be examined on his own behalf or on behalf of any other party.

[69] Part of opinion omitted.

husband is not a competent witness, in a suit to which he and his wife are parties, unless he has a substantial interest in the controversy, or acted as her agent in the transaction which is the foundation of the suit. Steffen v. Bauer, 70 Mo. 405, is unlike any of the cases above cited. It was a suit to set aside a deed executed by husband and wife, conveying land, the title of which was vested in the wife, on the ground that it was not acknowledged in compliance with the law, and that she signed under compulsion of her husband. The husband was offered as a witness. The court excluded him, but this court held it error, because "he had an interest in the issue as well as his wife, since in the event of her death he would be tenant by curtesy, and also had an interest in his wife's land during coverture." It is contended by appellants' counsel that the excluded witness in the case at bar, "had a substantial interest, as a party litigating for a tenancy by the curtesy initiate," relying upon Steffen v. Bauer, supra. But in the latter case the husband had a vested interest in his wife's land, before the conveyance, and that interest continued if the deed was inoperative. In the case at bar, the witness Wood had never had any interest in the land in controversy. His wife was never seized of the land, and could never be until a judgment in her favor in this cause. How can it be said that he was tenant by the curtesy initiate of land of which his wife was never seized? All concurring, the judgment is affirmed.[70]

DEXTER v. BOOTH.

(Supreme Judicial Court of Massachusetts, 1861. 2 Allen, 559.)

CHAPMAN, J.[71] This being an action against an executor to recover the price of goods purchased by the testator's wife, and delivered to her, some of which it is conceded were not necessaries, the plaintiff was allowed to prove by the testimony of the widow that after the purchase the husband ratified it in a private conversation with her. The question is now raised, whether she was a competent witness to prove such a conversation. It is admitted that, at common law, she is excluded on considerations of policy from testifying to confidential conversations between herself and her husband, and that the exclusion remains unaffected by his death. The question is whether this rule

[70] Where both husband and wife are parties, and each has a substantial interest, both are competent under similar statutes. Bell v. Hannibal & St. J. R. Co., 86 Mo. 599 (1885); Snell v. Westport, 9 Gray (Mass.) 321 (1857). But a spouse not a party, though substantially interested, is excluded. Layson v. Cooper, 174 Mo. 211, 73 S. W. 472, 97 Am. St. Rep. 545 (1903).

In Canole v. Allen, 222 Pa. 156, 70 Atl. 1053 (1908), an action against husband and wife for an alleged trespass of the wife, it was held that the statute qualifying parties did not make the husband competent for the plaintiff.

[71] Part of opinion omitted.

extends to his ratification of a purchase made by her, which in its nature does not seem to be confidential, though made in a private conversation. In England this question is settled. In Monroe v. Twistleton, cited in Peake on Ev. c. 3, § 4, and Appendix, Lord Alvanley stated the doctrine broadly, that a wife, who has been divorced by an act of Parliament, cannot be called to prove any conversation which happened between herself and her husband during the coverture. In Aveson v. Kinnaird, 6 East, 194, Lord Ellenborough expressed a doubt whether the exclusion was so broad, and said he considered Lord Alvanley as having mentioned it as a general doctrine that trust and confidence shall not be betrayed. He remarked that, as such, it is sound doctrine. In Doker v. Hasler, Ry. & Mood. 198, Best, C. J., refused to allow the widow to testify to a conversation with her husband—the question at issue being whether he had fraudulently taken out an execution to protect the goods of a debtor. But in Beveridge v. Minter, 1 C. & P. 364, Abbott, C. J., admitted the widow as a witness to prove her husband's admission in respect to a debt sued for. Thus far the authorities are contradictory. They are reviewed, and the doctrine is thoroughly discussed, in O'Connor v. Marjoribanks, 4 Man. & Gr. 435. That was an action brought by an administrator to recover goods which the wife had pledged to the defendant, and she was offered by the defendant to prove that her husband had, in a private conversation, authorized her to pledge them. Tindal, C. J., and Coltman and Maule, JJ., gave separate opinions, each declaring that she was excluded, and that considerations of policy protect all private conversations between husband and wife from disclosure, not only during the coverture, but after it has ceased to exist. If the exclusion extends to the giving of an authority to make a contract, it extends, of course, to the ratification of a contract made by her.

In the same year that O'Connor v. Marjoribanks was decided (1842), the Supreme Court of New York had occasion to consider the question, and made a similar decision, overruling the case of Beveridge v. Minter. Babcock v. Booth, 2 Hill (N. Y.) 181, 38 Am. Dec. 578. And in Osterhout v. Shoemaker, 3 Hill (N. Y.) 513, Judge Bronson reaffirmed the decision. In Stein v. Bowman, 13 Pet. 209, 10 L. Ed. 129, the Supreme Court of the United States discussed the question to some extent, but did not decide the precise point raised here. In Dickerman v. Graves, 6 Cush. 308, 53 Am. Dec. 41, the doctrine of exclusion is recognized by this court as resting on the broad ground that all private conversations between husband and wife should be regarded as sacred. But the case did not require a decision of the question. The same doctrine is held in Delaware in Gray v. Cole, 5 Har. 418. The offer was to prove by the widow an admission of her husband that he occupied a house under an agreement to pay rent. The evidence was excluded.

Our legislature has by statute extended the competency of witnesses as far as it was deemed safe to do so; and where it makes husbands

and wives admissible, it provides that "they shall not be allowed to testify as to private conversations with each other." This includes conversations on subjects which are not confidential in their nature; and adopts the doctrine of O'Connor v. Marjoribanks.[72] Gen. St. 1860, c. 131, § 14. The present case does not belong to the particular class provided for by section 16, namely, actions against the husband growing out of a wrong or injury done by him to the wife, or his neglect to furnish her with the proper means of support. The section does not, by its terms, include actions brought after his death against his executor or administrator; and probably the reason of the distinction is, that in actions against himself he may protect his interests by his own testimony.

As she should not have been allowed to testify to her private conversation with her husband, the verdict for the plaintiff must be set aside. But as to any other facts, she was a competent witness. The cross-examination of her, however, by which the defendant sought to show that, at the time she made the purchases of the plaintiff, she made extravagant purchases of jewelry and gold watches of other persons, related to irrelevant matter. For if the fact were true, it ought not to affect the plaintiff's claim. The judge rightly excluded it. * * *

[72] In this case Tindal, C. J., gave the following reasons for excluding the evidence of the widow: "* * * And it appears to me that, of the two, Monroe v. Twisleton [Peake, Add. Ca. 219 (1802)] is the sounder; and that the doctrine therein laid down is built upon the general rule of law, which, subject to certain well-known exceptions, is this; that a wife never can be admitted as a witness either for or against her husband; she cannot be a witness for him, because her interest is precisely identical with his; nor against him, upon grounds of public policy, because the admission of such evidence would lead to dissension and unhappiness, and possibly to perjury. There are cases to shew that this intimate relation subsisting between the parties is not to be considered as dissolved by death, so as to let in the evidence of either party as to transactions occurring during their joint lives; but we are asked to confine the rule to cases where the communications between the husband and wife are of a confidential nature. But such a limitation of the rule would very often be extremely difficult of application; and would introduce a separate issue in each cause as to whether or not the communications between husband and wife were to be considered of a confidential character."

But see Lynn v. Hockaday, 162 Mo. 111, 11 S. W. 885, 85 Am. St. Rep. 480 (1901), holding that, in a suit by one claiming to be an adopted child for a distributive share of the estate, the widow was competent to prove the contract of adoption.

STUHLMULLER v. EWING, Ex'x.

(Court of Error and Appeals, Mississippi, 1860. 39 Miss. 447.)

In the court below the widow of Ewing was admitted to testify, as stated in the brief [78] of counsel for defendant in error. The plaintiff objected, and his objection being overruled, he excepted. Verdict and judgment for defendant, and plaintiff sued out this writ of error.

[Stuhlmuller sued the estate of Jesse H. Ewing on an account for medical services rendered said Ewing in his last illness.

On the trial, the widow of the defendant was introduced as a witness for defendant, and stated that plaintiff and her deceased husband had a conversation, in her presence, a few days before her husband's death, in relation to said account, in which conversation the deceased said to plaintiff that the contract between plaintiff and the deceased was that Stuhlmuller was to be paid if he cured him (Ewing), and if he did not cure him, he (plaintiff) was to receive nothing, and that plaintiff did not deny or dissent from that statement; also, that plaintiff did not cure her said husband, but he died a few days after this conversation.

The counsel for plaintiff, in their brief, thus state the question: "Can the wife, after her husband's death, be permitted to testify in behalf of his estate, as to matters which transpired during the marriage relation?"

We think the question would be more properly stated thus: "Can the widow be permitted to testify, on behalf of the estate of her deceased husband, as to an admission made by the plaintiff, in a conversation between plaintiff and her husband, in his lifetime, in her presence, touching the matter in controversy?"]

HARRIS, J., delivered the opinion of the court.

The only question for determination here is, whether the wife, after the death of her husband, is competent to testify in favor of his estate against a creditor as to conversations between her husband and such creditor in relation to the contract upon which their dealings were based.

By the common law the incompetency of husband and wife on this subject is placed, first, on their identity of rights and interests, and second, on principles of public policy.

In its spirit and extent the rule is analogous to that which excludes confidential communications made by a client to his attorney, and therefore at common law the wife, after the death of the husband, has been held competent to prove facts not in their nature confidential, nor coming to her knowledge from the husband by means of the marital relation. See 1 Greenleaf, Ev. § 338; also Coffin v. Jones, 13 Pick.

[78] The part of the statement inclosed in brackets has been taken from the brief referred to.

(Mass.) 445; Williams v. Baldwin, 7 Vt. 506; Cornell v. Vanartsdalen, 4 Pa. 364; Wells v. Tucker, 3 Bin. (Pa.) 366; Saunders v. Hendrix, 5 Ala. 224; McGuire v. Maloney, 1 B. Mon. (Ky.) 224; also the numerous authorities collected and reviewed in the very able argument of the counsel for defendant in error.

Our statute, Rev. Code, c. 61, arts. 190–193, having removed the incompetency arising from interest and her testimony not falling within the class of confidential communications, which, on principles of public policy, are held sacred, there remains no legal obstacle to its admissibility. In the case of Dunlap et al. v. Hearn, 37 Miss. 471, these same principles are recognized.

Let the judgment be affirmed.

Appeal of ROBB.

(Supreme Court of Pennsylvania, 1881. 98 Pa. 501.)

Appeal of John Robb and others, brothers and distributees, under the intestate law, of David Robb, deceased, from the decree of the said court dismissing their exceptions to the adjudication in the matter of the distribution of the balance appearing on the account of Jane Robb, widow and administratrix of the said decedent.

Before the auditor, Mary Steen, a sister of the accountant, presented a claim of $1,582 for wages as a domestic servant from October 1st, 1870, until the death of the decedent, September 10th, 1877. She alleged an express contract of hiring made by the deceased at the rate of $3 per week, afterwards increased to $3.50 per week. The claimant proved the performance of services during the time named, and that they were worth at least $3.50 per week.

In order to prove the alleged express contract, the claimant called as a witness Jane Robb, the widow and administratrix, who was objected to as incompetent to testify against the estate of her deceased husband. Objection overruled. Exception. The witness testified that at the time Mary Steen was employed by her husband, she was living with a Mrs. Dean in Allegheny, and getting $3 a week wages; that her husband (the decedent) said that, as they required some help, they might as well pay her as a stranger, and he would pay her whatever she got from strangers; that Mary Steen accepted that arrangement, and came to live with them; that Mrs. Dean afterwards offered her $3.50 a week, if she would go back to her, and that Mr. Robb said she was worth all to him she was to any one else, and he agreed to give her $3.50 a week. The appellants alleged that Miss Steen, being a sister-in-law of the decedent, lived with him and was provided for as a member of his family, without wages. They also interposed the statute of limitations as a bar to that part of the claimant's demand, which accrued more than six years prior to the death of the decedent.

The court, without referring to this objection, decreed to the claimant the sum of $1,466.70, being the entire fund for distribution. John Robb and others took this appeal, assigning for error the admission of Jane Robb as a witness, and the entering of said decree.

Mr. Justice STERRETT [74] delivered in the opinion of the court.

It is contended that, on grounds of public policy, the widow of the decedent was incompetent to testify to the contract on which appellee's claim for wages is based; that the disqualification incident to coverture continued after the death of her husband, and is not limited to what occurred in their confidential intercourse, but extends to all facts and transactions which came to her knowledge during their marital relations. While the principle, thus broadly stated, has sometimes been recognized, the better and more generally received opinion is that the disqualification is restricted to communications of a confidential nature, and does not embrace ordinary business transactions and conversations in which others have participated. This appears to be the principle recognized in our own cases. Cornell v. Vanartsdalen, 4 Pa. 364; Peiffer v. Lytle, 58 Pa. 386. The Orphans' Court, adhering to this view of the law, permitted the widow to testify to conversations between her husband, herself and the appellee, which resulted in a contract of hiring, in pursuance of which the latter entered the service of Mr. Robb in October, 1869, and continued therein until his death on September 10th, 1877. These conversations, as shown by the testimony, are not, in any proper sense of the term, confidential communications, and there was therefore no error in permitting the witness to testify. * * *

Decree affirmed.[75]

WARNER v. PRESS PUB. CO.

(Court of Appeals of New York, 1892. 132 N. Y. 181, 30 N. E. 393.)

PARKER, J.[76] The judgment under review awards to the plaintiff damages against the defendant for publishing in the New York World what purported to be a brief report of a judicial proceeding which contained matter imputing unchastity to her. The defenses sought to be interposed were (1) that the publication was privileged, because a fair and true report of a proceeding in court; (2) that it was true. * * *

[74] Part of opinion omitted.

[75] But see Mahlstedt v. Ideal Lighting Co., 271 Ill. 154, 110 N. E. 795, Ann. Cas. 1917D, 209 (1915), excluding wife from testifying to any transactions between a third person and her husband, though the latter was not a party to the action.

The same extreme view appears in State v. Kodat, 158 Mo. 125, 59 S. W. 73, 51 L. R. A. 509, 81 Am. St. Rep. 292 (1900), where a divorced woman was held incompetent to prove an assault by her former husband on a third person.

[76] Part of opinion omitted.

Our attention is called to but one other exception. The libelous article suggests improper relations between the plaintiff and one Smith, evidenced by letters from Smith to her. She denied, not only the charge, but all knowledge of the letters. The defendant asserted the truth of the charges and insinuations contained in the article, and in support of its contention called the husband of the plaintiff, to whom the following questions were propounded: "Question. Had you any dispute with Mrs. Warner at any time about Smith? Q. Had you any conversation with Mrs. Warner, your wife, at any time, in relation to a man by the name of Frank Smith or F. Sidney Smith?" Objection was made that the evidence was incompetent, under section 831 of the Code of Civil Procedure, which provides that "a husband and wife shall not be compelled, or, without the consent of the other, if living, allowed, to disclose a confidential communication made by one to the other during marriage." The evidence offered could have no purpose useful to the defendant, unless it tended to show that, during such a conversation with her husband, she said or did, or omitted to say or do, something from which it might be inferred that there existed an unlawful intimacy between her and Smith. A conversation on such a subject between husband and wife seems to us to be clearly within the protection of the statute.

The appellant calls our attention to the decision in Parkhurst v. Berdell, 110 N. Y. 386-393, 18 N. E. 123, 6 Am. St. Rep. 384, in which Judge Earl, in speaking for the court, said: "What are 'confidential communications,' within the meaning of the section? Clearly, not all communications made between husband and wife when alone. * * * They are such communications as are expressly made confidential, or such as are of a confidential nature or induced by the marital relations." Clearly, the definition given does not exclude such a conversation as the defendant desired to prove from the protection of the statute. Its nature was not only confidential, but it was apparently induced by the marital relation; for it cannot be conceived that such a topic would have been the subject of discussion but for the existence of such relation between the parties. A further test by which to determine whether a communication is confidential is suggested by the learned judge in characterizing the nature of the conversations sought to be excluded in that case. He said: "They were ordinary conversations, relating to matters of business, which there is no reason to suppose he would have been unwilling to hold in the presence of any person." It cannot be supposed that both husband and wife would have been willing to discuss such a subject in the presence of other persons, or would have consented to a repetition of the conversation by either party to it. Its nature, and the relation of the parties, forbade the thought of its being told to others, and the law stamped it with that seal of confidence which the parties in such a situation would feel no occasion to exact. The wisdom of the statute was never more apparent than in this case, which exhibits a worth-

less husband in the attempted role of a destroyer of the good name of the mother of his children, because she sought, in the name of the law, to compel him to contribute towards her support, and that of his children.

The judgment should be affirmed. All concur, except HAIGHT, J., absent.

Judgment affirmed.[77]

COMMONWEALTH v. GRIFFIN.

(Supreme Judicial Court of Massachusetts, 1872. 110 Mass. 181.)

Indictment for manslaughter. At the trial, before Rockwell, J., the Commonwealth offered to prove a conversation as to the alleged homicide between the defendant and his wife, while confined in jail, from the testimony of two officers who concealed themselves in the jail for the purpose of listening to the conversation, without the defendant and his wife knowing that the witnesses or any other persons were in hearing of them. The defendant objected to the admission of this testimony, but the judge admitted it. The jury returned a verdict of guilty, and the defendant alleged exceptions.

BY THE COURT. There is no rule of law requiring that third persons who hear a private conversation between husband and wife shall be restrained from introducing it in their testimony.

Exceptions overruled.[78]

V. OFFICIAL CONNECTION WITH THE TRIBUNAL

PRIOR v. POWERS.

(Court of King's Bench, 1665. 1 Keb. 811.)

In an action upon the case for misusing a horse, Orlaby prayed a new trial, because the jurors in Bedfordshire being divided six and six, they agreed by lot, putting two sixpences into a hat, that which the bailiff took, that way the verdict should go, which was for the plaintiff, and 2d. damages; but the Court denied it, because it appeared only by pumping a juryman, who confessed all; but being against himself, it was not much regarded. Also the Court cannot grant new trial without punishing the jury, which cannot be by this confession against themselves; and by Windham, This is as good a way of decision as by the strongest body, which is the usual way, and

[77] See section 828, New York Code, ante, p. 170, generally qualifying a party and the spouse of a party to testify.

[78] The rule is the same in other privileged relations. Com. v. Everson, 123 Ky. 330, 96 S. W. 460, 124 Am. St. Rep. 365 (1906).

is suitable in such cases to the law of God. Twisden doubted it would be of ill example, and in Sir Philip Acton Case, on such verdict, on fillip of counter, a new trial was granted, but here it was denied.[79]

REX v. SIMMONS.

(Court of King's Bench, 1752. 1 Wils. 329.)

The Jew was indicted for putting into the pocket of one Ashley three ducats, with a malicious intent to charge him with felony, and was tried before Mr. Justice Foster at the last assizes for the county of Essex, and found guilty generally as to all the counts in the indictment.

The Court was moved for a new trial upon the affidavits of all the twelve jurymen, "that they only intended to find the defendant guilty of putting the ducats into Ashley's pocket, and did not intend or understand that they had found him guilty of putting the ducats into his pocket with an intent to charge him with felony; and Dodson, the foreman, swears that he declared at the Bar to the Court, when they brought in their verdict, that they found the defendant guilty of putting the ducats in Ashley's pocket, but without any intent."

Mr. Justice Foster reported that, after the evidence was gone through and summed up, the jury departed from the Bar to consider of their verdict, and gave a private verdict at his lodgings that the defendant was guilty; the next morning they all appeared in Court at the Bar, and being asked if they stood by their former verdict, they answered they found the defendant guilty. That Mr. Justice Foster then told them that there were four counts in the indictment, and that the evidence for the King was only applicable to the third, which charged the defendant with maliciously putting three ducats into Ashley's pocket with an intent to charge him with felony, and told them that the intent was the principal thing to be considered by them, and that if they believed the defendant did not put the ducats into Ashley's pocket with an intent to charge him with felony, they must

[79] Apparently the earlier practice was otherwise. Metcalfe v. Deane, Cro. Eliz. 189 (1590): "The jury were gone from the bar to confer of their verdict. One of the witnesses that was before sworn on the part of Deane, was called by the jurors; and he recited again his evidence to them, and after they gave their verdict for Deane. Complaint being made to the Judge of the assises of this misdemeanor, he examined the inquest, who confessed all the matter, and that the evidence was the same in effect that was given before, et non alia nec diversa. This matter being returned upon the postea, the opinion of the Court was, that the verdict was not good, and a venire facias de novo was awarded. Vide 35 Hen. 6, "Examination," 17, 11 Henry 4, pl. 17, and Brownlow cited a precedent, Leming v. Kempe, accordingly."

See, also, Watts v. Brains, Cro. Eliz. 778 (1600), ante, p. 3. The suggestion in the principal case seems to connect the matter with the privilege against self-incrimination which was then developing, as to which see section 3 of this chapter.

acquit him; whereupon the foreman at the Bar said, "We find him guilty of putting the ducats into his pocket without any intent." But by some mistake, or misapprehension of the Court, or the jury, or of both, a general verdict was taken that the defendant was guilty.

After this report the jury by further affidavits swear that there was a very great noise in Court; and that when the Judge directed them to acquit the defendant, if they believed he did not put the ducats into Ashley's pocket with an intent to charge him with felony, they did not hear or understand him.

This question having been debated by five or six counsel of each side, the Court gave their opinion for a new trial.

LEE, C. J.[80] There is no doubt but a new trial may be granted in a criminal case; and the true reason for granting new trials is for the obtaining of justice; but to grant them upon the affidavits of jurymen only, must be admitted to be of dangerous consequence. It appears to me from the report of my brother, and the affidavits of Dodson the foreman, that this verdict was taken by mistake, for he swears that he declared in court "that they did not find the defendant guilty of any intent," and therefore this is not granting a new trial upon any after-thought of the jury, but upon what the foreman Dodson declared at the Bar when they gave their verdict. I am very clear in my opinion there ought to be a new trial, and the rather as this is a criminal matter.

WRIGHT, J. New trials are generally supposed to be more ancient than appears in the books, for want of reporters when they first began to be granted: every case of this kind must depend upon its particular circumstances; the jury, every man of them, come here and tell us that they were not understood, for that they declared at the Bar they did not find the defendant guilty of any intent. My brother reports that he told them if they did not believe the intent, they must acquit him; the jury now swear, "they did not hear him;" therefore I am of opinion it is a verdict misentered, contrary to the declaration of the foreman, not contradicted by any of the rest at the time it was spoken at the Bar; and that it is most plainly no afterthought, so that we may keep clear of the danger of granting new trials merely upon the affidavits of jurymen; I think this man has been convicted contrary to the judgment of his peers; that he has not had judicium parium, and that we are bound to grant a new trial; and this being a criminal case is more to be favoured as to a new trial, than if it had been a civil case.

New trial granted.[81]

[80] Opinions of Dennison and Foster, JJ., omitted.

[81] See Peters v. Fogarty, 55 N. J. Law, 386, 26 Atl. 855 (1893), where the affidavits of jurors were received to prove mistake in recording the verdict.

DUNBAR v. PARKS.

(Supreme Court of Judicature of Vermont, 1802. 2 Tyler, 217.)

The plaintiff brought trover for a horse. On the trial of the issue to the jury, after the examination of all the witnesses on the stand, and before argument, Mr. Sias, one of the jurors observed to the Court, that he knew some matters which had relation to the cause; and requested information whether it would be improper for him to communicate his knowledge to his brethren of the panel after they were charged, and should retire to the jury-room.

CURIA. As the juror had a doubt in his mind relative to his conduct, it is highly commendable in him to apply to the Court for advice. Let the witness's oath be administered to him.

He was accordingly sworn, and testified, standing in the jury-box, to a material fact.

Upon his cross-examination,

John Mattocks, counsel for the plaintiff, put a question to the witness, the answer to which would indicate for which party as a juror he would eventually decide.

Sed PER CURIAM. This must not be suffered. Examine the witness solely as to facts, and such as came to his knowledge before he was sworn as a juror.[82]

MURDOCK v. SUMNER.

(Supreme Judicial Court of Massachusetts, 1839. 22 Pick. 156.)

Trover for divers goods attached by the defendant as sheriff of Suffolk. A verdict had been found for the plaintiff, which the defendant now moved to set aside, upon the affidavits of the jurors, that in assessing the damages they proceeded under a mistake.

SHAW, C. J., delivered the opinion of the Court. This is an application by the defendant, to set aside the verdict and grant a new trial, on the affidavit of the jurors, that in the assessment of damages they made a mistake. The mistake alleged was this, that in estimating the value of the goods which were the subject of controversy, one witness only was examined, who testified as to the quality, condition and cost of the goods, and to his opinion that they were worth the cost; that the jury believed that they were bound by this opinion, whereas if they had felt at liberty to exercise their own judgment, they would have estimated them at a lower rate.

Affidavits of jurors are to be received with great caution. The rule is inflexible, that they will not be received to show misconduct or ir-

[82] It is generally thought that the judge trying a case ought not to be admitted as a witness. For an elaborate consideration of the matter, see Morss v. Morss, 11 Barb. (N. Y.) 510 (1851).

regularity on the part of the jury or any of them. And the general rule is, that affidavits of jurors will not be received to prove any mistake of the evidence or misapprehension of the law, on the part of the jury. Different jurors, according to their different degrees of intelligence, of attention and habits of thought, may entertain different views of the evidence, and of the instructions of the court in point of law. But the verdict, in which they all concur, must be the best evidence of their belief, both as to the fact and the law, and therefore must be taken to be conclusive.[88] Jackson v. Williamson, 2 T. R. 281; Owen v. Warburton, 4 Bos. & Pul. 326; Ex parte Caykendoll, 6 Cow. (N. Y.) 53; Napier v. Daniel, 3 Bingh. New Cases, 77. The rule is founded upon a consideration of the great danger, practically, of listening to suggestions of misapprehension and mistake in the juries.

The Court are not prepared to say that this is a rule without exception; there may be cases of manifest mistake in computation, or other obvious error, where there are full means of detecting and correcting it, where it would be proper to interfere.

But in the present case, the evidence having been heard de bene esse, the Court are of opinion, that the verdict ought not to be set aside. It was an estimate of the value of goods. The facts were stated by the witness, and also his opinion. But the jurors had full opportunity to exercise their own judgment on the facts, and form their own opinion of the value. If indeed any juror knew any fact bearing upon the subject, such as the state and condition of the particular parcel of goods, especially if it differed from the facts testified, he should have stated it and testified to it in open court, that the court might judge of the competency of the evidence, that the parties might fully examine the witness, and that the counsel and court might have under their consideration the whole of the evidence upon which the verdict is formed. It is not suggested that the jury acted upon such facts. But the jury may properly exercise their own judgment and apply their own knowledge and experience in regard to the general subject of inquiry. In the present case, the jury were not bound by the opinion of the witness; they might have taken the facts testified by him, as to the cost, quality and condition of the goods, and come to a different opinion as to their value.

It is said that the jury understood the court to instruct them, that they must go by the testimony. This, as a general proposition, was true and correct. If there was any danger that the jury would be mis-

[88] It has been suggested that the rule here involved is much the same as in certain contract cases where evidence of mistake is rejected because the contract is binding in spite of the mistake, and hence that the question is as to the effect of a verdict rather than as to a prohibited means of showing a mistake. But this is hardly satisfactory, in view of the practise of granting new trials where the court is satisfied that the jury have mistaken either the law or the facts. Bright v. Eynon, 1 Burr. 390 (1757).

led by the generality of this direction, the counsel should have requested the judge to modify it and make it more precise, as applicable to the evidence in the particular case, by informing the jury that they were not bound by the opinions of the witness, but only by such facts as upon the testimony they considered proved, the jury exercising their own judgment upon the credit of the witness, and the weight of the evidence. Besides, if the defendant considered the value of the goods an important point, it was open to him to offer other and more satisfactory evidence upon that point; but he gave no evidence on the subject, relying on that given by the plaintiff.

Motion dismissed.

STANDEWICK v. HOPKINS.

(Court of Queen's Bench, 1844. 2 Dowl. & L. 502.)

This was an action which had been tried before the undersheriff of Somersetshire, and a verdict found for the plaintiff. An application had been made in the vacation to a Judge at Chambers to stay execution, on affidavits imputing misconduct and gross partiality on the part of some of the jurors, which was granted. A rule nisi was obtained in the present term for a new trial. It was drawn up on reading the affidavits filed at Chambers.

J. W. Smith shewed cause, and proposed to read the affidavits of three jurors, denying and explaining the misconduct alleged.

Prideaux, in support of the rule, objected, first, that no new affidavits having been used in obtaining the rule nisi, the plaintiff could not use affidavits on shewing cause, Atkins v. Meredity, 4 Dowl. 658; and secondly, that inasmuch as the affidavit of a juror could not be received to impugn a verdict given, Straker v. Graham, 7 Dowl. 223 (see s. c., 4 M. & W. 721), it would be unfair to permit him to make an affidavit to support it in any way.

PATTESON, J. As a general rule, the affidavits of jurymen cannot be received to support or impugn their verdict; but, in the present instance, it is sought to use them in answer to affidavits imputing gross misconduct to them; and, I think, that every principle of natural justice demands that they should be heard to repel the imputations thus cast on them. With respect to the other objection, it is true that the affidavits which are used in support of the rule have been already read at Chambers; but the present rule is drawn up on reading them, and I therefore think the opposite party may use affidavits in shewing cause.

The rule was afterwards made absolute, on the ground of the verdict being against evidence.

Rule absolute.

McDONALD et al. v. PLESS.

(Supreme Court of the United States, 1915. 238 U. S. 264, 35 Sup. Ct. 783, 59 L. Ed. 1300.)

Mr. Justice LAMAR [84] delivered the opinion of the court:

Pless & Winbourne, attorneys at law, brought suit in the superior court of McDowell county, North Carolina, against McDonald to recover $4,000 alleged to be due them for legal services. The case was removed to the then circuit court of the United States for the western district of North Carolina. There was a trial in which the jury returned a verdict for $2,916 in favor of Pless & Winbourne. The defendant McDonald moved to set aside the verdict on the ground that when the jury retired the foreman suggested that each juror should write down what he thought the plaintiffs were entitled to recover, that the aggregate of these amounts should be divided by 12, and that the quotient should be the verdict to be returned to the court. To this suggestion all assented.

The motion further averred that when the figures were read out it was found that one juror was in favor of giving plaintiffs nothing, eight named sums ranging from $500 to $4,000, and three put down $5,000. A part of the jury objected to using $5,000 as one of the factors, inasmuch as the plaintiffs were only suing for $4,000. But the three insisted that they had as much right to name a sum above $4,000 as the others had to vote for an amount less than that set out in the declaration. The various amounts were then added up and divided by 12. But by reason of including the three items of $5,000, the quotient was so much larger than had been expected that much dissatisfaction with the result was expressed by some of the jury. Others, however, insisted on standing by the bargain, and the protesting jurors finally yielded to the argument that they were bound by the previous agreement, and the quotient verdict was rendered accordingly.

The defendant further alleged in his motion that the jurors refused to file an affidavit, but stated that they were willing to testify to the facts alleged, provided the court thought it proper that they should do so. At the hearing of the motion one of the jurors was sworn as a witness, but the court refused to allow him to testify on the ground that a juror was incompetent to impeach his own verdict. That ruling was affirmed by the court of appeals. 124 C. C. A. 131, 206 Fed. 263. The case was then brought here by writ of error.

On the argument here it was suggested that it was not necessary to consider the question involved as an original proposition, since the decision of the Federal court was in accordance with the rule in North Carolina (Purcell v. Southern R. Co., 119 N. C. 739, 26 S. E. 161),

[84] Part of opinion omitted.

and therefore binding under Rev. Stat. § 914, Comp. St. § 1537, which requires that the practice, pleadings and forms and modes of procedure in the Federal courts shall conform as near as may be to those existing in the state within which such Federal courts are held. * * *

But though Rev. Stat. § 914, does not make the North Carolina decisions controlling in the Federal court held in that state, we recognize the same public policy which has been declared by that court, by those in England, and most of the American states. For while by statute in a few jurisdictions, and by decisions in others, the affidavit of a juror may be received to prove the misconduct of himself and his fellows, the weight of authority is that a juror cannot impeach his own verdict. The rule is based upon controlling considerations of a public policy which in these cases chooses the lesser of two evils. When the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial, the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room.

These two conflicting considerations are illustrated in the present case. If the facts were as stated in the affidavit, the jury adopted an arbitrary and unjust method in arriving at their verdict, and the defendant ought to have had relief, if the facts could have been proved by witnesses who were competent to testify in a proceeding to set aside the verdict. But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.

The rule on the subject has varied. Prior to 1785 a juror's testimony in such cases was sometimes received, though always with great caution. In that year Lord Mansfield, in Vaise v. Delaval, 1 T. R. 11, refused to receive the affidavit of jurors to prove that their verdict had been made by lot. That ruling soon came to be almost universally followed in England and in this country. Subsequently, by statute in some states, and by decisions in a few others, the juror's affidavit as to an overt act of misconduct, which was capable of being controverted by other jurors, was made admissible. And, of course, the argument in favor of receiving such evidence is not only very strong, but unanswerable—when looked at solely from the stand-

point of the private party who has been wronged by such misconduct. The argument, however, has not been sufficiently convincing to induce legislatures generally to repeal or to modify the rule. For, while it may often exclude the only possible evidence of misconduct, a change in the rule "would open the door to the most pernicious arts and tampering with jurors." "The practice would be replete with dangerous consequences." "It would lead to the grossest fraud and abuse" and "no verdict would be safe." Cluggage v. Swan, 4 Bin. 155, 5 Am. Dec. 400; Straker v. Graham, 4 Mees. & W. 721, 7 Dowl. P. C. 223, 1 Horn & H. 449, 8 L. J. Exch. N. S. 86.

There are only three instances in which the subject has been before this court. In United States v. Reid, 12 How. 361, 366, 13 L. Ed. 1023, 1025, the question, though raised, was not decided because not necessary for the determination of the case. In Mattox v. United States, 146 U. S. 140, 148, 36 L. Ed. 917, 920, 13 Sup. Ct. 50, such evidence was received to show that newspaper comments on a pending capital case had been read by the jurors. Both of those decisions recognize that it would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without "violating the plainest principles of justice." This might occur in the gravest and most important cases; and without attempting to define the exceptions, or to determine how far such evidence might be received by the judge on his own motion, it is safe to say that there is nothing in the nature of the present case warranting a departure from what is unquestionably the general rule, that the losing party cannot, in order to secure a new trial, use the testimony of jurors to impeach their verdict. The principle was recognized and applied in Hyde v. United States, 225 U. S. 347, 56 L. Ed. 1114, 32 Sup. Ct. 793, Ann. Cas. 1914A, 614, which, notwithstanding an alleged difference in the facts, is applicable here.

The suggestion that, if this be the true rule, then jurors could not be witnesses in criminal cases, or in contempt proceedings brought to punish the wrongdoers, is without foundation. For the principle is limited to those instances in which a private party seeks to use a juror as a witness to impeach the verdict.

Judgment affirmed.[85]

[85] That the rule does not exclude such proof of misconduct of a juror when separated from the others, see Heffron v. Gallupe, 55 Me. 563 (1868).

For a very exhaustive review of the English and American cases, see Woodward v. Leavitt, 107 Mass. 453, 9 Am. Rep. 49 (1871).

MURPHY v. STATE.

(Supreme Court of Wisconsin, 1905. 124 Wis. 635, 102 N. W. 1087.)

Error to review a conviction on a charge of bribery. The facts are sufficiently set out in the opinion.

SIEBECKER, J.[86] * * * Error is assigned upon the ruling of the trial court to the effect that the proceedings before a grand jury are privileged from being adduced before it as evidence by the defendant for the purpose of showing his immunity under section 4078, Rev. St. 1898, as amended by chapter 85, p. 106, Laws 1901. The amended section provides that no witness or party in the actions, proceedings, or examinations therein specified "shall be excused from testifying on the ground that his testimony may expose him to prosecution for any crime, misdemeanor or forfeiture. But no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, in such action, proceeding or examination, except a prosecution for perjury committed in giving such testimony." It is not questioned but that this statute gives the defendant an important right, in that he may assert a statutory exemption from punishment by way of defense in a criminal prosecution. An act of Congress of like import was held valid legislation, and it was decided that under its terms witnesses and parties could be compelled to give testimony of a self-incriminating character, if the provisions of the statute afforded immunity from prosecution for the offense to which the testimony related. Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819.

The defendant interposed a plea in bar claiming immunity from punishment for the offense charged in the information upon the ground that he appeared before the grand jury of Milwaukee county while it was in session in the month of January, 1902, and gave testimony as to the transaction, matter, and things alleged in the information. Upon the trial of the special issue raised by this plea he attempted to compel the production of the minutes of the proceedings of the grand jury for the purpose of offering them as original evidence to sustain the allegations of his plea in bar, but the court ruled these minutes as well as the testimony of members of the grand jury and the district attorney to be privileged under the rule of secrecy applied to proceedings before a grand jury. The purpose of such secrecy is embodied in the terms of their oath of office, and was designed to further an efficient and effective administration of the criminal law. The authorities as to whether testimony of the proceedings before a grand jury is competent as original evidence upon a trial in court are not uniform. They

[86] Part of opinion omitted.

unite in declaring that it can at no time be shown how the individual jurors voted, or what was said by them during their deliberations, for the reason that a disclosure thereof could not serve any purpose of justice. In Commonwealth v. Mead, 12 Gray (Mass.) 167, 71 Am. Dec. 741, the court, speaking on this subject, through Justice Bigelow declares: "The reasons on which the sanction of secrecy which the common law gives to proceedings before grand juries is founded are said in the books to be threefold: One is that the utmost freedom of disclosure of alleged crimes and offenses by prosecutors may be secured. A second is that perjury and subornation of perjury may be prevented by withholding the knowledge of facts testified to before the grand jury, which, if known, it would be for the interest of the accused or their confederates to attempt to disprove by procuring false testimony. The third is to conceal the fact that an indictment is found against a party in order to avoid the danger that he may escape and elude arrest upon it before the presentment is made."

All of the reasons practically disappear after the arrest of the accused, when he is put upon his trial in court. The only one of these grounds which could possibly, in a measure, subsist, is the danger of subornation, and this is quite effectually disregarded in modern criminal law, which approves the right and the procedure by which the accused, in fairness, is informed before the trial of the witnesses the state relies upon to establish the case. An examination of the adjudications leads us to the conclusion that evidence by grand jurors of the statements made before them by witnesses and parties is competent upon trials in courts, and that the weight of authority sustains the practice whenever the trial court deems it necessary for the ascertainment of truth and in furtherance of justice. Of the leading authorities on this subject we cite the following: State v. Benner, 64 Me. 267; Izer v. State, 77 Md. 110, 26 Atl. 282; Commonwealth v. Mead, 12 Gray (Mass.) 167, 71 Am. Dec. 741; Commonwealth v. Hill, 11 Cush. (Mass.) 137; People v. Naughton, 38 How. Prac. (N. Y.) 430; Wigmore on Evidence, § 2360–3; and Rice on Evidence, vol. 4, p. 412.

It is urged that the rule of the common law as to the competency of this class of evidence cannot control, because the subject is regulated by statute, which excludes it except as therein made competent. The statutory provisions on the subject are embodied in sections 2553–2555. An examination of these sections shows that, when the court so orders, grand jurors and officers attending on them are forbidden to make disclosure of the fact that an indictment for felony has been found until the arrest of the offender; that the jurors are not allowed to state or testify in what manner they may have voted, or what opinion was expressed by any of them, on any question before them; and that the members of the jury may be required to testify as to whether the testimony of a witness examined before them is consistent with or differs from his evidence before a court; and in prosecutions for per-

jury of the person who appeared and testified before them they may be required to disclose the testimony given before them. It will be observed that the statutes [87] are declaratory in part of the rules which had been established by the courts as to the competency of such evidence in the administration of the criminal law, but they in no way indicate that it was thereby intended to interfere with the established practice, which was to the effect that it is proper to examine a grand juror upon a trial in court as to what a witness testified to before the grand jury, when not objectionable under the ordinary rules of evidence, and when the ends of justice require it. The Supreme Court of the state of Florida, in construing their statute on the subject, which is the same in terms and phraseology as the sections above mentioned, held that they in no way abrogated the common-law rules which prevailed when the statute was adopted. See Jenkins v. State, 35 Fla. 737, 18 South. 182, 48 Am. St. Rep. 267, and cases cited; Hinshaw v. State, 147 Ind. 334, 47 N. E. 157. Upon these grounds we must hold that the court erred in holding that the evidence of grand jurors, the district attorney, and the minutes of the grand jury's proceedings could not be received as original testimony, when it is material to the issues in evidence upon this trial.

But an additional and very strong and cogent reason for holding this evidence material and competent is found in applying the provisions of chapter 85, p. 106, Laws 1901, quoted above. As stated, this statute takes from the defendant a very important right, in that he may be compelled to give testimony before the grand jury, and for the deprivation of this constitutional privilege has granted him complete immunity from prosecution or subjection to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he testified or produced evidence. If the defendant can establish that he is entitled to such immunity, it will be a complete defense to any further proceeding, and entitle him to a discharge from further prosecution. In its legal aspect this right is as important to the defendant as any legal defense to the accusation. No grounds are suggested why he should not be awarded the usual and ordinary methods recognized by the law for showing the facts necessary to establish this defense, nor do any valid reasons suggest themselves to us for holding that he should be deprived of this right given him in the law. We are of the opinion that this evidence, if otherwise unobjectionable, is competent as original evidence on the question involved in the issue raised by defendant's plea in bar, and should have been received, regardless of whether or not defendant testified as a witness upon the trial. It is the policy of the state not to compel

[87] A few courts have construed somewhat similar statutes as excluding the testimony of grand jurors in all cases not thus excepted; e. g., Tindle v. Nichols, 20 Mo. 326 (1855).

persons charged with crimes to testify in their own behalf. This privilege should not be imperiled by denying them the right to employ any legal means to establish their defenses. * * *

Judgment reversed.[88]

SECTION 2.—REQUIRED WITNESSES [89]

BARNES v. TROMPOWSKY.

(Court of King's Bench, 1797. 7 Durn. & E. 265.)

Debt on a charter-party of affreightment, not under seal. The charter-party, being produced at the trial at York before Rooke, J., appeared to be dated the 26th September, 1795, and signed by the name of M. Trompowsky, and attested by one Knieriem, whose seal as a sworn broker was affixed to the instrument. A witness was called, who was a merchant residing at Hull long conversant in the Russia

[88] See elaborate opinion in State v. Benner, 64 Me. 267 (1874), admitting testimony of grand juror to contradict a witness.

[89] In Fox v. Reil, 3 Johns. 477 (N. Y. 1808), Chief Justice Kent gives the following as the origin of the extremely technical rules applied to attested documents: "In the early periods of the English law, the names of the witnesses were always registered in the body of the deed. They were selected from the best men in the neighborhood; and if the deed was denied, they formed a necessary part of the jury, who was to try its validity. This rule continued, until the Statute 12 Edw. II, c. 2, allowed the inquest to be taken, without any of the witnesses being associated with the jury; but they were still to be summoned as usual. 'It is agreed,' says the statute, 'that when a deed, release, acquittance, or other writing, is denied in the king's court, wherein the witnesses be named, process shall be awarded to cause such witnesses to appear, as before hath been used.' The practice of joining the witnesses to the jury continued throughout the reign of Edward III, and Fortescue (de Laud. Leg. Ang. c. 32.) mentions it as existing in the reign of Henry VI. It gradually fell into disuse, and ceased about the time of Henry VIII, and until that period, the process to bring in the witnesses, upon the denial of a deed, continued, of which numerous instances are collected from the Year Books, by Brooke, (tit. Testmoignes.) When, therefore, the ancient law required the witnesses to a deed to form part of the jury, and continued down to the time of Henry VIII, to compel them to come in, by similar process as that awarded for the jury, (see Reg. Brev. jud. 60, and Thesaurus Brevium, 88,) it cannot be supposed that the notion of proving a deed, by the confession of the party, in pais, was ever thought of or admitted. Under Henry VI it was held, that if a deed be acknowledged and enrolled of record, the party was estopped to plead non est factum; but the case assigns a very sufficient reason for this, because, as was observed, upon every deed enrolled, the party shall be examined, and the deed shall be read to him by the court, and it is not to be supposed that the party has been deceived. Year Book, Hil. 9 Hen. VI, pl. 8.

"In the case of Smartle v. Williams, 1 Salk. 280 (1695), the court of King's Bench, after debate, went, perhaps, a little further, and held that the acknowledgment of a deed by the party in a court of record, or before a master in chancery in the country, was good evidence of the execution of a deed, and such an acknowledgment estopped the party from relying on the plea of non est factum. * * *"

trade and in habits of correspondence with the defendant, and who proved the signature to the charter-party to be his handwriting; he also proved that eight years ago a sworn broker named Knieriem was living and resident at Riga, and he had not heard of his death. Another witness proved that he knew Knieriem acting there as a broker in 1790; but neither of these witnesses knew his handwriting. After the plaintiff had gone through his whole case, it was objected, amongst other things, that the charter-party was not duly proved: but the learned judge thought there was sufficient evidence to go to the jury; and the plaintiff recovered a verdict. A rule was obtained on a former day in this term calling on the plaintiff to shew cause why the verdict should not be set aside and a new trial had on the ground of this as well as several other objections, which were stated: but the Court desired the plaintiff's counsel on shewing cause to confine themselves to this objection.

Law, Chambre, and Raine, shewed cause against the rule; contending that under all the circumstances this was the best evidence within the power of the plaintiff to produce. In Swire v. Bell, 5 Durn. & E. 371, where the party could not examine the subscribing witness to a bond by reason of his interest in the cause, proof of the handwriting of the obligor was held sufficient. By parity of reasoning the same mode of proof ought to be received here; for the witness lives at Riga, and cannot be compelled to attend by any process; he might equally refuse to be examined if a commission were sent out; and that mode of examination has fallen into disuse from the heavy expence and difficulty attending it. Besides, proof of the handwriting of the subscribing witness is only a medium of proof of the handwriting of the contracting party; and as this instrument is not under the seal of the contracting party himself, but has its force from his signature only, this proof is sufficient. In the proof too of foreign instruments more latitude has been allowed than in general cases between subject and subject. Even where the subscribing witness, though a subject, had been absent in the East Indies for five years, Lord Mansfield held in Coghlan v. Williamson, Dougl. 93, that proof of the obligor's handwriting and of his admission of the debt was sufficient. And upon a motion for entering a nonsuit the Court concurred with his Lordship, the point being given up by the defendant's counsel, upon the ground of his admission of the debt.

Gibbs, Heywood, Serjeant, and Holroyd, contra, were stopped by the Court.

Lord Kenyon, C. J. We ought not to suffer this point to be called in question; it is too clear for discussion. I do not say that proof of the handwriting of the contracting party is not under any circumstances sufficient where there is a subscribing witness; as if no intelligence can be obtained respecting the subscribing witness after reasonable inquiry has been made; but here the witness is a known person

residing[90] at Riga. Generally speaking, every instrument, whether under seal or not, the execution of which is witnessed, must be proved in the same manner, regularly by the witness himself if living; if dead by proving his handwriting; if residing abroad by sending out a commission to examine him, or at least by proving his handwriting, which last indeed is a relaxation of the old rule, and admitted only of late years. I remember the case alluded to which was tried at Guildhall, where the subscribing witness being domiciled in a foreign country Lord Mansfield permitted evidence to be given of his handwriting. That opinion was received with approbation at the time on account of the necessity and convenience of the case; and I myself have adopted it in cases which have been tried before me. The same medium of proof has also been admitted where the subscribing witness has been sought for and could not be found, so as to furnish a presumption that he was dead. But the rule has never been relaxed further than these instances; and there is neither necessity nor convenience in doing so. The case of Swire v. Bell[91] went on the ground that the subscribing witness was interested at the time of the execution and also at the time of trial.

ASHURST, J., of the same opinion.

GROSE, J. Where there is a subscribing witness the parties thereby agree that the proof of their handwriting shall be made through that medium.[92]

LAWRENCE, J. Even an acknowledgment by the obligor himself has been held not to be sufficient evidence on the plea of non est factum. Abbot v. Plumbe, Dougl. 215.

Rule absolute.[93]

[90] In Prince v. Blackburn, 2 East, 250 (1802), it was held proper to prove the signature of an attesting witness who had gone abroad on a business trip.

[91] In Swire v. Bell, 5 D. & E. 371 (1793), the witness was incompetent both at the time of attesting and at the trial, and it was held that his signature could not be proved, distinguishing the case of a witness who subsequently becomes incompetent to testify. In case of subsequent incompetency the signature of the witness may be proved as in case of death. Godfrey v. Norris, 1 Strange, 34 (1717); Jones v. Mason, 2 Strange, 833 (1729).

[92] The rule requiring the examination of the attesting witness has been applied to noncontractual instruments, such as an attested notice to terminate a tenancy. Doe v. Durnford, 2 M. & S. 62 (1813). The rule has also been applied in actions between strangers to the instrument, where it was sought to prove the execution by one of the parties to it. The King v. Harringworth, 4 M. & S. 350 (1815); Brigham v. Palmer, 3 Allen (Mass.) 450 (1862).

[93] In a few states the courts have limited the rule to sealed instruments, or at least refused to apply it to attested promissory notes. Hall v. Phelps, 2 Johns. (N. Y.) 451 (1807).

There are statutes in several of the states confining the rule to instruments required to be attested; e. g., Hurd's Rev. St. Ill. 1913, c. 51, § 51.

CALL v. DUNNING.

(Court of King's Bench, 1803. 4 East, 53.)

In debt on bond, at the trial before Lord Ellenborough, C. J., at the Sittings after last term, the only proof offered of the execution of the bond was the answer of the defendant in Chancery to a bill filed for a discovery, Whether this were his bond? in which answer it was admitted to be so. But the bond, when produced, having the name "Richard Wilson" subscribed thereto as the witness attesting the execution, and no evidence being given of his hand-writing, or that any inquiry had been made who the person was, or where he was to be found, or that any application had been made to any person of that name to know whether he were the subscribing witness; (though it was suggested on the part of the plaintiff that no knowledge of the witness could be obtained by him;) the Lord Chief Justice thought that no sufficient foundation had been laid to let in the secondary evidence offered, and therefore nonsuited the plaintiff.

Gibbs moved to set aside the nonsuit.

LORD ELLENBOROUGH, C. J. This case falls within the common rule. The answer of the defendant in Chancery, admitting the execution of his bond, to which there was a subscribing witness, cannot be more than secondary evidence: and I did not reject it as not being admissible in any event, but because the plaintiff had not laid a foundation for letting it in by shewing that he had made inquiry after the subscribing witness Richard Wilson, and had not been able with due diligence to procure any account of him. No one person of that name (of whom several were suggested in court within reach of inquiry) had been applied to for the purpose of knowing whether he were the subscribing witness.

LE BLANC, J. The argument of the plaintiff's counsel goes upon the supposition that the obligor himself must know every circumstance attending the execution of the bond: but that does not follow. A fact may be known to the subscribing witness not within the knowledge or recollection of the obligor, and he is entitled to avail himself of all the knowledge of the subscribing witness relative to the transaction.[94]

PER CURIAM. Rule refused.[95]

[94] REPORTER'S NOTE.—Vide Abbot v. Plumbe, Doug. 216; Johnson v. Mason, 1 Esp. 89, Manners q. c. v. Postan, 4 Esp. 239; Cunliffe v. Sefton, 2 East, 183, 187, 8; Phipps v. Parker, 1 Campb. 412. The rule which requires the subscribing witness to a deed, or other written instrument, to be produced, or his

[95] See note 95 on page 220.

absence accounted for, in order to prove the execution, has very few exceptions. The following are all that occur to me:

Where the deed has been acknowledged and enrolled of record. Year Book, Hil. 9, Hen. VI, pl. 8.

Where it has been acknowledged before a master in chancery in the country. Smartle d. Newport v. Williams, 1 Salk. 280.

Where the party has acknowledged the execution by an indorsement under his hand and seal. Dillon v. Crawley, 12 Mod. 500.

Where the instrument comes out of the hands of the opposite party after notice to produce it. The King v. The Inhabitants of Middlezoy, 2 Term Rep. 41; Thompson v. Jones and Passel v. Godsall, cited by counsel; Bowles et al. v. Langworthy, 5 Term Rep. 366.

Where the party, pending a suit on the instrument, agrees to admit the execution. Laing v. Raine, 2 Bos. & Pull. 85.

In one case it was held by the Supreme Court of New York, that promissory notes were not within the rule, and that the confession of the party was sufficient without producing the subscribing witness. Hall v. Phelps, 2 Johns. (N. Y.) 451. But the same court fully recognized the rule as applicable to sealed instruments in a case that came before them soon afterwards. Fox et al. v. Reil et al., 3 Johns. (N. Y.) 477.

Where the general rule was not controverted it has still been a question in many cases, What shall be sufficient to account for the absence of the subscribing witness so as to let in secondary evidence? It has been decided that his absence is sufficiently accounted for under the following circumstances:

Where he is dead, or presumed to be so. Anon. 12 Mod. 607; Adam v. Kerr, 1 Bos. & Pull. 360; Webb v. St. Lawrence, 3 Bro. Parl. Ca. 640 (Toml. edit.); Banks v. Farquarson, 1 Dick. 167; Barns v. Trompowsky, 7 Term Rep. 265; Mott v. Doughty, 1 Johns. Cas (N. Y.) 230; Hopkins v. De Graffenreid, 2 Bay, 187.

Where he becomes party to the suit in consequence of being made the executor or administrator of one of the parties to the instrument. Case cited by Hooper, Serjnt., in Goss v. Tracy, 1 P. Wms. 289; Godfrey v. Norris, 1 Stra. 34; Cunliffe v. Sefton, 2 East, 183.

Where he was interested in the instrument at the time of its execution, and continues so at the time of the trial. Swire v. Bell, 5 Term Rep. 371.

Where he has become blind. Wood v. Drury, 1 Ld. Raym. 734.

Where he has been convicted of an infamous crime. Jones v. Mason, 2 Stra. 833.

Where he resides beyond sea. Barns v. Trompowsky, 7 Term Rep. 266; Wallis v. Delancey, cited in notis; Anon., 12 Mod. 607; Webb v. St. Lawrence, 3 Bro. Parl. Ca. 640.

Where he is out of the jurisdiction of the Court, so as not to be amenable to its process. Prince v. Blackburn, 2 East, 250; Holmes v. Pontin, Peakes' Ca. 99; Banks v. Farquarson, 1 Dick. 167; Cooper v. Marsden, 1 Esp. 2; Ward v. Wells, 1 Taun. 461; Sluby v. Champlin, 4 Johns. (N. Y.) 461; Hopkins v. De Graffenreid, 2 Bay (S. C.) 187.

[95] In Bowles v. Langworthy, 5 D. & E. 366 (1793), the defendant's examination before the commissioners of bankrupt was received apparently as an admission, without calling the attesting witness; but in that case the defendant produced the instrument and apparently claimed under it. See Orr v. Morice, post, p. 223.

In chancery the admission in the defendant's answer giving discovery was sufficient, but this was thought to be analogous to an admission by the pleadings at law, per Pollock, C. B., in Whyman v. Garth, 8 Exch. 803 (1853). In this case the defendant was called to prove his own signature. The court held, however, that the statute making him a competent witness did not dispense with the necessity of calling the attesting witness. But see Bowling v. Hax, 55 Mo. 446 (1874).

GORDON et al. v. SECRETAN.

(Court of King's Bench, 1807. 8 East, 548.)

In an action upon a policy of insurance on goods on board the ship Tom, at and from the Southern Whale Fishery until her arrival at London, the declaration contained an averment that the plaintiffs were interested in the subject-matter of insurance; and the defendant meaning to dispute that at the trial, gave them notice to produce certain articles of agreement between them (who were also owners of the ship) and the captain, whereby, as he contended, it would appear that the captain (who was not a plaintiff) was interested in one third of the neat proceeds of the cargo: and if so, the defendant, having paid more than enough into court to cover the shares of these plaintiffs, would have been entitled to a verdict, unless the plaintiffs were entitled to recover the remainder of the sum insured as trustees for the captain; which would depend upon the construction of the articles. In pursuance of the notice the instrument was accordingly produced at the trial by the plaintiffs, when there appeared to be two subscribing witnesses to it; and therefore the plaintiffs insisted that the defendant could not give it in evidence without calling one of those witnesses to prove it. And Lord Ellenborough being of that opinion, the plaintiffs recovered.

The Attorney General moved at the beginning of the term for a new trial, 1st, on the ground that the instrument coming out of the hands of the plaintiffs, parties thereto, upon notice to produce it, was not necessary to be proved by one of the subscribing witnesses, according to the rule laid down in Rex v. Middlezoy, 2 Term Rep. 41.[96] * * *

LORD ELLENBOROUGH, C. J., said, that the case of The King v. Middlezoy, which was much questioned at the time, had been since overruled. And that it was not enough to give notice to the opposite party in a cause to produce an instrument in his hands, in order to dispense with any further proof of it by the party giving the notice; but that the production of it at the trial, in pursuance of such notice, did not supersede the necessity of proving it by one of the subscribing witnesses, if any, as in ordinary cases.

And LAWRENCE, J., said, that this had been so ruled by Lord Kenyon in a subsequent case, respecting a will, which the adverse party, in whose hands it was, had notice to produce, and did produce at the trial, when it appeared that there were subscribing witnesses to it; and Lord Kenyon held that the party calling for it was bound to call one of the subscribing witnesses to prove the instrument.

LORD ELLENBOROUGH, C. J., added, that the case of a will shewed strongly the necessity of adhering to the strict rule of proof, and the enormity of the general proposition, that the production of an instru-

[96] Statement condensed and part of opinion omitted.

ment by an adverse party, in consequence of a notice, dispensed with the general rule of proving its execution by a subscribing witness: for if a party were fixed with the possession of an instrument affecting his property, however questionable its execution might be, and even though he had impounded it because it was forged, or had been obtained by fraud: that, according to the argument, was to relieve the party attempting to avail himself of it from calling the subscribing witness.

The ATTORNEY GENERAL, after suggesting the difficulty which parties would be laid under in these cases, from their ignorance of the names of the subscribing witnesses to an instrument till produced at the trial, then offered an affidavit on the part of the defendant, of his being surprized and not prepared at the trial for want of knowing who the subscribing witnesses were; relying on the case of The King v. Middlezoy, that the notice to produce the articles dispensed with further proof of them when produced.

LORD ELLENBOROUGH, C. J., said, that there could be no objection to his taking a rule to shew cause on the ground of surprize. * * *

Rule absolute on ground of surprise.

COOKE v. TANSWELL.

(Court of Common Pleas, 1818. 8 Taunt. 450.)

Covenant on an indenture of apprenticeship, with an averment in the declaration that the indenture was in the possession of the defendant, and, therefore, could not be produced by the plaintiff. Plea, non est factum. At the trial before Burrough, J., at the sittings for Westminster, after the last term, it was proved that the deed was in the hands of the defendant, to whom notice, specifying the name of Pain, as that of the subscribing witness, had been given to produce it. The plaintiff, on the defendant's refusal to produce the deed, gave in evidence what was supposed to be a copy of it, on which the name of the subscribing witness was apparent; but, on its turning out that this paper was not a copy, the plaintiff abandoned it and gave parol evidence of the contents of the original without calling the subscribing witness who was in court. For the defendant, it was contended that the plaintiff had failed in his proof, and that the attesting witness should have been called. But Burrough, J., was of opinion, that the proof was sufficient without the evidence of the subscribing witness.

Lens, Serjt., on a former day, had obtained a rule nisi to set aside this verdict, and enter a nonsuit on the ground urged at the trial.

GIBBS, C. J. I do not think the knowledge of the name of the subscribing witness makes any difference in the case. I take the question to be, whether when one party calls for a deed of the other, who does not produce it, and the party calling for the deed is consequently driven to give parol evidence of its contents, it is necessary for him

to call the subscribing witness. In cases where non est factum is not pleaded, as in ejectment, when a party so situated gives evidence of the contents of a deed, I never yet heard it contended that it was necessary to call the subscribing witness. Here, the deed was in the hands of the defendant; if he wished to throw on the plaintiff the burthen of calling the subscribing witness, he might have produced the deed. It was alleged on the record, that the deed was in the defendant's hands, that allegation was admitted, and the defendant being called on to produce it, and refusing to do so, it was not necessary that the plaintiff should call the subscribing witness to the deed before he gave evidence of the contents.

PARK, J., of the same opinion.

BURROUGH, J. Not only was it averred on the record that the deed was in the defendant's hands, but that fact was proved, and also that notice had been given to him to produce it, which he refused to do; and I thought at the trial, as I think now, that there was no necessity for calling the subscribing witness.

Rule discharged.

ORR v. MORICE et al.

(Court of Common Pleas, 1821. 3 Brod. & B. 139.)

Assumpsit for use and occupation. The defendants were the assignees of a bankrupt, and at the trial before Dallas, C. J., (Middlesex sittings after Trinity term last,) it was proved, that one of them had continued for some time after the bankruptcy to occupy a countinghouse, which, up to his bankruptcy, had been occupied by the bankrupt.

The defendants, under a notice from the plaintiff, produced the deed of assignment, and the plaintiff, omitting to prove its execution by the attesting witness, it was contended, that the deed was not admissible in evidence.

Dallas, C. J., held, that the assignment so produced was admissible, as coming out of the possession of the defendants, who had taken a beneficial interest under it. A verdict having been found for the plaintiff,

Hullock, Serjt., on a former day, obtained a rule nisi to set aside this verdict, and enter a nonsuit, on the ground, that the plaintiff ought to have proved the deed by calling the attesting witness.

DALLAS, C. J.[97] The cases on this subject, have been contradictory; the earlier cases laying down a rule, which, on first consideration I should have thought correct, namely, that when an adverse party, who has a deed in his custody, produces it on notice, it shall be deemed to be duly executed, and the party calling for it, shall not be required to

[97] Opinions of Park, Burrough, and Richardson, JJ., omitted.

prove the execution by calling an attesting witness. That rule indeed proceeded on the ground, (which subsequent practice has in some degree removed,) that the party calling for the deed could not be supposed to know the name of the attesting witness. Then came the case of Gordon v. Secretan [8 East, 548], by which that doctrine was expressly overruled, and wherein the party calling for the deed, was held bound to prove its execution, as in every other case. After that, followed the case of Pearce v. Hooper [3 Taunt. 60], in which it was decided, that where an adverse party produces, upon notice to do so, an instrument under which he claims a beneficial estate, the party calling for the deed shall not be compelled to prove its execution by the testimony of the attesting witness: and in another case at nisi prius, in which the circumstances were of the same nature, I remember having ruled to the same effect. The question then will be, whether, in the present instance, the assignees did claim [98] a beneficial interest under the instrument which they were called on to produce? As to that, it appeared that the bankrupt had claimed the premises in question, that his assignees had entered, and had occupied them for some time. This brings the case within the rule laid down in Pearce v. Hooper, and I think it was not incumbent on the plaintiff to call the attesting witness of the deed produced by the defendants under these circumstances.

Rule discharged.

CUNLIFF et al. v. SEFTON et al.

(Court of King's Bench, 1801. 2 East, 183.)

Upon a rule nisi for setting aside a nonsuit in this cause, which stood over from last Michaelmas term, Chambre, J., before whom it was tried at the last Summer assizes at Lancaster, reported that it was an action on a bond given by the defendants to the intestate, dated 31st of February, 1795, for £600., to which non est factum was pleaded. That the bond when produced appeared to be witnessed by Richard Bate, and by Alice Houghton, one of the plaintiffs: and to prove the execution of it the following evidence was offered, viz. That the plaintiffs had taken out a subpœna for Richard Bate, one of the subscribing witnesses; and that for the purpose of serving him with it, diligent inquiry was made at the place where the obligors and the obligee lived, without having been able to obtain any intelligence of such a person; who he was, or where he lived, or any other circumstance relating to him. That the defendants had acknowledged the debt, and made a calculation of what was due for principal and interest, which the plaintiffs offered to prove by letters of correspond-

[98] Extrinsic evidence may be used to prove that the adverse party does claim under the deed. Wilkins v. Wilkins, 4 Adol. & El. 86 (1835).

ence: and as Alice Houghton, the other subscribing witness, by reason of her interest as administratix and plaintiff, could not be produced as a witness, it was offered to perfect the proof by evidence of her hand-writing. The learned Judge, upon the authority of Abbot v. Plumbe, Dougl. 216, thought himself precluded from receiving the evidence of acknowledgment as proof of the execution of the bond. He also thought that the inquiry after Richard Bate was too slight a foundation for directing the jury to find for the plaintiff upon the *rest* of the evidence, without producing Bate as a witness, or proving *his* hand-writing. Not having, however, any doubt of the justice of the demand, he wished to have reserved the point for the determination of this Court upon a case: but there being no person to consent on the part of the defendants, the learned Judge directed a nonsuit, with liberty to the plaintiffs to apply to this Court to set it aside.

GROSE, J. The general principle of evidence is clear, that the best evidence which the nature of the case will admit of must be given. Then apply that to the present case: here is a bond executed, nobody knows where, and attested by a witness, of whom nothing appears to lead to a discovery who he was, or where he lived. But it was known where the parties to the bond lived; and there it is stated that diligent inquiry was made after the subscribing witness, and no account could be obtained of him. The bond itself is dated in February, 1795, and the obligee is since dead. I do not see what the plaintiffs could have done more than they have. Then if they have used due diligence without effect, that will let them in to secondary evidence. It is plain from the report that the learned Judge was not satisfied with the first impression of his mind, that the evidence offered ought not to have been received; because he reserved the point, and referred it to our opinion: and upon more mature consideration we think that the evidence offered was sufficient to entitle the plaintiffs to recover. I form this opinion with reference to what is daily passing in the world. The frequency of written instruments in modern times has made persons less careful than they used to be in the selection of witnesses to their attestation. It has occurred to me to know that persons unknown to the parties, such as waiters at a tavern, have been called in to attest instruments of the most important kind, even wills; where the parties had no previous knowledge of them, nor even were apprized that they bore the names by which they attested the execution. The difficulty, therefore, which has occurred in this case can be no matter of surprize. On the whole, I think the nonsuit ought to be set aside; and possibly the plaintiffs may, in the mean time, be able to procure some intelligence of the subscribing witness.

LAWRENCE, J. It is now admitted as a general rule, that proof of the acknowledgment of a defendant is not sufficient in an action on a bond without calling the subscribing witness. The only question now is on that part of the report of the learned Judge, which states that he

was not satisfied that sufficient inquiry had been made after Richard Bate, one of the subscribing witnesses, in order to let in the proof of the hand-writing of the other subscribing witness, who has since become one of the parties interested. Now no doubt that a subscribing witness's hand-writing may be proved, if diligent inquiry have been made after him, and he cannot be found. Then the question is, Whether it be not sufficient to inquire after a witness whom nobody knows at the place where the obligors and obligee lived? It is stated, that diligent inquiry was made after the witness there, but without success: then where else were the parties to inquire? It does seem that they have done everything that could be expected of them; and if so, I think they ought to have been let into the secondary evidence offered.

LE BLANC, J. Inquiry was made for the subscribing witness at the only place where it was probable to find or hear of him. The only other step the parties could have taken was to advertise for him in the public papers: and unless the Court should hold that necessary to be done in all these cases, I think the plaintiffs have made all the inquiry which could reasonably be required of them.

Rule absolute.[99]

DOE ex dem. OLDHAM et ux. v. WOLLEY.

(Court of King's Bench, 1828. 8 Barn. & C. 22.)

Ejectment for lands in Worcestershire. Plea, the general issue. At the trial before Vaughan, B., at the last Spring assizes for Worcester, it appeared that the lessors of the plaintiff claimed as devisees of Frances Wolley, who was said to be heir of T. Wolley, who died in 1800, seised of the estate in question, having devised it to his widow for life, remainder to his right heirs. This will was dated the 21st February, 1798, more than thirty years before the trial, but one of the subscribing witnesses was proved to be still living; and it was insisted for the defendant that he must be called to prove the execution of the will, as the testator had died within thirty years. The learned Judge thought that the thirty years must be computed from the date of the will, and overruled the objection.[1]

LORD TENTERDEN, C. J. As to the first point I am of opinion that the rule of computing the thirty years from the date of a deed is equally applicable to a will. The principle upon which deeds after that period are received in evidence, without proof of the execution, is, that the witnesses may be presumed to have died. But it was urged that when the existence of an attesting witness is proved, he must be called.

[99] All of the attesting witnesses must be shown to be unavailable in order to admit secondary evidence. Forbes v. Wales, 1 Wm. Blackstone, 532 (1764); Gelott v. Goodspeed, 8 Cush. (Mass.) 411 (1851).

[1] Statement condensed.

That, however, would only be a trap for a nonsuit. The party producing the will might know nothing of the existence of the witness until the time of the trial. The defendant might have ascertained it, and kept his knowledge a secret up to that time, in order to defeat the claimant. As to the other point, it must at all events be admitted, that the death of the grandfather's brothers might be presumed, and then, in order to raise the objection, two affirmatives must be presumed; viz. that they did marry, and did leave issue. I think that would be a very unreasonable, and that the direction of the learned Judge was right.

Rule refused.

McPHERSON v. RATHBONE et al.

(Supreme Court of New York, 1833. 11 Wend. 96.)

This was an action of assumpsit, tried at the Albany circuit in September, 1831, before the Hon. James Vanderpoel, one of the circuit judges.

The suit was against Lyman Rathbone, Moses Rathbone and Samuel Rathbone; the declaration was for goods sold and delivered, and also contained the money counts. The plaintiff claimed to recover for goods sold in September, 1825, and July, 1826. To prove the partnership of the defendants, he offered in evidence a memorandum of dissolution of partnership, signed and sealed by Samuel Rathbone alone, bearing date 15th August, 1826, in which it was stated that a partnership had existed between the defendants, and was on that day dissolved by mutual consent. This evidence was objected to by the defendant, but the objection was overruled, and the defendants excepted. The plaintiff next introduced articles of partnership entered into by the defendants, bearing date in May, 1823, by which they agreed to enter into copartnership as merchants, under the name and firm of "L. Rathbone & Co.," the partnership to continue as long as the parties should mutually agree to its continuance. The articles purported to be signed and sealed by the three defendants, and to have been executed in the presence of H. A. Rathbone. The plaintiff called Samuel Rathbone, junior, to prove the signature of H. A. Rathbone, the subscribing witness. He testified that he was the son of the defendant, Samuel Rathbone, and brother of Henry A. Rathbone, who was at the time of the trial a resident of the state of Tennessee; that he did not know the signature of H. A. Rathbone, subscribed to the articles as a witness, to be the hand writing of his brother Henry A. Rathbone; that he did not think it resembled the present hand writing of his brother, and that he did not know his hand writing at the date of the articles. Upon this evidence the plaintiff offered to prove the hand writing of the defendant Samuel Rathbone subscribed to the

articles; the defendant objected to such proof, insisting that either the subscribing witness must be produced or his hand writing proved. The judge overruled the objection, and the defendants excepted; whereupon the signatures of Samuel Rathbone and of Lyman Rathbone were proved, and the articles were read in evidence as their admission of the partnership. It was further proved that at the time of the existence of the partnership, the other defendant, Moses Rathbone, was always reputed to be a member of the firm. A witness for the plaintiff then testified that in March, 1827, he presented an account of the items of the plaintiff's demand to Lyman Rathbone, who admitted the same to be correct, and gave his note for the balance stated to be due, signing the same in the partnership name, to wit, "L. Rathbone & Co." The note was produced and deposited with the clerk of the circuit, and the jury, under the charge of the judge, found a verdict for the plaintiff for the amount of his demand, with interest. The defendants having tendered and obtained a bill of exceptions to be signed, move for a new trial.

SAVAGE, C. J. It was undoubtedly competent to have proved the partnership of all these defendants by general reputation, but probably no such reputation could be shown as to Samuel Rathbone. The principal question is, whether the articles of copartnership were sufficiently proved, as respects Samuel Rathbone.

Where a sealed instrument is attested by a subscribing witness, the testimony of such witness is the best evidence of its execution. If the subscribing witness is not produced, his absence must be sufficiently accounted for: as that he is dead, or cannot be found, after diligent inquiry; or that he resides out of the state, and is beyond the reach of the process of the court, &c. 2 Stark. Ev. 337; 1 Phil. Ev. 419. In such case, proof of the hand writing of the subscribing witness proves the execution of the instrument. 1 Phil. Ev. 420; Jackson v. Chapin, 5 Cow. 485; Jackson v. Cody, 9 Cow. 148; 2 Stark. Ev. 341, 2 n. 1. Such is the rule in this state, but it is different in some of the other states; and some of the English cases say, that in addition to the proof of the hand writing of the witness, proof should also be given of the hand writing of the party. 2 Stark. Ev. 342; 1 Bos. and Pull. 300. If the hand writing of the subscribing witness cannot be proved, after proper diligence has been used for that purpose, the party must then resort to the same testimony as if there had been no subscribing witness; the hand writing of the party executing the instrument may be proved by any one acquainted with it. In this case, the execution of the instrument was sufficiently proved, if, under the circumstances, enough was done to prove the hand writing of the absent subscribing witness. It must be conceded, I think, that the plaintiff had procured a witness who would be most likely to know the hand writing of the absent subscribing witness. If his own brother could not prove his hand writing, the court was justified in assuming that it

could not be proved, and in receiving evidence of the hand writing of the party.

Assuming the partnership of the defendants to have been proved, as I think it was, then there can be no doubt of the plaintiff's right to recover. The indebtedness accrued during the existence of the partnership. And though one partner cannot bind his copartner by a note, after the dissolution of the partnership, yet he may liquidate a previous account. By doing so, he does not create a debt; that was previously in existence. I am therefore of opinion that a new trial must be denied.[2]

WRIGHT v. DOE dem. TATHAM.

(Court of Exchequer Chamber, 1834. 1 Adol. & E. 3.)

The defendant in error declared in ejectment against the plaintiff in error in the Court of King's Bench. At the trial before Gurney, B., at the Lancaster Spring assizes, 1833, the jury found a verdict for the plaintiff below, and the counsel for the defendant below tendered a bill of exceptions.

By the bill of exceptions it appeared, that the plaintiff below claimed as heir at law of John Marsden deceased, who was admitted to have died seized, leaving the plaintiff below his heir at law; but Wright claimed under a will of Marsden.

[It appeared from the bill of exceptions that Wright, the defendant below, in order to prove the will, introduced the testimony, taken at a former trial, of one of the attesting witnesses named Bleasdale, who had since died. On this proof the defendant offered the will, but it was excluded because the other attesting witness had not been called. The verdict was for the plaintiff.][3]

TINDAL, C. J., [after holding that the former testimony of the deceased witness was properly received.][4] If, therefore, such evidence be, as we think it is, producible, the only question that remains is, what is the character and degree of that evidence, and for what purpose it can be produced: and it seems to us, that such evidence is direct and immediate evidence in the cause, and is producible in evidence in the cause for the same purpose and to the same extent as if the witness

[2] In a number of states a rule has been developed that, where the instrument appears to have been executed out of the jurisdiction and the attesting witnesses are nonresidents, no further showing is necessary to admit other proof of execution. Newson v. Luster, 13 Ill. 175 (1851); Valentine v. Piper, 22 Pick. (Mass.) 85, 33 Am. Dec. 715 (1839); Woodman v. Segar, 25 Me. 90 (1845).

In the case of an instrument required to be attested, as a will, obviously proof of the handwriting of the testator alone would not establish the fact of attestation.—*Ed.*

[3] This part of the statement has been condensed.

[4] See Doncaster v. Day, 3 Taunt. 262 (1810), post, p. 443.

himself had been alive and sworn, and had given the same evidence in the witness box in the present cause.

For unless the evidence is carried to this extent, it is impossible to define any line or limit to which it shall be held to extend.

It is objected on the part of the plaintiff below, first, that the admitting of this evidence is in contravention of the rule of law, by which the best evidence is required to be given in every case; for it is contended that the vivâ voce evidence of Proctor, the surviving witness, is better evidence than the examination of Bleasdale, who is dead.

But we think this argument assumes the very point in dispute. If the evidence which had been offered of the execution of the will, had consisted simply in proving the hand-writing of Bleasdale, one of the attesting witnesses, which would have been the legitimate mode of proving the attestation by him, after his death, it might indeed have been objected with some ground of reason, that such evidence could not be the best, whilst another of the attesting witnesses was still alive, and within the jurisdiction of the court. For, in that case, the proof of the hand-writing only would have done no more than raise the presumption, that he witnessed all that the law requires for the due execution of a will; whereas the surviving witness would have been able to give direct proof, whether all the requisites of the statutes had been observed or not. Such direct testimony, therefore, might fairly be considered as evidence of a better and higher nature than mere presumption arising from the proof of the witness's hand-writing. Stabitur præsumptioni, donec probetur in contrarium. The effect, however, of Bleasdale's examination is not merely to raise a presumption; it is evidence as direct to the point in issue, and as precise in its nature and quality, as that of Proctor when called in person: it is direct evidence of the complete execution of the will, by the statement upon oath of the observance of every requisite made necessary by the statute of frauds. If Proctor had been examined in the present action by the plaintiff below, there can be no doubt but the examination of Bleasdale on the last trial might have been put in, to contradict him. But on what principle could such contradiction have been admissible, unless the evidence obtained by means of the examination was of as high a character and degree as that of the vivâ voce examination of the surviving witness? If the parol examination of Proctor was the better evidence, as contended for, how could it be opposed by the inferior evidence of Bleasdale's examination?

It was objected, secondly, that not to allow this testimony, that is, to dispense with the necessity of calling the surviving attesting witness, is, in effect, to destroy the security intended to be given by the statute of frauds. For it is said that, as that statute requires the attestation of three witnesses, so, to allow the will to be proved upon a trial at law without calling an attesting witness, so long as one of the three remains in life, is to give up the full benefit of having three witnesses to the will. It may be observed, however, that the statute

of frauds did not look primarily to the mode of proving the will when contested, but to the security of the testator at the time of the execution of the will; the statute intending that three witnesses should be in the nature of guards or securities, to protect him in the execution of his will against force, or fraud, or undue influence. The proof of the will by the three witnesses, supposing it should afterwards come in contest, is only an incidental and secondary benefit, derived from that mode of attestation. Indeed the principle of this objection, if carried to its full extent, would require the will to be proved in every case by the three witnesses. It is well settled, however, that, in an action at law, it is sufficient to call one only of the subscribing witnesses, if he can speak to the observance of all that is required by the statute; and the objection itself is obviously open to the same answer which has been given to the first, viz. that the evidence resulting from the written examination of the deceased witness, in the former suit between the same parties, is of as high a nature, and as direct and immediate, as the vivâ voce examination of one of the witnesses remaining alive, and actually examined in the cause.

Upon the whole, we think that, after the proof given in this case of the examination of Bleasdale and his subsequent death, the will and codicil were receivable in evidence without further proof, and consequently that a venire de novo must be awarded.

Venire de novo awarded.[5]

[5] Courts of chancery appear to have required the examination of all the attesting witnesses in will cases. Townsend v. Ives, 1 Wilson, 216 (1748): "This was a bill preferred by the legatees under the will of John Townsend, in order to have his real estate sold for payment of their legacies, which are charged thereupon, against the heir at law of the testator who is an infant, and to have the will established. There were three witnesses to the will all now living, but only one has been examined, who proved the execution of it, and the attestation of the other two witnesses. But his Honour refused to establish the will without the examination of all the witnesses, for it is a rule that all the witnesses if living must be examined to prove the will: besides the heir at law is, in this case, an infant, who, if of age, has a right to cross-examine all the witnesses; and as no admission of this sort can be received for an infant, this court must protect his right, and therefore must insist upon all those requisites which he would have a right to insist upon if he were of age, and capable of making a defense for himself."

And so in Bootle v. Blundell, 19 Ves. Jr. 494 (1815). A number of the states have construed their wills act as adopting the chancery rule for proceedings to probate wills in solemn form.

At law, where none of the attesting witnesses are available, proof of the signature of one of the attesting witnesses is sufficient; no other proof of execution is necessary. Adam v. Kerr, 1 B. & P. 360 (1798); Stebbins v. Duncan, 108 U. S. 32, 2 Sup. Ct. 313, 27 L. Ed. 641 (1882).

SECTION 3.—PRIVILEGE

I. SELF INCRIMINATION [6]

SCROOP'S TRIAL.

(Old Bailey Sessions, 1660. 5 How. St. Trials, 947.)

In the course of the trial of the Regicides, the prosecution sought to prove that the defendant Scroop acted as a member of the court and took part in the proceedings which resulted in the conviction and sentence of Charles I.[7]

Mr. Clark called.

Counsel: Mr. Clark, have you heard the question, did you ever see the prisoner at the bar in that which they called the High Court of Justice?

Clark: I do remember in the year 1649, I saw the prisoner sitting in that which they called the High Court of Justice upon the trial of the king.

Scroop: My lords, you may desist in examining witnesses touching my sitting.

Court: Do you acknowledge you did sit in that which they called the High Court of Justice?

Scroop: Yes, I see it proved, and I see a gentleman here in my eyes that I know very well. I will not deny it.

Court: Did you sit upon the Sentence day, that is the evidence, which was the 27th day of January? You are not bound [8] to answer me, but if you will not, we must prove it. Do you confess that?

Scroop: I do not confess that I stood up as assenting to the Sentence.

Mr. Clark called.

Counsel: Mr. Clark, what say you to that?

Clark: I did not take particular notice of him that day, that he stood up; but the whole Court stood up, to my apprehension, but I took notice that he was there then present.

[6] For the history of this privilege, see article by Prof. Wigmore, 5 Harv. Law Rev. 71.

[7] Statement condensed.

[8] That this was a new doctrine at this period, see 3 Wigmore, § 2250.

REX v. WORSENHAM et al.

(Court of King's Bench, 1701. 1 Ld. Raym. 705.)

An information was preferred against the defendants being custom-house officers, for forging of a bond supposed to be given by a merchant to the King for his customs. And motion was made on behalf of the prosecutor, to have the custom-house books in which the entries were made, &c. brought into court, to convict the defendants. But the motion was denied, because the said books are a private concern, in which the prosecutor has no interest; and therefore it would be in effect, to compel the defendants, to produce evidence against themselves. And the court never makes such rules, but only of records, or deeds of a publick nature.[9]

THE KING v. INHABITANTS OF WOBURN.

(Court of King's Bench, 1808. 10 East, 395.)

Upon an appeal by the churchwardens and overseers of the poor of the parish of St. Alban in the county of Hertford against an order of justices for the removal of Mary Brown, widow, and her children, from the parish of Woburn in the county of Bedford to St. Alban, John Hilliard, an inhabitant of the appellants' parish of St. Alban, and rated and paying to the poor's rates of the said parish, was called as a witness on the part of the respondents, and refused to give evidence. The Sessions were of opinion that the said John Hilliard was not compellable to give evidence, and quashed the said order; subject to the opinion of this Court on the point.

[9] And so in Rex v. Cornelius, 2 Strange, 1210 (1745).

See Comments on this class of cases in Atty. Gen. v. Le Merchant, 2 D. & E. 201 (1788), distinguishing between an order on the defendant to produce books or papers, and merely permitting the prosecution to use secondary evidence of the contents of books or papers which the defendant declines to produce on notice. It seems that the privilege is confined to natural persons and that a corporation has no privilege which will excuse the production of papers. Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652 (1906).

The privilege does not apply to papers wrongfully taken from a defendant. Trask v. People, 151 Ill. 523, 38 N. E. 248 (1894); State v. Pomeroy, 130 Mo. 489, 32 S. W. 1002 (1895); People v. Adams, 176 N. Y. 351, 68 N. E. 636, 63 L. R. A. 406, 98 Am. St. Rep. 675 (1903). But in Weeks v. U. S., 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177 (1913) it was held that the Fourth Amendment to the Constitution entitles a defendant to the restoration of papers wrongfully taken from him by the prosecution; and where this has been refused by the court, such papers should be excluded at the trial.

But see Schenck v. U. S., 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. — (1919) where incriminating documents were seized under a valid search warrant.

LORD ELLENBOROUGH, C. J., now delivered the judgment of the Court.

This Sessions case was argued on Wednesday last, and the Court wished to consider, whether the very ungracious objection, made by a rated inhabitant of the appealing parish, to be examined as a witness, when called upon by the respondents, were well founded; and, on consideration, we are of opinion that it was. The parties appealing before the court of quarter sessions, as appeared by the proceedings returned to this court, were the churchwardens and overseers of the parish of St. Alban; which at first seemed to afford an answer to the objection; that the inhabitant proposed to be called was not a party to the proceeding: but in reality the appeal is by them on behalf of the inhabitants of the parish, who are all of them, paying to the rates, the parties grieved, and are all directly and immediately interested in the event of the proceeding, by which the maintenance of the pauper is to be fixed on them, or removed from them, as well as the costs. It is a long established rule of evidence, that a party to the suit cannot be called upon against his will by the opposite party to give evidence; and we think that the late act of the 46th of the king does not break in upon this rule. That act takes away the right of objecting by reason only, or on the sole ground, that the answering the question may establish, or tend to establish, that the witness owes a debt, or is otherwise subject to a civil suit. But that is not the ground of the present objection: nor does it appear to us to have been the intention of the legislature by this act of parliament to alter the situation of parties to a suit or proceeding, more especially in a proceeding such as the present, where the situation of Hilliard, the person proposed to be examined, did not bring him within the words of the act, nor the inconvenience intended to be remedied by it. We therefore are of opinion that the Sessions have properly determined the party not to be compellable to give evidence. And that their order, quashing the order of the two justices, must be affirmed.[10]

BRYAN et al. v. STATE.

(Supreme Court of Georgia, 1870. 40 Ga. 688.)

Bryan, A. J. Moye and N. M. Weaver, were required by rule to appear before the Superior Court and show cause why they should not be fined for a neglect of their duties as road commissioners of the county. They answered and were at issue with the State; they were tried jointly. The solicitor general proposed to examine said Bryan

[10] And so in Benoist v. Darby, 12 Mo. 196 (1848), a person for whose use the action was brought not compellable to testify. This privilege has been abolished in practically all jurisdictions; e. g. Code Civ. Proc. N. Y. § 828, ante, p. 170.

as a witness for the State. Defendant's counsel contended that this was a criminal proceeding, and that Bryan could not be compelled to testify against himself. The Court overruled the objection, Bryan was examined, and the State closed. Weaver and Moye testified in behalf of defendants. The Court fined each of said parties $50.00. Compelling Bryan to testify is assigned as error. Other points were made but were not passed upon by this court in this case.

McCAY, J. It has been from time immemorial a settled principle of the common law, that no one shall be compelled to answer any question as a witness, tending to criminate himself or to subject him to a fine or forfeiture, or any criminal charge. 1 Greenleaf, Ev. pages 620, 621. Our Evidence Act of 1866, Code, section 3798, making all persons competent and compellable to be witnesses, contains substantially the same principle. The words used are: "No person shall be compellable to answer any question tending to criminate himself or herself."

It is true this is not exactly a criminal case, yet, it closely analogizes itself to such cases. The Court will, if the jury sustain the complaint, fine the defendant, and the answer to the questions will be an answer to a question tending to criminate the witness. We think therefore it was error in the Court to compel this witness to answer, he objecting.

Judgment reversed.

STATE v. GARRETT et al.

(Supreme Court of North Carolina, 1874. 71 N. C. 85, 17 Am. Rep. 1.)

The prisoners were charged with the murder of Alvina Garrett, a girl of fourteen years of age; on the trial, Lucy Stanley was acquitted.

The evidence for the State established that on the 26th of August, 1873, the prisoners made an out-cry that the deceased came to her death by her clothes accidentally catching fire while she was asleep; and when the witness reached the house where the body of the girl, and where the prisoners were, Anica Garrett told the witness that "she," Anica, "was asleep when she was awakened by the deceased screaming; that she went to her, her clothes were still burning, and in attempting to put out the flames, she, Anica, burnt one of her hands."

By Dr. Walker, the examining physician on the Coroner's inquest, it was proved that the body of the deceased girl was not burned before, but after death, there being no serum in the blisters, &c.

The prisoner, Anica, while under arrest, and very much agitated before the Coroner, and after the jury had rendered their verdict against her, in their presence, was ordered by the Coroner to unwrap

the hand she alleged had been burnt, and show it to Dr. Walker, so that it might be seen if it had been burned or not. This she did, and there was no indication whatever of any burn upon it. This evidence was objected to by the counsel for the prisoner, because it was in substance compelling the prisoner to furnish evidence against herself; and that being under arrest, and alarmed, nothing which she had said or done while under arrest, and at the Coroner's command, was admissible in evidence against her, she not having been cautioned and informed of her rights according to law.

The Court ruled that anything the prisoner said at the inquest was inadmissible, but that the actual condition of her hand, although she was ordered by the Coroner to unwrap it and exhibit to the doctor, was admissible as material evidence to contradict her statement to the witness on the night of the homicide and before she was arrested. To this ruling, counsel for prisoner excepted.

The jury returned a verdict of guilty. Rule for a new trial, granted and discharged. Judgment of death and appeal by prisoner.

BYNUM, J. The prisoner objected to the admissibility of the evidence as to the condition of her hand and relied upon the case of State v. Jacobs, 50 N. C. 259.

The distinction between that and our case is that in Jacobs' case, the prisoner himself, on trial, was compelled to exhibit himself to the jury, that they might see that he was within the prohibited degree of color, thus he was forced to become a witness against himself. This was held to be error.

In our case, not the prisoners, but the witnesses, were called to prove what they saw upon inspecting the prisoner's hand, although that inspection was obtained by intimidation.

The prisoner had alleged that she had her hand burned in endeavoring to extinguish the fire upon the deceased, and at the Coroner's inquest she carried her hand wrapped up in a handkerchief and thus concealed it from view. She was made to unwrap and show her hand to the physician, which thus exposed, upon examination, showed no indication of a burn. It was evidently a fraud adopted to give countenance and support to her story, and the Coroner was justified in exposing a trick upon the public justice of the country.

The later cases are uniform to the point that a circumstance tending to show guilt may be proved, although it was brought to light by declaration, inadmissible, per se, as having been obtained by improper influence. Arch. Crim. Pl. 131, and note by Waterman, State v. Johnson, 67 N. C. 55. Familiar illustrations are where the accused is, by force, made to put his foot in a track, or allow the foot to be measured, where he is, by duress, compelled to produce stolen goods, or to disclose their hiding place, and they are there found. In these cases the facts thus brought to light are competent evidence, though the declarations of the accused, made at the time, are excluded as having been obtained by improper influence.

We have carefully examined the whole record, and we find no defect therein.

There is no error. This will be certified to the Court below that further proceedings be there had, according to law.

PER CURIAM. Judgment affirmed.[11]

PEOPLE v. TYLER.

(Supreme Court of California, 1869. 36 Cal. 522.)

SAWYER, C. J.[12] * * * At the trial the defendant did not avail himself of the right conferred by this Act [St. 1865–66, p. 865] to offer himself as a witness on his own behalf. During the argument of the case, the District Attorney called the attention of the jury to the fact that the defendant had not testified in his own behalf, and argued and insisted before said jury that the silence of the defendant was a circumstance strongly indicative of defendant's guilt. Defendant's counsel objected to this course of argument, and requested the Court to require the District Attorney to refrain from urging such

[11] And so where intimidation was used to compel a defendant to produce a pistol, State v. Turner, 82 Kan. 787, 109 Pac. 654, 32 L. R. A. (N. S.) 772, 136 Am. St. Rep. 129 (1910); or to try on clothing, Holt v. U. S., 218 U. S. 245, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138 (1910).

That the privilege was not violated where the sheriff took the defendant's shoes and compared them with certain tracks, see State v. Barela, 23 N. M. 395, 168 Pac. 545, L. R. A. 1918B, 844 (1917), annotated.

In State v. Ah Chuey, 14 Nev. 79, 33 Am. Rep. 530 (1879), it was held that the privilege was not violated by a compulsory examination of the defendant's arm. But in Blackwell v. State, 67 Ga. 76, 44 Am. Rep. 717 (1881), it was held error to compel the defendant to exhibit his leg to a witness in the presence of the jury. For a collection of the cases, see People v. Gardner, 28 L. R. A. 699 (1894), annotated case.

In the earlier periods it seems to have been taken as a matter of course that the defendant might be inspected in the presence of the jury. In the trial of Capt. Thomas Vaughan on a charge of treason before Lord Chief Justice Holt, assisted by several other judges, at the Old Bailey in 1696, 13 Howell's State Trials 485, the practice is illustrated by the following (page 517):

"Mr. Phipps: Did you know any other Thomas Vaughan but this?

"French: No, not in Galloway.

"Rivet: This may be a confirmation of what I say; if it be the same gentleman, his hair is reddish.

"L. C. J.: Pull off his peruke (which was done).

"Vaughan: My hair is not red.

"L. C. J.: How are his eye brows?

"Vaughan: A dark brown, my lord, the same as my wig.

"Baron Powis: Let somebody look on it more particularly. (Then an officer took a candle, and looked on his head, but it was shaved so close the colour could not be discerned.)"

In modern times it is considered proper to require a defendant to stand up in the presence of the jury in order that a witness might identify him. People v. Gardner, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699, 43 Am. St. Rep. 741 (1894); State v. Ruck, 194 Mo. 416, 92 S. W. 706, 5 Ann. Cas. 976 (1906).

[12] Statement and part of opinion omitted.

inference, but the Court declined to interfere, and intimated that the law justified the counsel in the course pursued. Counsel thereupon continued to urge before the jury that the silence of the defendant was a circumstance tending strongly to prove his guilt, and the counsel for the prisoner excepted.

At the close of the argument of the case to the jury the defendant's counsel asked the Court to give to the jury the following instruction: "The jury should not draw any inference to the prejudice of the defendant from the fact that he did not offer himself as a witness in his own behalf. It is optional with a defendant to do so or not, and the law does not intend that the jury should put any construction upon his silence unfavorable to him." The Court refused to give the instruction, and defendant excepted. The action of the Court in the premises is claimed to be erroneous. * * *

Upon an examination of the Act, we find that a person charged with an offense, "shall, at his own request, but not otherwise, be deemed a competent witness." It is optional with him, then, whether he will testify or not; and section 2 provides that "nothing herein contained shall be construed as compelling any person to testify." This is but a re-enactment by the statute of that provision of our State Constitution, which says, no person "shall be compelled in any criminal case to be a witness against himself." (Art. 1, Sec. 8.)

At the trial, by his plea of not guilty, the party charged denies the charge against him. This is itself a positive act of denial, and puts upon the People the burden of affirmatively proving the offense alleged against him. When he has once raised this issue by his plea of not guilty the law says he shall thenceforth be deemed innocent till he is proved to be guilty, and both the common law and the statute give him the benefit of any reasonable doubt arising on the evidence. Now, if, at the trial, when, for all the purposes of the trial, the burden is on the People to prove the offense charged by affirmative evidence, and the defendant is entitled to rest upon his plea of not guilty, an inference of guilt could legally be drawn from his declining to go upon the stand as a witness, and again deny the charge against him in the form of testimony, he would practically, if not theoretically, by his act declining to exercise his privilege, furnish evidence of his guilt that might turn the scale and convict him. In this mode he would indirectly and practically be deprived of the option which the law gives him, and of the benefit of the provision of the law and the Constitution, which say, in substance, that he shall not be compelled to criminate himself. If the inference in question could be legally drawn the very act of exercising his option as to going upon the stand as a witness, which he is necessarily compelled by the adoption of the statute to exercise one way or the other, would be, at least to the extent of the weight given by the jury to the inference arising from his declining to testify, a crimination of himself.

Whatever the ordinary rule of evidence with reference to inferences to be drawn from the failure of parties to produce testimony that must be in their power to give, we are satisfied that the defendant, with respect to exercising his privilege under the provision of the Act in question, is entitled to rest in silence and security upon his plea of not guilty, and that no inference of guilt can be properly drawn against him from his declining to avail himself of the privilege conferred upon him to testify on his own behalf; that to permit such an inference would be to violate the principles and the spirit of the Constitution and the statute, and defeat rather than promote the object designed to be accomplished by the innovation in question.

We are of opinion, therefore, that the Court erred in permitting the District Attorney to pursue the line of argument to which objection and exception were taken, and intimating its approbation of the ground taken, and, especially after what had transpired, in refusing the instruction asked on behalf of defendant for the purpose of correcting any erroneous view that might have been impressed on the minds of the jury. We think such instruction proper in all cases where the defendant desires it. * * *[18]

PEOPLE v. DUPOUNCE.

(Supreme Court of Michigan, 1903. 133 Mich. 1, 94 N. W. 388, 103 Am. St. Rep. 435, 2 Ann. Cas. 246.)

CARPENTER, J. Defendant was convicted in the court below of the offense of bastardy. The complaint alleged, and the evidence for the people tended to prove, that the bastard child was born February 9, 1901, and that it was begotten on or about May 15, 1900. The complaining witness testified that she became 16 years of age March 17, 1901. Defendant became a witness in his own behalf, and on direct examination testified that he did not have intercourse with the complaining witness in the months of April or May, 1900. On cross-examination, despite defendant's objection that, contrary to section 32

[18] Statutes in nearly all of the states now provide that the failure of the accused to testify in his own behalf shall not create any presumption against him, thus impliedly excluding adverse inference or comment. Com. v. Harlow, 110 Mass. 411 (1872). In the absence of such statutory restrictions there is a strong tendency to hold that the failure of the defendant to testify is the proper subject of comment and inference. State v. Bartlett, 55 Me. 200 (1867); Parker v. State, 61 N. J. Law, 308, 39 Atl. 651 (1898), followed in several later cases in that state. This view appears out of harmony with the rule applied to other privileges. It may be quite natural to infer that an accused remains silent because he cannot truthfully deny the charges, but there are other possible and not improbable explanations. An innocent man might consider it wiser to remain silent rather than to be compelled to disclose suspicious circumstances which would probably outweigh his denial, People v. Forbes, 143 N. Y. 219, 38 N. E. 303 (1894); or, though innocent of the offense in question, he might be compelled to disclose a more serious crime, as in People v. Dupounce, post, p. 239.

of article 6 of the Constitution of Michigan, he was thereby compelled to be a witness against himself, he was made to answer questions which proved that he had sexual intercourse with the complaining witness in December, 1899, and that this continued until April 1, 1900; and that, though their relation was, on account of his illness, interrupted in April and May, it was resumed after June 1st. The sole question raised in this court relates to the ruling compelling defendant to give this testimony.

While it is clear that the cross-examination in this case compelled defendant to testify to the commission of the crime of rape, as the complaining witness was less than 16 years of age (see section 11,489, 3 Comp. Laws 1897), and though he could not be convicted of the offense charged in the complaint by reason of the intercourse occurring before April 1, or after June 1, 1900 (see Hull v. People, 41 Mich. 167, 2 N. W. 175), nevertheless testimony establishing these other acts of intercourse had a legitimate tendency to prove defendant guilty of the offense for which he was being tried, and therefore to contradict his testimony on direct examination. See People v. Schilling, 110 Mich. 412, 68 N. W. 233; People v. Keefer, 103 Mich. 83, 61 N. W. 338; Matthews v. Detroit Journal Co., 123 Mich. 608, 82 N. W. 243; People v. Jamieson, 124 Mich. 164, 82 N. W. 835. If defendant, by availing himself of the privilege of testifying in his own behalf, given him by our statute (see section 10,211, 3 Comp. Laws 1897), waived his constitutional right to refuse to answer the questions complained of, the ruling of the trial court is correct; otherwise, it is erroneous. While this court has held (see People v. Howard, 73 Mich. 10, 40 N. W. 789) that a defendant who takes the stand as a witness in his own behalf is subject to the same inquiries upon cross-examination as any other witness, neither that nor any other decision of this court can be said to be an authority touching the precise question involved in this case.

The question has, however, received the attention of the courts of many of our sister states. Contrary to the views of that eminent author and judge, Mr. Justice Cooley (see his Constitutional Limitations, at page 317), it seems to have been universally held that the defendant, by taking the stand in his own behalf, thereby waives, to a certain extent at least, his constitutional right to refuse to testify. While the Supreme Court of Maine has held that the statute of that state, which reads, "The defendant in a criminal prosecution who testifies in his own behalf shall not be compelled to testify on cross-examination to facts which would convict him or furnish evidence to convict him of any other crime than that for which he is on trial," "does not alter the law as it stood in this state before the enactment" (see State v. Witham, 72 Me., at page 534), the overwhelming weight of authority supports the proposition, contended for by the people, that he thereby waives his constitutional right to refuse to answer any question, material to the case, which would, in the case of any other witness, be

legitimate cross-examination. Commonwealth v. Nichols, 114 Mass. 285, 19 Am. Rep. 346; Commonwealth v. Bonner, 97 Mass. 587; Commonwealth v. Mullen, 97 Mass. 545; Commonwealth v. Morgan, 107 Mass. 199; Foster v. Pierce, 11 Cush. (Mass.) 437, 59 Am. Dec. 152; Commonwealth v. Smith, 163 Mass. 431, 40 N. E. 189; Connors v. People, 50 N. Y. 240; People v. Tice, 131 N. Y. 651, 30 N. E. 494, 15 L. R. A. 669; State v. Ober, 52 N. H. 459, 13 Am. Rep. 88; Norfolk v. Gaylord, 28 Conn. 309; State v. Allen, 107 N. C. 805, 11 S. E. 1016; State v. Pancoast, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. at page 527; Disque v. State, 49 N. J. Law, 249, 8 Atl. 281; State v. Cohn, 9 Nev. 189.

And this principle applies, even though the answers to such questions tend to prove him guilty of some other crime than that for which he is on trial. Commonwealth v. Nichols, State v. Pancoast, and Connors v. People, supra.

As, in this state, a witness may be asked, on cross-examination, any question material to the issue (People v. Barker, 60 Mich. at page 302, 27 N. W. 539, 1 Am. St. Rep. 501; Ireland v. R. R. Co., 79 Mich., at page 164, 44 N. W. 426; Hemminger v. Western Assurance Co., 95 Mich. at page 359, 54 N. W. 949), we are forced to the conclusion that there was no error in the ruling complained of, and that the conviction should be affirmed. The other Justices concurred.[14]

MORRIS v. McCLELLAN.

(Supreme Court of Alabama, 1908. 154 Ala. 639, 45 South. 641, 16 Ann. Cas. 305.)

DOWDELL, J.[15] This is an action to recover damages for an assault and battery committed on the plaintiff by the defendant. The defendant pleaded the general issue, and a number of special pleas, in which it was attempted to set up matter in justification of the assault. * * *

The plaintiff filed interrogatories to the defendant under section 1850

[14] In Fitzpatrick v. United States, 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078 (1900), where a defendant testified to an alibi, it was held that he was bound to answer questions tending to show his connection with the offense in question, but there was no suggestion of any collateral offense.

In State v. Wentworth, 65 Me. 234, 20 Am. Rep. 688 (1875), the defendant had denied the authority of a clerk to make a sale of liquor, and the court held, limiting several earlier cases, including Low v. Mitchell, 18 Me. 372 (1841), that he was bound to answer as to certain prior sales by himself. The same rule was applied in Powers v. United States, 223 U. S. 303, 32 Sup. Ct. 281, 56 L. Ed. 448 (1912), where the defendant was required to testify to prior criminal acts; and so in Com. v. Nichols, 114 Mass. 285, 19 Am. Rep. 346 (1873). But it would seem that the waiver does not extend to disconnected crimes merely affecting credibility. State v. Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518 (1895).

[15] Statement and part of opinion omitted.

et seq. of the Code of 1896. Some of the questions propounded the defendant answered, and others he refused to answer on the ground that he could not be required to give evidence which might subject him to criminal punishment. In so doing he exercised his constitutional right. The interrogatories, with the answers to certain questions and the refusal to answer others, were read to the jury. The defendant's refusal to answer certain questions was the subject of comment in argument by counsel to the jury. The question is now presented whether it was permissible for the plaintiff, over the defendant's objection, to read to the jury those interrogatories which the defendant refused to answer, and the defendant's ground of refusal, and to comment on the same in argument. In criminal prosecutions the failure or refusal of the defendant to testify cannot be commented on in argument; but we know of no authority applying this rule to civil actions, nor do we see any reason for so doing. The plaintiff in a civil action has rights, as well as the defendant; and one of these rights is to secure evidence to support his cause in court, even to calling upon the defendant as a witness to supply it. It has always been the rule in civil actions that the failure of a party to the suit, when present at the trial, to testify as to a fact in issue, furnished legitimate ground of comment in argument to the jury by the opposite party. The defendant availed himself of his constitutional right of refusal to answer on the ground stated, and he had his benefit and protection from prosecution in exercising his privilege; but he could not expect to extend this privilege to the deprivation of the plaintiff of his right to comment in argument on his silence, no matter upon what ground he might put it. We are of the opinion that the trial court committed no error in its rulings on this question.

For the errors pointed out, the judgment will be reversed, and the cause remanded.

Reversed (on other grounds).[16]

CAMINETTI v. UNITED STATES.

DIGGS v. SAME.

HAYS v. SAME.

(Supreme Court of the United States, 1917. 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502.)

Caminetti, Diggs, and Hays were separately indicted and convicted in the United States District Court on charges of violating the statute known as the "White Slave Act" (Comp. St. §§ 8812–8819). These convictions were affirmed by the Circuit Court of Appeals, 220

[16] Where a witness, not a party, exercises his privilege, there can be no inference against either party. Beach v. United States (C. C.) 46 Fed. 754 (1890).

Fed. 545, 136 C. C. A. 147, 231 Fed. 106, 145 C. C. A. 294. The defendants obtained writs of certiorari to review these decisions. In the Supreme Court the cases were argued together.[17]

Mr. Justice DAY [after upholding the validity of the statute, and the construction placed upon it by the trial court]: Notwithstanding this disposition of the questions concerning the construction and constitutionality of the act, certain of the questions made are of sufficient gravity to require further consideration.

In the Diggs Case, after referring to the fact that the defendant had taken the stand in his own behalf, and that his testimony differed somewhat from that of the girls who had testified in the case, and instructing the jury that it was their province to ascertain the truth of the matter, the court further said: "After testifying to the relations between himself and Caminetti and these girls down to the Sunday night on which the evidence of the government tends to show the trip to Reno was taken, he stops short and has given none of the details or incidents of that trip nor any direct statement of the intent or purpose with which that trip was taken, contenting himself by merely referring to it as having been taken, and by testifying to his state of mind for some days previous to the taking of that trip. Now this was the defendant's privilege, and, being a defendant, he could not be required to say more if he did not desire to do so; nor could he be cross-examined [18] as to matters not covered by his direct testimony. But in passing upon the evidence in the case for the purpose of finding the facts you have a right to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so, no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence;[19] but where a defendant elects to go upon the witness stand and testify, he then subjects himself to the same rule as that applying to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence; since it is a legitimate inference that,

[17] Statement has been condensed and part of opinion and the dissenting opinion of Mr. Justice McKenna omitted.

[18] But see Fitzpatrick v. United States, 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078 (1900), and Powers v. United States, 223 U. S. 303, 32 Sup. Ct. 281, 56 L. Ed. 448 (1912), as to the extent to which a defendant in a criminal case is subject to cross-examination. Probably a court would not feel justified in punishing a defendant for refusal to answer a proper question on cross-examination.

[19] Section 1465, U. S. Comp. St., provides that the failure of the accused to testify shall not create any presumption against him.

could he have truthfully denied or explained the incriminating evidence against him, he would have done so."

This instruction, it is contended, was error in that it permitted the jury to draw inferences against the accused from failure to explain incriminating circumstances when it was within his power to do so, and thus operated to his prejudice and virtually made him a witness against himself, in derogation of rights secured by the 5th Amendment to the Federal Constitution.

There is a difference of opinion expressed in the cases upon this subject, the circuit court of appeals in the eighth circuit holding a contrary view, as also did the circuit court of appeals in the first circuit. See Balliet v. United States, 64 C. C. A. 201, 129 Fed. 689; Myrick v. United States, 134 C. C. A. 619, 219 Fed. 1. We think the better reasoning supports the view sustained in the court of appeals in this case, which is that where the accused takes the stand in his own behalf and voluntarily testifies for himself (Act of March 16, 1878, 20 Stat. at L. 30, chap. 37, Comp. St. § 1465), he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it.

The accused, of all persons, had it within his power to meet, by his own account of the facts, the incriminating testimony of the girls. When he took the witness stand in his own behalf he voluntarily relinquished his privilege of silence, and ought not to be heard to speak alone of those things deemed to be for his interest, and be silent where he or his counsel regarded it for his interest to remain so, without the fair inference which would naturally spring from his speaking only of those things which would exculpate him and refraining to speak upon matters within his knowledge which might incriminate him. The instruction to the jury concerning the failure of the accused to explain acts of an incriminating nature which the evidence for the prosecution tended to establish against him, and the inference to be drawn from his silence, must be read in connection with the statement made in this part of the charge which clearly shows that the court was speaking with reference to the defendant's silence as to the trip to Reno with the girls named in the indictment, and as to the facts, circumstances, and intent with which that trip was taken; and the jury was told that it had a right to take into consideration that omission.

The court did not put upon the defendant the burden of explaining every inculpatory fact shown or claimed to be established by the prosecution. The inference was to be drawn from the failure of the accused to meet evidence as to these matters within his own knowledge and as to events in which he was an active participant and fully able to speak when he voluntarily took the stand in his own behalf. We agree with the circuit court of appeals that it was the privilege of the trial court to call the attention of the jury in such manner as

it did to this omission of the accused when he took the stand in his own behalf.

See, in this connection, Brown v. Walker, 161 U. S. 591, 597, 40 L. Ed. 819, 821, 5 Interst. Com. R. 369, 16 Sup. Ct. 644; Sawyer v. United States, 202 U. S. 150, 165, 50 L. Ed. 972, 979, 26 Sup. Ct. 575, 6 Ann. Cas. 269; Powers v. United States, 223 U. S. 303, 314, 56 L. Ed. 448, 452, 32 Sup. Ct. 281. * * *

Affirmed.[20]

THE KING v. EDWARDS.

(Court of King's Bench, 1791. 4 Durn. & E. 440.)

On an application to bail the prisoner, who was charged with grand larceny, one of the bail was asked, whether he had not stood in the pillory for perjury; this question was objected to as tending to criminate him, but

THE COURT over-ruled the objection; saying there was no impropriety in the question, as the answer could not subject him to any punishment: and the bail admitting the fact, he was of course rejected.

CATES v. HARDACRE.

(Court of Common Pleas, 1811. 3 Taunt. 424.)

This was an action by an endorsee against the drawer of a bill, drawn, payable to the drawer's order, upon Stratton, and by him accepted and afterwards dishonoured; it was stated in the declaration to have been endorsed by the defendant to the plaintiff. The case was tried before Heath, J., at Westminster, at the sittings after last Hilary term. The plaintiff proved his case. The defence intended to be set up was usury. The first witness called on the part of the defendant was one Taylor, and the bill having been put into his hands, he was asked by Shepherd, Sergt., for the defendant, "whether that bill had ever been in his possession before;" upon which Best, Sergt., interfered, by asking the witness whether he had not been indicted for usury in this transaction, and upon his answering in the affirmative, Best cautioned him against answering questions which might tend to criminate him; the witness said that he thought his answer to the question proposed would have a tendency to convict him of the offence of usury; the learned judge told him that if he thought so, he was not bound to answer the question: the witness availed himself of this di-

[20] Accord: People v. Trybus, 219 N. Y. 18, 113 N. E. 538 (1916), where the defendant confined his testimony to the question as to how an alleged confession had been obtained from him.

rection, and the counsel for the defendant being thus prevented from pursuing his inquiry, a verdict passed for the plaintiff.

On this day Shepherd, Sergt., moved for a new trial, contending that the judge's direction was wrong; that it was not sufficient that a witness thought that his answers would tend to criminate him; but that it ought clearly to appear that they would have that effect.

MANSFIELD, C. J. Your questions go to connect the witness with the bill, and they may be links in a chain.

Rule refused.[21]

ZOLLICOFFER v. TURNEY.

(Supreme Court of Tennessee, 1834. 6 Yerg. 297.)

This was an action on the case to recover the value of a lot of cotton shipped on board the defendant's boat, which was lost. The only question in this cause arises upon the facts set forth in the following bill of exceptions:

"Be it remembered, that upon the jury being sworn in this cause, the plaintiff introduced James S. Walker as a witness, and offered to prove by him, that the bill of lading upon which this action is founded, was executed by Turney to him; and that the cotton or bales marked therein with the letters "J. J. Z." were shipped by him, as the agent of the plaintiff, on board of defendant's boat. The witness objected to answering the question, and upon being sworn upon his voir dire, stated he was a partner, together with others, of the defendant, Turney, in the freighting of said cotton, and that he could not give evidence without subjecting himself to liability as a partner.[22]

CATRON, C. J., delivered the opinion of the court.

The question presented by the annexed bill of exceptions, for the first time comes before this court for decision. Can a witness be heard to object, that he will be compelled to disclose facts going to show he was a partner in the transaction which gave cause of action; and that he is equally liable with the defendant to the plaintiff?

The witness was called by the plaintiff. The defendant did not, and could not object, to his competency; but the witness, for the reason above, objected on his own account to testifying, and was excused by the court, contrary to the wishes of the plaintiff who had called him.

Of necessity the question in England has arisen generally in course of practice before the nisi prius courts, and been determined by single judges. They disagreed. The writers on evidence have therefore adopted the opinions of those most in accordance with their own. The consequence was, that until the question arose before the House of Lords in 1800, on Lord Mellville's impeachment, the rule of evi-

[21] See, also, Rex v. Hodgson, Russell & Ryan, 211 (1812), post, p. 395.

[22] Statement condensed.

dence was unsettled, and greatly perplexed by conflicting opinions of individual judges.

Shortly before, Mr. Peake had published his book on evidence, holding that a witness was not compellable to give any answer which might subject him to a civil action, or charge himself with a debt. Peake, 184. He relies upon Title v. Grevatt, 2 Lord Ray. 1008, where Holt remarked, "A man that conveys lands, may be a witness to prove he had no title because that is swearing against himself; but he is not compellable to give such evidence." The remark seems to have been made during the progress of a trial, whether called for, or obiter, does not appear. The report is a loose note entitled to little weight.

Peake is a writer of accuracy and merit, and has had much influence on the practice of this country.

The subsequent treatises of Phillips and Starkie on Evidence, refer to the declaratory act of 46 George III, and afford no further information on the subject. 1 Phil. on Ev. 225; 1 Starkie, 135.

Nothing has been settled in this State. In Cook v. Corn, 1 Overt. 340, brought before the old superior court in 1808, something was said on the question, but nothing decided.

We are therefore compelled to resort to the British authorities to ascertain the law. In Lord Mellville's case, the twelve judges were called upon for their respective opinions, "whether, according to law, a witness can be required to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, but the answering of which may establish or tend to establish, that he owes a debt recoverable by civil suit?

Eight of the judges reported the witness was compellable to answer, and four declared he was not. With the eight, Lord Eldon, then out of office, concurred. 1 Hall's Law Journal, 223, and Peake's Evidence, 188, Philadelphia edition of 1812, in note.

An act of Parliament was then passed, (46 George III,) declaratory of the law, in affirmance of the opinion of the majority of the judges. This act can have no influence on us, further than it furnishes evidence of the common law theretofore existing.

The majority of the English judges thought, and this court thinks, no good reason exists why the rules of evidence should be different in the courts of law and equity. In equity the witness, Walker, could not be protected, because Turney, the defendant, could be compelled to give evidence for the plaintiff, either by answer or before the master; and in this suit at law, a bill could be filed, and the answer of Turney be had and read as evidence on the trial. As no bill of discovery could be filed against the co-partner, Walker, who is not sued, of course, he could be compelled to testify. The prominent reason given by the eight judges in Lord Mellville's case is,

that clearly in equity the witness could be compelled to answer, and no rule existed why the rule at law should not be the same.

We take the true rule to be that a witness cannot, by law, refuse to answer a question relevant to the matter in issue, (the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any nature whatsoever,) by reason only, or on the sole ground that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of the plaintiff in the action then on trial, or of any other person.

The judgment will be reversed, and the cause remanded for another trial.

Judgment reversed.

HENRY v. BANK OF SALINA.

(Court of Appeals of New York, 1847. 1 N. Y. 83.)

On error from the Supreme Court. The Bank of Salina sued Henry and Pierce in the court below upon a promissory note signed by Pierce as principal and Henry as surety, payable to the bank and not negotiable. Henry pleaded the general issue and gave notice of the defense of usury, verifying the notice according to the usury act of 1837. On the trial at the Circuit in April, 1844, after the plaintiffs had rested, the defendant's counsel opened the defense to the jury, and stated, among other things, that the note was made to be discounted at the plaintiffs' bank, and was in the first instance presented by Pierce to the bank for discount; that the bank refused to discount it; that this fact was known to Elisha Chapman, who was the teller of the bank; that the note was afterward presented to Chapman, who, with full knowledge that the note had been presented to the bank for discount and refused, discounted the same, and in so doing deducted $10 from the face of the note, under a corrupt and usurious agreement between him and Pierce. The note was payable in sixty-three days from its date.

To prove this defense the defendant called the said Chapman and had him sworn as a witness, and in the first instance proposed to prove by him, under the plea of the general issue, that the note was usurious and void. Chapman objected to answering on the ground that his testimony would form a link in the chain of evidence to convict him of a misdemeanor, or would expose him to a penalty or forfeiture. In support of the objection it was insisted that when called as a mere witness, and not as a party under the usury act of 1837, he could not be compelled to testify under the provisions of that act. It was also insisted that he was protected from answering under 1 R. S. 595, § 28, which declares that "no president, director, cashier, clerk or agent, of

any corporation having banking powers, and no person in any way interested or concerned in the management of any such corporation, shall discount or directly or indirectly make any loan upon any note which he shall know to have been offered for discount to the directors, or to any officer of such corporation, and to have been refused, and that every person violating the provisions of that section shall for each offense forfeit twice the amount of the loan which he shall have made." The Circuit judge sustained the objection of the witness, and the defendant excepted.

The defendant then offered to prove the usury by the same witness under the notice of the defense of usury served with the plea, on the ground that he was the plaintiff in interest. The witness again objected on the ground, first, that the act of 1837 did not require him to testify, unless it should first appear that he was the plaintiff in interest and the owner of the note, and second, that he could not answer and show himself to be the owner of the note, without subjecting himself to a penalty or forfeiture under the statute which is above set forth, or without establishing a link in the chain of evidence which might subject him to a penalty or forfeiture, under that statute. Objection sustained and defendant excepted.

The defendant then offered to prove by the witness that he was the party in interest. This was objected to by the witness, and the objection sustained on the same grounds, and an exception taken. A verdict was had for the plaintiffs, and the defendant moved the Supreme Court for a new trial on a bill of exceptions. That motion was denied and judgment rendered for the plaintiffs. See Bank of Salina v. Henry, 2 Denio, 155.

BRONSON, J. There is another ground, besides those mentioned by the Supreme Court, on which Chapman was privileged from answering the questions put to him. It was one branch of the defense that the witness, being the teller of the bank, discounted the note after it had, with his knowledge, been offered for discount to the directors, and been refused by them. If this fact could be established, Chapman would not only forfeit twice the amount of the loan which he made (1 R. S. 595, § 28), but he would forfeit the debt itself. As the discounting of the note was expressly forbidden by the statute, there can be no doubt that the security would be void. A witness must speak, though the answer may establish that he owes a debt, or is otherwise subject to a civil suit; but he is not bound to speak where the answer may subject him to a forfeiture, or any thing in the nature of a forfeiture of his estate or interest. 2 R. S. 405, § 71; 1 Phil. Ev. 278; Mitf. Plead. 197, ed. of 1833; Livingston v. Tompkins, 4 Johns. Ch. 416, 8 Am. Dec. 598; Livingston v. Harris, 3 Paige, 533, and 11 Wend. 329, s. c. in error. As the answer of the witness might tend to establish facts which would work a forfeiture of the debt, he was not obliged to testify. This ground is of itself sufficient to establish the privi-

lege of the witness; and as to this, the statute of limitations has no application.

The grounds on which the privilege of the witness was put by the Supreme Court are equally conclusive, unless a prosecution under the usury law, and a suit under a bank law for twice the amount of the loan, had been barred by the statute of limitations; and there is nothing in the case to show that a prosecution, or a suit, or both of them, had not been commenced in due time. In all the cases where it has been held that the running of the statute took away the privilege of the witness, it expressly appeared, not only that the time for suing or prosecuting had elapsed, but that no suit or prosecution had been commenced, or if one had been commenced, that it had been discontinued. Here the statute was not even mentioned on the trial. It may not have been necessary for the defendant to prove the negative fact that no suit or prosecution had been commenced. But if he intended to rely on the statute, he was at least bound to say so; and then the witness might have answered, that proceedings against him had already been commenced.

The witness claimed his privilege, and there was a prima facie case for allowing it. If there was any answer to that case, the defendant should have mentioned it, for the double purpose of allowing the truth of the supposed answer to be examined at the proper time, and of dealing fairly with his adversary and the Circuit judge. A party is not at liberty to start a question, on a motion for a new trial, or in a court of review, which, had it been mentioned on the trial, might have received a satisfactory answer. This is a principle of every-day application, and there is nothing in this case which should induce a departure from it.[28]

LOHMAN v. PEOPLE.

(Court of Appeals of New York, 1848. 1 N. Y. 379, 49 Am. Dec. 340.)

The defendant was convicted in the court of general sessions of the city and county of New York, under the second section of the act to prevent the procurement of abortion, passed in 1845, and sentenced to imprisonment in the county jail. The judgment of the court of sessions was affirmed on a writ of error, by the supreme court, (see 2 Barb. 216,) which last decision the defendant removed by writ of error into this court.

Upon the trial Maria Bodine, the person named in the indictment, was called as a witness by the people, and testified that she went to live with one Cook in the month of July, 1845, that she had intercourse with him about a month after, which was continued to May, 1846, at which time she discovered that she was pregnant. Upon the cross-

[28] Concurring opinion of Wright, JJ., omitted.

examination, the counsel for the defendant proposed the following questions to the witness, which she declined to answer upon the ground that they would tend to disgrace her. "Had you any sexual intercourse with any other person than Cook prior to April, 1846? Had you during the fall of 1845, or winter of 1846, the venereal disease? Had you any sexual intercourse with any other person than Cook between July, 1845, and April, 1846?" The court refused to compel the witness to answer, and to this decision the defendant excepted.[24]

GARDINER, J. * * * As to the questions proposed to Maria Bodine. It is hardly necessary to say that the answers sought to these questions would have disgraced the witness. She was, therefore, privileged from answering unless her answers were material to the issue. Her pregnancy was, it is true, one of the facts to be established by the prosecution, but whether induced by Cook or any other person was entirely immaterial. If her response had been in the affirmative to each of these interrogatories, it would not have been inconsistent with, or tended to disprove the fact of her pregnancy, or the agency of the prisoner in procuring the miscarriage, any farther than those answers affected her general character. The privilege of witnesses has been carried much farther in some of the cases, but all the authorities agree that where, as in this case, the object of the question is to impair the credibility of the witness, she could not be compelled to answer. (People v. Mather, 4 Wend. 250, 21 Am. Dec. 122, and cases cited; Cowen & Hill's Notes, No. 521, and cases cited; 1 Burr's Trial, 244; 1 Greenl. § 454.) * * *

Judgment affirmed.[25]

REG. v. GARBETT.

(Court of Crown Cases Reserved, 1847. 1 Denison, Cr. Cas. 236.)

The prisoner was tried and convicted before Mr. Baron Alderson, at the Old Bailey Sessions, in May, 1847, of the crime of forging the acceptance of William Booth to a bill of exchange.

In the course of the trial Mr. Martin for the prosecution proposed to give in evidence the examination of the prisoner on the trial of the civil action of Blagden v. Booth, at the last Kingston assizes. The bill stated in the declaration in that suit was drawn by the prisoner upon William Booth, Priors Lee, near Oakin Gate, Salop, payable three months after date to the drawer's order, and purported to be accepted as follows: "Accepted, payable at Masterman & Co.'s, London, William Booth."

[24] Statement condensed and part of opinion omitted.

[25] That the privilege does not extend to matters relevant to the issue, see Jennings v. Prentice, 39 Mich. 421 (1878).

The prisoner was called as a witness for the defendant. His examination in chief was as follows:

This is my signature to the bill as drawer. The bill is made payable to my order. The acceptance was on it when I handed it to Mr. Phillips (the second indorser).

Then the cross-examination was as follows:

The stamp was never out of my possession till it was handed to Mr. Phillips.

Had you Mr. Booth's authority to accept it?

I had not.[26] * * *

When was the "William Booth" put upon it?

Between the Friday and the Sunday.

What Friday and what Sunday?

I believe it was between the last Friday and the last Sunday in November.

After the 21st?

Certainly after the 21st.

After the 21st of November, 1846?

Certainly.

Did you communicate with Mr. Booth on the subject?

Not in any way. * * *

Did you know what you came here to prove?

I did not until I came into the box.

Do you know what you are attempting to prove?

I do.

Do you mean to say it is a forgery?

It is not his handwriting.

Not in his handwriting. Who accepted it, then?

I am in the hands of the Court.

LORD DENMAN. It must be answered.

The Witness: I state, my Lord, that I filled the bill up at Mr. Phillips's request in his own drawing-room, and handed it to him, and have never received a penny for it.

Mr. Chambers. I ask you who did that (pointing to the bill)?

Not Mr. Booth.

Did Mr. Phillips?

No.

Who was present when the bill was filled up?

Mr. Phillips alone.

Were there only you two present?

Mr. Phillips was not present when "William Booth" was written. William Booth had been written before I filled it up in Mr. Phillips' drawing-room.

Who was present when "William Booth" was written?

I won't say—only myself.

[26] Part of case omitted.

Was any one else?

I cannot say.

I ask you to tell me whether any other person was present when "William Booth" was written besides yourself?

I believe a clerk.

What clerk?

That I decline to say.

Mr. Chambers: My Lord, I press the question.

LORD DENMAN (to the witness). That other person or you must have written it.

Precisely so.

You knew that when you uttered it?

When I handed it to Mr. Phillips I did know it and Mr. Phillips knew it too.

By Mr. Chambers: Who was the other person? I ask the question, and I submit, my Lord, it is a proper question.

LORD DENMAN. It must be answered.

The Witness: I decline to answer that. * * *

When the signature "William Booth" was written, was it copied from anything?

No.

Are you sure it was not?

That is my belief. I strongly believe it was not. * * *

Now, I insist on knowing the name of the party who did it?

I decline to answer the question.

You say you know nothing at all whether the party had authority or not?

I believe he had not.

Were you and he the only persons in the room?

We were.

I ask again the name, and require you to give it to me?

I decline to do it.

LORD DENMAN. The question must be answered.

I have not said any other person was in the room but myself.

LORD DENMAN. Then we are to take it you did it yourself.

I decline to answer it. * * *

Mr. Chambers, for the prisoner, objected to those parts of the cross-examination being read, which followed the prisoner's declining to answer, and applying to the Court for protection, and the decision of Lord Denman that he must answer the questions.

The learned Baron received the evidence, but reserved the point for further argument.

The prisoner was convicted upon this and other evidence, and the learned Baron reserved the judgment till the opinion of the Judges could be obtained whether the evidence was properly received.

On the 29th May, 1847, this case was argued before all the judges, except Parke, B., Wightman, J., and Williams, J.

Montagu Chambers, Q. C., for the prisoner: * * * Thirdly. Although a witness has answered several questions in chief, and in cross-examination, if he afterwards objects and claims his privilege, he ought to be protected. In answer to this position, the doctrine laid down by Dampier, J., Winchester Summer assizes, 1815, 1 Starkie's Evid. 198, 3d Ed., that "if a witness voluntarily answers questions tending to criminate him on his examination in chief, he is bound to answer on cross-examination, however penal the consequences may be," and a like dictum by Best, C. J., in Dixon v. Vale, 1 C. & P. 278, may be referred to; but so general and unqualified a rule can scarcely be correct, for, if true, it would have been applicable in several of the cases already cited. Indeed, it can rarely happen that at the commencement of the evidence the questions will be objectionable; and to hold that the inadvertent answers of a witness to some questions should bind him to go on to any extent, and to declare himself guilty of a crime, would be taking away the protection altogether, as its utility would then be dependent on the skill of the examining counsel, and the degree of prudence, wariness, knowledge and self-possession of the witness. It seems, therefore, that at any period of the examination, a witness may refuse to answer, and if such refusal is warranted by the rule before mentioned, he ought not to be compelled to proceed. Paxton v. Douglas, 19 Ves. 225; R. v. Slaney, 5 C. & P. 214; Stevenson v. Jones, Peake, Ev. note, p. 179, 5th Ed. * * *

On 5th June, 1847, Willes was heard for the Crown. * * * Now, if this be a privilege, the same rule is applicable to it as to all other privileges; the party may use it so as to protect himself, but not so as to injure others. Hence Lord Tenterden ruled, that if a witness waive his privilege so far as to answer part of the questions tending to criminate him, he cannot be exempted from answering the remainder. East v. Chapman, 1 M. & M. 48; 2 Phillipp's Ev. p. 418. It would be monstrous if it were otherwise; for, in that case, it would amount to a privilege to the witness to garble the facts; but his privilege is to be silent; if not silent, he is bound to speak the truth, the whole truth and nothing but the truth. * * * The object of the cross-examination was to see whether the bill was accepted by Booth, or by his authority; or to falsify the statement of the witness. The witness answers all the previous questions, knowing what the issue is between the parties, and what he came to prove.

ALDERSON, B. He never gave any evidence in chief; he was only put in as an act of charity; one short-hand writer said that he only took down the cross-examination; another said, that he took down all that was said; and, therefore, it is clear that no question was put in chief to show that the acceptance was forged. It makes a material difference whether the criminating matter is first introduced on cross-examination, or whether he had already admitted it in his examination in chief.

Willes: Where a witness in a matter directly in issue has inadvertently gone into part of a transaction, he must answer the whole truth; but it may be otherwise, when a witness has done so in a merely collateral matter. * * *

COLTMAN, J. But it was not voluntary on his part answering any of these questions; he was forced to begin.

Willes: He might have objected at the outset, and not having done so, he laid himself open to cross-examination on the whole case. * * *

M. Chambers, Q. C., replied.

In reference to an observation, that the statement of the prisoner resembled a confession made under undue influence,

ALDERSON, B., said: "Is not this the true ground of exclusion—that his liberty of refusing to say anything on the subject has been infringed—rather than that his evidence is not receivable, because it is possibly not true?"

Cur. adv. vult.

Afterwards the Judges met to consider this case; most of them twice. Nine of them, viz., PARKE, B., ALDERSON, B., COLTMAN, J., MAULE, J., ROLFE, B., WIGHTMAN, J., CRESSWELL, J., PLATT, B., and WILLIAMS, J., were of opinion, that if a witness claims the protection of the Court, on the ground that the answer would tend to criminate himself, and there appears reasonable ground to believe that it would do so, he is not compellable to answer; and if obliged to answer, notwithstanding, what he says must be considered to have been obtained by compulsion, and cannot be given in evidence against him. They did not decide, as the case did not call for it, whether the mere declaration of the witness on oath, that he believed that the answer would tend to criminate him, would or would not be sufficient to protect him from answering, where sufficient other circumstances did not appear in the case to induce the Judge to believe that it would not. The above nine Judges also thought, that it made no difference in the right of the witness to protection, that he had chosen to answer in part; being of opinion that he was entitled to it at whatever stage of the inquiry he chose to claim it, and that no answer forced from him by the presiding Judge (after such a claim), could be given in evidence against him; and they did not consider themselves bound by the ruling of Best, C. J., in Dixon v. Vale, 1 C. & P. 278, and of Lord Tenterden in East v. Chapman, 2 C. & P. 573.[27]

[27] See People v. Forbes, 143 N. Y. 219, 38 N. E. 303 (1894), that a witness before the grand jury might claim his privilege after stating that he took no part in the matter under investigation.

FOSTER v. PIERCE.

(Supreme Judicial Court of Massachusetts, 1853. 11 Cush. 437, 59 Am. Dec. 152.)

This was a complaint under the bastardy act, Rev. Sts. c. 49. At the trial in the court of common pleas, before Perkins, J., the complainant testified to the facts set forth in the complaint, and also that she never had sexual intercourse with any person other than respondent. The respondent introduced a witness, whom he asked: "If he knew of the complainant's having sexual intercourse during the month, in which the complaint stated the child to have been begotten, with other persons than the respondent?" To which he replied that "he did, and on two occasions during that month." The counsel for the complainant then asked with whom such intercourse was had. This the witness hesitated about answering, and the counsel for the respondent asked the court to advise the witness that he was not bound to answer, if the answer would tend to criminate himself. But the court declined so to do, on the respondent's application, the witness not having stated that the answer would tend to incriminate himself, and not having asked the protection of the court. But it became apparent to the court from the statement and the appearance of the witness that he did not answer, because the answer might tend to criminate himself, and that from the beginning of his evidence he had fully understood his right to refuse to give testimony of that character, and thereupon the court declined to state to the witness that he was not bound to criminate himself, but ruled (the respondent objecting) that the witness having given the evidence above stated in chief, could not now under the circumstances, refuse to answer the interrogatory put by the complainant; having stated a part of the transaction, he could not now stop and leave the complainant to suffer under the weight of the former answer, without giving her the usual means of so fixing and identifying the transaction, as to contradict or disprove it, if in her power. If the respondent would strike out the former answer of the witness, he need not go any further. But if the respondent retained and used it, the complainant had a right to all the information which could be given by the witness in answer to the question put. The respondent then asked the court to state to the witness the consequences of declining to answer, and the court stated that if the witness did not answer, he would be committed. The witness then replied that the intercourse was with himself. The jury found the respondent guilty, and to the above refusal and instructions he excepted.

DEWEY, J. The general principle of law, that a witness is not bound to criminate himself, is not controverted. But the question, is, at what state of the case is he to claim his privilege? Can the witness proceed to state material facts bearing upon the case, and favorable to one party, and when cross-examined by the opposite party in ref-

erence to the same subject, decline answering by reason of his privilege not to criminate himself?

In the case of Dixon v. Vale, 1 Car. & P. 278, it was ruled by Best, C. J., that if a witness, being cautioned that he is not obliged to answer a question which may criminate him, still does answer such question, he cannot afterwards take the objection to any further question relative to the whole transaction. In East v. Chapman, 2 Car. & P. 570, Abbott, C. J., says upon a similar objection taken to answering further questions, "you might have objected to giving any evidence, but having given a long history of what passed, you must go on, otherwise the jury will only know half of the matter." It is said in 1 Greenl. Ev. § 451, where the witness after being advertised of his privilege, chooses to answer, he is bound to answer every thing relating to the transaction.

The latter proposition would fully embrace the present case, as the presiding judge in the bill of exceptions states that from the beginning of his evidence the witness had fully understood his privilege, as was apparent to the court. This being so, it was unnecessary for the court further to state the same to him. With this knowledge of his rights, having chosen to answer in part, he must answer fully. In the case of Brown v. Brown, 5 Mass. 320, a libel for divorce, the counsel proposed that a witness should be allowed to testify that he knew the party to have committed the crime of adultery, but without naming the person with whom the adultery was committed, but the court said they should inquire of the witness with whom it was committed.

It would seem quite reasonable to go somewhat further than the present case requires, and adopt the broad principle that the witness must claim his privilege in the outset, when the testimony he is about to give, will, if he answers fully all that appertains to it, expose him to a criminal charge, and if he does not, he waives it altogether. In Chamberlain v. Willson, 12 Vt. 491, 36 Am. Dec. 356, the principle is directly held that if a witness submit himself to testify about the very matter tending to criminate himself, without claiming his privilege, he must submit to a full cross-examination. If he states a particular fact in favor of the party calling him, he will be bound on his cross-examination to state all the circumstances relating to that fact, although in so doing he may expose himself to a criminal charge. State v. K——, 4 N. H. 562.

We are satisfied that the ruling of the presiding judge was correct, and the

Exceptions are overruled.[28]

[28] And so in Norfolk v. Gaylord, 28 Conn. 309 (1859); Foster v. People, 18 Mich. 266 (1869).

PITCHER v. PEOPLE.

(Supreme Court of Michigan, 1867. 16 Mich. 142.)

The information in this case charged Pitcher with burglariously entering a certain dwelling house, with intent to steal, etc. The proof tended to show that the building entered was the complainant's barn, and that the same constituted one of the outbuildings belonging to the dwelling, and that Pitcher stole certain wool therefrom.

On the trial, one Newman—the confederate of Pitcher—on cross-examination testified to the commission by him of other offenses, and when asked in regard to the larceny by him of certain harness on the night of the burglary, he claimed his privilege on the ground that his answer would tend to criminate him, and which was sustained by the court.

Pitcher was convicted, and sentenced to state prison.[29]

COOLEY, J. * * * The question not disposed of is, whether the court was right in holding the witness Newman excused from answering whose harness he stole on the night when the burglary in question was committed.

Newman was the confederate of Reed in that burglary, and was the principal witness on whose testimony the plaintiff in error was convicted. On the cross-examination he testified to the commission of other criminal offenses by him, but when asked in regard to the larceny of the harness, he claimed his privilege on the ground that his answer would tend to criminate him, and the court sustained the claim. In this I perceive no error. When an accomplice is thus placed upon the stand, and testifies for the government, he cannot shield himself, on cross-examination, from making a full disclosure of his connection with the offense which is being investigated; but his admission of guilt in that transaction does not oblige him to disclose criminality in other cases. At any stage in such collateral inquiries he is at liberty to claim his privilege. No man can be made a witness to testify to his own crimes except by his own consent; and consent to testify as to one transaction does not entitle either the government or the defense to make the examination inquisitorial, and, thereby obtain evidence which might be used against him in future prosecutions.

I think there was no error in the judgment, and that it should be affirmed.

The other justices concurred.[30]

[29] Statement condensed and part of opinion omitted.

[30] In State v. Foster, 23 N. H. 348, 55 Am. Dec. 191 (1851), where defendant's clerk testified that defendant did not make the sale in controversy, it was thought that the witness was bound to answer on cross-examination as to other illegal sales made by himself.

SAMUEL v. PEOPLE.

(Supreme Court of Illinois, 1897. 164 Ill. 379, 45 N. E. 728.)

MAGRUDER, C. J.[81] This was a proceeding under an information by the state's attorney against the defendant, filed in the county court, on the 14th day of December, 1894, containing six counts, charging the defendant with gaming, keeping a gaming house, etc. * * *

On the trial of the case, a witness who testified was one Oscar King, who had previously signed an affidavit upon the back of the information to the effect that the allegations therein contained were true. There was an ordinance in force in the city of Clinton making it a penal offense for any person to frequent or visit or be found in any room or house or place used for the purposes of gaming, or to bet on any such game when played by others. This witness, when placed upon the stand, and interrogated by the state's attorney, claimed his privilege to decline answering each and every question propounded to him by the state's attorney touching the question of his being in any gaming house or room or place used for that purpose, or playing at any game, or giving a description of the room or place wherein any such gaming occurred, etc., on the ground that the answers which the truth would compel him to give would tend to criminate himself, or render him liable to the penalty prescribed by said ordinance. The court refused to entertain his claim of privilege, and compelled him to testify to all that he knew concerning said matters, notwithstanding his claim of privilege, upon the ground that, he having voluntarily and at his own request caused the prosecution to be commenced, his privilege was waived. * * *

Two questions are presented for our consideration by this record.

1. Where a witness in a criminal prosecution claims his privilege of refusing to answer a question upon the ground that the answer will criminate him or expose him to a penal liability, is the court justified in disallowing such claim, if it appears that the witness has previously made an affidavit, indorsed upon the back of the information filed by the district attorney, stating that the matters and things set out in the information are true? It is contended in this case that the witness claiming the privilege caused the prosecution to be commenced by his voluntary act of swearing to the truth of the information, and that he thereby waived his right to insist upon his privilege, when called upon to testify at the trial subsequently taking place. It is urged in support of this contention that a man ought not to be permitted to set the machinery of the law in motion, and then afterwards turn the prosecution into naught by withholding his evidence. The privilege in question is a constitutional right, of which the citizen cannot be deprived by either legislatures or courts. Section 10 of the bill of

[81] Part of opinion omitted.

rights says: "No person shall be compelled in any criminal case to give evidence against himself." 1 Starr & C. Ann. St. p. 104. The privilege, which a witness has, of refusing to give evidence which will criminate himself, is granted to him upon grounds of public policy, and as one of the safeguards of his personal liberty. It cannot be regarded as released or waived by some disclosure,[82] which he may have made elsewhere, and under other circumstances. If the answer to a question put to him as a witness upon the stand might tend to criminate him, it would not tend any the less to do so because he had elsewhere made a statement having such a tendency. The question is not as to what he may have previously said in an affidavit, but the question is whether the disclosure he is asked to make as a witness upon the trial of the case will have a tendency to expose him to criminal charge or penalty. We are of the opinion that his constitutional right in this regard is not abridged or waived by the fact of making the ex parte affidavit indorsed upon the back of the information filed by the prosecuting attorney. Minters v. People, 139 Ill. 363, 29 N. E. 45; Lamson v. Boyden, 160 Ill. 613, 43 N. E. 781. Reliance is placed upon the doctrine, announced in a number of cases, that a witness who voluntarily and understandingly discloses part of a transaction exposing him to a criminal prosecution, without claiming his privilege, is ordinarily obliged to go forward, and complete the narrative, by stating the whole of the transaction. Whart. Cr. Ev. (9th Ed.) § 470; 29 Am. & Eng. Enc. Law, p. 844. This doctrine, however, can have no application here, unless the statements made in the affidavit indorsed upon the information and the statements made in the testimony elicited upon the trial may be regarded as parts of one continuous account. We do not think, however, that, under the doctrine thus invoked, the affidavit and the evidence on the trial can be thus run together, so as to be considered one statement. The doctrine applies only to a case where the witness, while testifying upon the trial, states a fact, and afterwards refuses to give the details, or discloses a part of a transaction in which he was criminally concerned, without claiming his privilege, and then refuses to go forward, and state the whole; it does not apply to a case where some admission made long prior to the trial is sought to be brought forward and joined to the answers given on the trial. State v. Foster, 23 N. H. 348, 55 Am. Dec. 191; People v. Freshour, 55 Cal. 375; Town of Norfolk v. Gaylord, 28 Conn. 309. * * *

2. The next question which the record presents is whether the plaintiff in error can assign as error that the court below compelled the witness to testify, notwithstanding his claim of his privilege. It will be noted that the witness here was not Wilkin Samuel, the party

[82] It has been held that no waiver results from the fact that the witness had previously testified before the grand jury, Temple v. Com., 75 Va. 892 (1881); or on a previous trial, Georgia Railroad & Banking Co. v. Lybrend, 99 Ga. 421, 27 S. E. 794 (1896).

indicted, and the present plaintiff in error; but it was Oscar King, a third person, not connected with the prosecution, or involved in it. The witness King did not persist in his refusal to testify after the court decided against him upon the question of his right to claim his privilege, but, after such decision, he proceeded to answer the questions addressed to him. He might have refused to answer notwithstanding the adverse ruling, and might have chosen to submit to punishment, as for a contempt. There were such refusal and punishment in the cases of Minters v. People, supra, and Temple v. Com., supra [75 Va. 892]. "The refusal of a witness to answer any question which he may be lawfully required to answer is a contempt of court, and, if he persists in his refusal, he may be punished accordingly." 29 Am. & Eng. Enc. Law, p. 846.

It is not contended that the evidence given by the witness King was not competent evidence under the issues involved, but it is claimed that the defendant below is entitled to complain, because King was compelled to testify, although claiming his privilege. This is a matter of which the witness [33] alone can complain, and of which the plaintiff in error can take no advantage, as being error committed against himself. The privilege is that of the witness, and not of the party; and counsel will not be allowed to make the objection. The privilege cannot be interposed by either party to the action, nor can either party raise the objection on behalf of the witness. It must be claimed by the witness in order to be available, and it lies with him to claim it or not, as he may choose. As the privilege is personal to the witness, he may waive it, and elect to testify. Mackin v. People, 115 Ill. 312, 3 N. E. 222; Moline Wagon Co. v. Preston, 35 Ill. App. 358; State v. Foster, supra; 1 Greenl. Ev. § 451; Whart. Cr. Ev. (9th Ed.) § 465; 29 Am. & Eng. Enc. Law, p. 843. This being so, the evidence is equally good where the witness, instead of giving it voluntarily, is compelled to give it. * * *

Judgment affirmed.[34]

[33] Professor Wigmore suggests, apparently, that the same rule ought to apply where the defendant testifies as a witness. Wigmore, sec. 2270, n. 6. But it would seem to be an extremely harsh rule which would force the accused to prejudice his case by persisting in a refusal to answer, thereby subjecting himself to punishment for contempt, or at least to the most unfavorable inferences. State v. Ober, 52 N. H. 459, 13 Am. Rep. 88 (1873), in order to preserve the benefit of his privilege.

See State v. Gardner, 88 Minn. 130, 92 N. W. 529 (1902), holding that, where the defendant was compelled to testify before the grand jury, the indictment should be quashed.

[34] The omitted parts of the opinion contain extensive quotations from Reg. v. Kinglake, 11 Cox. Cr. Cases 499 (1870); Cloyes v. Thayer, 3 Hill (N. Y.) 564 (1842); and Morgan v. Halberstadt, 60 Fed. 592, 9 C. C. A. 147 (1894).

BURDICK v. UNITED STATES.

(Supreme Court of the United States, 1915. 236 U. S. 79, 35 Sup. Ct. 267, 59 L. Ed. 476.)

Mr. Justice McKENNA delivered the opinion of the court.

Error to review a judgment for contempt against Burdick upon presentment of the Federal grand jury for refusing to answer certain questions put to him in an investigation then pending before the grand jury into alleged custom frauds in violation of §§ 37 and 39 of the Criminal Code of the United States [35 Stat. at L. 1096, chap. 321, Comp. St. §§ 10201, 10203].

Burdick first appeared before the grand jury and refused to answer questions as to the directions he gave and the sources of his information concerning certain articles in the New York Tribune regarding the frauds under investigation. He is the city editor of that paper. He declined to answer, claiming upon his oath, that his answers might tend to criminate him. Thereupon he was remanded to appear at a later day, and upon so appearing he was handed a pardon which he was told had been obtained for him upon the strength of his testimony before the other grand jury. [Burdick declined to accept the pardon and again refused to answer the questions. He was adjudged guilty of contempt, and committed to the custody of the marshal.]

May plaintiff in error, having the means of immunity at hand, that is, the pardon of the President, refuse to testify on the ground that his testimony may have an incriminating effect? A superficial consideration might dictate a negative answer, but the answer would confound rights which are distinct and independent.

It is to be borne in mind that the power of the President under the Constitution to grant pardons and the right of a witness must be kept in accommodation. Both have sanction in the Constitution, and it should, therefore, be the anxiety of the law to preserve both,—to leave to each its proper place. In this as in other conflicts between personal rights and the powers of government, technical—even nice—distinctions are proper to be regarded. Granting, then, that the pardon was legally issued and was sufficient for immunity, it was Burdick's right to refuse it, as we have seen; and it, therefore, not becoming effective, his right under the Constitution to decline to testify remained to be asserted; and the reasons for his action were personal. It is true we have said (Brown v. Walker, 161 U. S. 601, 605, 40 L. Ed. 822, 824, 5 Interst. Com. R. 369, 16 Sup. Ct. 644) that the law regards only mere penal consequences, and not "the personal disgrace or opprobrium attaching to the exposure" of crime, but certainly such consequence may influence the assertion or relinquishment of a right. This consideration is not out of place in the case at bar. If it be objected that the sensitiveness of Burdick was extreme because his refusal to answer was itself an implication of crime, we answer, not necessarily in fact,

not at all in theory of law. It supposed only a possibility of a charge of crime, and interposed protection against the charge, and, reaching beyond it, against furnishing what might be urged or used as evidence to support it.

This brings us to the differences between legislative immunity [85] and a pardon. They are substantial. The latter carries an imputation of guilt; acceptance a confession of it. The former has no such imputation or confession. It is tantamount to the silence of the witness. It is noncommittal. It is the unobtrusive act of the law giving protection against a sinister use of his testimony, not like a pardon, requiring him to confess his guilt in order to avoid a conviction of it.

It is of little service to assert or deny an analogy between amnesty and pardon. Mr. Justice Field, in Knote v. United States, 95 U. S. 149, 153, 24 L. Ed. 442, 443, said that "the distinction between them is one rather of philological interest than of legal importance." This is so as to their ultimate effect, but there are incidental differences of importance. They are of different character and have different purposes. The one overlooks offense; the other remits punishment. The first is usually addressed to crimes against the sovereignty of the state, to political offenses, forgiveness being deemed more expedient for the public welfare than prosecution and punishment. The second condones infractions of the peace of the state. Amnesty is usually general, addressed to classes or even communities,—a legislative act, or under legislation, constitutional or statutory,—the act of the supreme magistrate. There may or may not be distinct acts of acceptance. If other rights are dependent upon it and are asserted, there is affirmative evidence of acceptance. Examples are afforded in United States v. Klein, 13 Wall. 128, 20 L. Ed. 519; Armstrong's Foundry, 6 Wall. 766, 18 L. Ed. 882; Carlisle v. United States, 16 Wall. 147, 21 L. Ed. 426. See also Knote v. United States, supra. If there be no

[85] The common-law privilege may, of course, be taken away by statute, except where embodied in the Constitution.

Statutes were passed in several of the states requiring the witness to testify, but providing that his testimony should not be used against him. A similar federal statute was held invalid in Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110 (1892), on the ground that Congress could not take away the constitutional protection without giving immunity from prosecution. The act was accordingly amended and its validity as an immunity statute sustained in Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819 (1896). In this case it was also held that the act was not objectionable because it might not furnish protection against state prosecution. In Jack v. Kansas, 199 U. S. 372, 26 Sup. Ct. 73, 50 L. Ed. 234, 4 Ann. Cas. 689 (1905), a similar state statute was upheld, though it clearly could not protect against federal prosecution.

In Heike v. United States, 227 U. S. 131, 33 Sup. Ct. 226, 57 L. Ed. 450, Ann. Cas. 1914C, 128 (1913), it was held that the federal act applied to the offense under investigation and did not bar a prosecution for some other offense incidentally disclosed. As to such matters it would seem that the privilege has not been taken away.

It seems that the privilege is taken away when a prosecution is barred by the statute of limitations. Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819 (1896).

other rights, its only purpose is to stay the movement of the law. Its function is exercised when it overlooks the offense and the offender, leaving both in oblivion.

Judgment reversed, with directions to dismiss the proceedings in contempt, and discharge Burdick from custody.

Mr. Justice McREYNOLDS took no part in the consideration and decision of this case.

FISHER v. RONALDS.

(Court of Common Pleas, 1852. 12 C. B. 762.)

Assumpsit on a bill of exchange for £245. drawn by one Chappell upon and excepted by the defendant, and endorsed by Chappell to the plaintiff.

Plea, amongst others, that the bill declared upon was accepted by the defendant for the purpose of securing to Chappell, the drawer, a sum of money won by him of the defendant by gaming, contrary to the statute; and that the bill was endorsed to the plaintiff with full knowledge of the circumstances under which it was given.

The cause was tried before Cresswell, J., at the second sitting in London in this term.

It appeared that the defendant was an officer of the 77th regiment, stationed at Plymouth; that, during the Plymouth races, in August, 1851, certain persons calling themselves "The Bath and Bristol Club," of whom Chappell was one, went down to Plymouth; that a room was hired for them there at the house of one John Hix, a livery-stable keeper, where roulette was played, and Ronalds, the defendant, was a considerable loser. The defence attempted to be set up, was, that the bill in question was given by the defendant for part of the money so lost by him to Chappell.

To prove this, Hix was called. He said he knew a set of persons called "The Bath and Bristol Club;" that, in August, 1851, he was applied to by some officers of the 77th, to let them a room; that some of the members of the club, among whom was Chappell, came there; that he was in the room on the night the money was alleged to have been lost by the defendant; that he saw the defendant there; but that he saw no gaming. He was then asked, "Was there a roulette-table in the room?" Byles, Serjt., for the plaintiff, interposed, and asked the learned judge to caution the witness, that his answer to that question might tend to subject him to a criminal charge under the 8 & 9 Vict. c. 109, ss. 1, 2. The learned judge, after looking at the statute, told the witness that he was not bound to answer the question, inasmuch as his answer might have a tendency to involve him in the danger of being indicted as the keeper of a common gambling-house, or as a conspirator to defraud.

The witness accordingly declined to answer the question: and a verdict was found for the plaintiff, for the amount claimed.

Montagu Chambers (with whom was Collier) now moved for a new trial.

JERVIS, C. J. I am of opinion that my Brother Cresswell was quite right in declining to compel the witness to answer the question. The tendency of the question was plain: and the learned judge saw that the witness really believed that his answer to it might tend to criminate him. In Phillipps on Evidence, 10th edit. Vol. II., p. 487, it is said that a witness is privileged from answering not only what will criminate him directly, but also whatever has any tendency to criminate him: and the reason given for this decisively disposes of this case,—"because, otherwise, question might be put after question, and, though no single question may be asked which directly criminates, yet enough might be got from him by successive questions, whereon to found against him a criminal charge." We must, therefore, allow the witness to judge for himself, or he would be made to criminate himself entirely. There is, no doubt, at times great difficulty in applying the rule; but it is impossible to help that.

MAULE, J. I am of the same opinion. We need not decide upon the present occasion, that the statement of the witness is conclusive, though I think the judge is bound by the witness's oath; otherwise, you might exhaust all possibilities consistent with a man's innocence, and so convict him even of murder. The question here put is just one of the questions which would necessarily have been asked on an indictment against the witness for keeping a gambling-house. I think it is impossible to put a case of the more proper application of the rule which protects a witness from criminating himself.

WILLIAMS, J. I am of the same opinion. It is unnecessary to determine whether the witness's statement that his answer may tend to criminate him, is conclusive or not. I think it was abundantly clear that his answer in this case must have a direct tendency to place the witness in danger.

TALFOURD, J., concurred.

Rule refused.[36]

[36] During the course of the argument counsel urged that the court should exercise its discretion as to whether the claim of privilege was well founded: "At all events the judge is to exercise his discretion as to whether or not the claim of privilege is well founded. (Maule, J. No; it is the witness who is to exercise his discretion, not the judge. The witness might be asked, 'Were you in London on such a day?' and, though apparently a very simple question, he might have good reason to object to answer it, knowing that, if he admitted that he was in London on that day, his admission might complete a chain of evidence against him which would lead to his conviction. It is impossible that the judge can know anything about that. The privilege would be worthless, if the witness were required to point out how his answer would tend to criminate him.)"

In Adams v. Lloyd, 3 H. & N. 351 (1858), Pollock, B., after quoting the above passage with approval, added: "It is impossible to satisfy the judge without

Ex parte GAUSS.

(Supreme Court of Missouri, 1909. 223 Mo. 277, 122 S. W. 741, 135 Am. St. Rep. 517.)

GANTT, P. J. The petitioner by this proceeding seeks to be discharged from imprisonment and the custody of the jailer of the city of St. Louis. It appears from the record that the petitioner was committed for contempt by the circuit court of the city of St. Louis for refusing to answer certain questions propounded to him by the grand jury of said city on the 27th day of September, 1909. It appears that in August, 1909, petitioner was arrested for making a wager on a horse race, and on September 30, 1909, he was summoned before the grand jury of the City of St. Louis, and was asked the following questions: "I want to ask you again, Mr. Gauss, on the day that you were arrested, which was some time in August, this year, had you, just prior to your arrest, made or placed a bet with Steve Pensa, at his place of business on Washington avenue, upon the result of a horse race? Q. Did you ever give Steve Pensa, or any other person in his place of business, any money to be placed upon a horse race to

exposing the whole matter; and a man may be placed under such circumstances with respect to the commission of a crime, that if he disclosed them he might be fixed upon by his hearers as a guilty person; so that the rule is not always the shield of the guilty, it is sometimes the protection of the innocent, although very likely it was originally introduced from humane motives, being probably derived from the maxim 'nemo tenetur seipsum accusare.'"

In Reg. v. Boyes, 1 B. & S. 311 (1861), where the point involved was whether a witness was privileged from answering an incriminating question, after having accepted a pardon which would not protect him from impeachment by the House of Commons, Cockburn, C. J., said: "It was also contended that a bare possibility of legal peril was sufficient to entitle a witness to protection: nay, further, that the witness was the sole judge as to whether his evidence would bring him into danger of the law: and that the statement of his belief to that effect, if not manifestly made mala fide, should be received as conclusive. With the latter of these propositions we are altogether unable to concur. Upon a review of the authorities, we are clearly of the opinion that the view of the law propounded by Lord Wensleydale, in Osborn v. The London Dock Company [10 Exch. 698 (1855)], and acted upon by V. C. Stuart, in Sidebottom v Adkins [3 Jur. (N. S.) 631 (1857)], is the correct one; and that, to entitle a party called as a witness to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. We indeed quite agree that, if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question: there being no doubt, as observed by Alderson, B., in Osborn v The London Dock Company, that a question which might appear at first sight a very innocent one, might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering it Subject to this reservation, a judge is in our opinion, bound to insist on a witness answering unless he is satisfied that the answer will tend to place the witness in peril."

In Ex parte Reynolds, 15 Cox, Crim. Cas. 108 (1882), the Court of Appeals in dealing with a claim of privilege evidently made in bad faith, approved the rule as stated in Reg. v. Boyes.

be run at any place within the state of Missouri, or without the state? Q. Have you, at any time within the last three years, made Steve Pensa the custodian of any bet upon the result of a horse race?" The petitioner refused to answer these questions because by so doing he might incriminate himself. Whereupon his refusal was reported to the judge of division No. 10 of the circuit court of the city of St. Louis, who ordered him to answer said questions, and upon his refusal to do so committed him to the jail of the city of St. Louis until such time as he would answer said questions.

The petitioner insists that he is entitled to be discharged from said imprisonment, because the effect of the said judgment and order was to violate section 23 of article 2 of the Constitution of this state (Ann. St. 1906, p. 158), which provides "that no person shall be compelled to testify against himself in a criminal cause," and because said commitment is in violation of that part of the fifth amendment of the Constitution of the United States, which says: "Nor shall any person be compelled in any criminal case to be a witness against himself." In State v. Young, 119 Mo. 495, loc. cit. 520, 24 S. W. 1038, 1045, it was said by this court: "The Constitution means more than the protection of the accused on his final trial when his rights are scrupulously guarded by the courts. It as clearly protects him from being forced to testify against himself in any and all preliminary investigation, whether before the coroner, grand jury, or the justice on his preliminary examination. The immunity afforded him by the Constitution is broad enough to protect him against self-incrimination before any tribunal in any proceeding." Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110; Cullen v. Commonwealth, 24 Grat. (Va.) 624; State ex rel. v. Hardware Co., 109 Mo. 118, 18 S. W. 1125, 15 L. R. A. 676.

Learned counsel for the state insists, however, that it is the province of the court to judge whether any direct answer to the question that may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms the necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it, so as to furnish matter for that conviction; but if the question propounded does not disclose upon its face that it will have such tendency, and the witness fails to clearly show to the court how it will have such effect, he may be punished for contempt after he refuses to answer after being directed to do so by the court; and their contention is that the petitioner was not entitled to invoke the protection of the Constitution against answering these questions for the reason, as they say, that it is not, under this act of 1907 (page 223) against book making, and pool selling, nor any other law, made a crime for a person to make or place a bet on a horse race, or to make any other person the custodian of a bet upon the result of a horse race. This court, in Ex parte Arnot Carter, 166 Mo., loc. cit. 614, 66 S. W. 544, 57 L. R. A. 654, said: "It is

reasonable construction of the constitutional provision that the witness is protected from being compelled to disclose the circumstances of his offense, or the sources from which evidence of its commission, or of its connection with it, may be obtained, or make effectual for his conviction, without using his answers as direct admissions against him."

Chief Justice Marshall, when engaged in the trial of Aaron Burr (1 Burr's Trial, 244, 25 Fed. Cas. 40, No. 14,692e), said: "If the question be of such description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say, upon his oath, that his answer would incriminate himself, the court can demand no other testimony of the fact. * * * According to their statement (the counsel for the United States), a witness can never refuse to answer any question, unless that answer, unconnected with other testimony, would be sufficient to convict him of crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable, case that a witness, by disclosing a certain fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing; but all other facts without it would be insufficient. While that remains concealed within his own bosom, he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed, by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is attainable, against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer, which would disclose a fact that would form a necessary and essential part of a crime, which is punishable by the laws."

Learned counsel for the state seem to conclude that the only possible prosecution that could grow out of an affirmative answer to the questions propounded to the petitioner in this case by the grand jury would be one for betting on a horse race; but the witness did not limit his reason to any particular offense, but stated that to answer the question would incriminate him. For aught that the court knew, the state may have been in possession of sufficient other evidence to have convicted the petitioner of some other crime if only it could fix upon him that he was present at Pensa's place at a given time, and then and there placed a bet with Pensa upon the result of a horse race, or gave Pensa money at that time to be placed upon a horse race. The meaning of this

constitutional provision has time and again been held not to be merely a provision that a person shall not be compelled to testify in a then existing case against himself, but that he shall not be compelled, when acting as a witness in any investigation, to give testimony which may tend to show that he himself has committed a crime; and this court has approved a doctrine, announced by Chief Justice Marshall, that, if the question be of such description that an answer to it may or may not incriminate the witness, it must rest with himself, who alone can tell what it would be to answer the question or not. And if, in such case, he say upon his oath that his answer would incriminate himself, the court can demand no other testimony of the fact.

This rule, we think, is entirely consistent with the doctrine generally held that where the court can say, as a matter of law, that it is impossible that a witness would incriminate himself by answering a question one way or the other, then the court can require an answer; but we think the question propounded in this case is not such a question, but one which the witness had the right to decline to answer, if, in his opinion, it would incriminate him. To hold that he must have explained all of the other testimony in the case, which would be sufficient to convict him, by an answer to this question, would render the rule entirely worthless.

The language of the court in People v. Mather, 4 Wend. (N. Y.) 252, 21 Am. Dec. 122, is, we think, very persuasive. Said the court: "When the disclosures he may make can be used against him to prosecute him for a criminal offense or to charge him with penalties or forfeitures, he may stop answering before he arrives at the question, the answer of which may show practically his moral turpitude. The witness knows what the court does not know, and what he cannot communicate without being a self-accuser, and is the judge of the effect of his answer, and if it proves a link in the chain of testimony, which is sufficient to convict him, he is protected by law from answering the question. If there be a series of questions, the answer to all of which would establish his criminality, the party cannot pick out a particular one, and say, if that be put, the answer will not criminate him. If it is one step having a tendency to criminate him, he is not compelled to answer."

In State ex rel. v. Simmons Hardware Co., 109 Mo. 118, 18 S. W. 1125, 15 L. R. A. 676, Judge Barclay, speaking for this court, said: "It is a reasonable construction of the constitutional provision that the witness is protected from being compelled to disclose the circumstances of his offense, the source from which, or the means by which, evidence of its commission or of his connection with it may be obtained or made effectual for his conviction without using his answers as direct testimony against him."

In our opinion, the petitioner having testified that he could not answer the questions without criminating himself, and it not being entirely plain that his answers might not lead to a prosecution of him-

self, we think the circuit court erred in committing him for contempt in refusing to answer, and he is therefore entitled to be discharged from his imprisonment, and it is so ordered.

BURGESS and FOX, JJ., concur.[87]

MASON et al. v. UNITED STATES.

(Supreme Court of the United States, 1917. 244 U. S. 362, 37 Sup. Ct. 621, 61 L. Ed. 1198.)

Mr. Justice MCREYNOLDS delivered the opinion of the court.

Plaintiffs in error were separately called to testify before a grand jury at Nome, Alaska, engaged in investigating a charge of gambling against six other men. Both were duly sworn. After stating that he was sitting at a table in the Arctic Billiard Parlors when these men were there arrested, Mason refused to answer two questions, claiming so to do might tend to incriminate him. (1) "Was there a game of cards being played on this particular evening at the table at which you were sitting?" (2) "Was there a game of cards being played at another table at this time?" Having said that at the specified time and place he, also, was sitting at a table, Hanson made the same claim and refused to answer two questions. (1) "If at this time or just prior to this time that yourself and others were arrested in the Arctic Billiard Parlors if you saw anyone there playing 'stud poker' or 'pangingi' ?" (2) "If at this same time you saw anyone playing a game of cards at the table at which you were sitting?"

The foreman of the grand jury promptly reported the foregoing facts and the judge at once heard the recalcitrant witnesses; but as the record contains no detailed statement of what then occurred we cannot know the exact circumstances. The court, being of opinion "that each and all of said questions are proper and that the answers thereto would not tend to incriminate the witnesses," directed them to return before the grand jury and reply. Appearing there, Mason again refused to answer the first question propounded to him, but, half yielding to frustration, said in response to the second, "I don't know." Hanson refused to answer either question.

A second report was presented by the foreman; the witnesses were once more brought into court; and after hearing evidence adduced by both sides and arguments of counsel they were adjudged in contempt. It was further ordered "that they each be fined in the sum of $100, and that they each be imprisoned until they comply with the orders of the court by answering the questions." Immediately following this order they made answers, but these are not set out in the record. The fines are unpaid; and we are asked to reverse the

[87] But see Manning v. Mercantile Securities Co., 242 Ill. 584, 90 N. E. 238, 30 L. R. A. (N. S.) 725 (1909).

trial court's action in undertaking to impose them because it conflicts with the inhibition of the 5th Amendment that no person "shall be compelled in any criminal case to be a witness against himself."

During the trial of Aaron Burr and "Re Willie," Fed. Cas. No. 14,692e, the witness was required to answer notwithstanding his refusal upon the ground that he might thereby incriminate himself. Chief Justice Marshall announced the applicable doctrine as follows: "When two principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. They are believed both to be preserved to a reasonable extent, and according to the true intention of the rule and of the exception to that rule, by observing that course which it is conceived courts have generally observed. It is this: When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be."

The constitutional protection against self-incrimination "is confined to real danger, and does not extend to remote possibilities out of the ordinary course of law." Heike v. United States, 227 U. S. 131, 144, 57 L. Ed. 450, 455, 33 Sup. Ct. 226, Ann. Cas. 1914C, 128; Brown v. Walker, 161 U. S. 591, 599, 600, 40 L. Ed. 819, 821, 822, 5 Interst. Com. Rep. 369, 16 Sup. Ct. 644.

In Reg. v. Boyes (1861) 1 Best & S. 311, 329, 330, 121 Eng. Reprint, 730, Cockburn, C. J., said:

"It was also contended that a bare possibility of legal peril was sufficient to entitle a witness to protection; nay, further, that the witness was the sole judge as to whether his evidence would bring him into danger of the law; and that the statement of his belief to that effect, if not manifestly made mala fide, should be received as conclusive. With the latter of these propositions we are altogether unable to concur. * * * To entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. We indeed quite agree that, if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question. * * * A question which might appear at first sight a very innocent one might, by affording a link in a chain of evidence, become the means of bringing home an offense to the party answering. Subject to this reservation, a judge

is, in our opinion, bound to insist on a witness answering unless he is satisfied that the answer will tend to place the witness in peril.

"Further than this, we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding inter alios, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice."

The statement of the law in Reg. v. Boyes was expressly approved by all the judges in Ex parte Reynolds (1882) L. R. 20 Ch. Div. 294, 51 L. J. Ch. N. S. 756, 46 L. T. N. S. 508, 30 Week. Rep. 651, 46 J. P. 533. Similar announcements of it may be found in Ex parte Irvine (C. C.) 74 Fed. 954, 960; Ward v. State, 2 Mo. 120, 122, 22 Am. Dec. 449; Ex parte Buskett, 106 Mo. 602, 608, 14 L. R. A. 407, 27 Am. St. Rep. 378, 17 S. W. 753.

The general rule under which the trial judge must determine each claim according to its own particular circumstances, we think, is indicated with adequate certainty in the above-cited opinions. Ordinarily, he is in much better position to appreciate the essential facts than an appellate court can hold, and he must be permitted to exercise some discretion, fructified by common sense, when dealing with this necessarily difficult subject. Unless there has been a distinct denial of a right guaranteed, we ought not to interfere.

In the present case the witnesses certainly were not relieved from answering merely because they declared that so to do might incriminate them. The wisdom of the rule in this regard is well illustrated by the enforced answer, "I don't know," given by Mason to the second question, after he had refused to reply under a claim of constitutional privilege.

No suggestion is made that it is criminal in Alaska to sit at a table where cards are being played, or to join in such game unless played for something of value. The relevant statutory provision is section 2032, Compiled Laws of Alaska 1913, copied in the margin.[88]

[88] "Sec. 2032. That each and every person who shall deal, play, or carry on, open or cause to be opened, or who shall conduct, either as owner, proprietor or employee, whether for hire or not, any game of faro, monte, roulette, rouge-et-noir, lansquenet rondo, vingt-un, twenty-one, poker, draw poker,

The court below evidently thought neither witness had reasonable cause to apprehend danger to himself from a direct answer to any question propounded, and, in the circumstances disclosed, we cannot say he reached an erroneous conclusion.

Separate errors are also assigned to the trial court's action in permitting counsel to introduce two documents in evidence; but we think the points are without substantial merit.

The judgment under review is affirmed.

II. PROFESSIONAL CONFIDENCE

WALDRON v. WARD.

(Court of King's Bench, 1654. Style, 449.)

In a tryal at the Bar between Waldron plaintiff, and Ward defendant, one Mr. Conye a counceller at the Bar was examined upon his oath to prove the death of Sir Thomas Conye. Whereupon Serjeant Maynard urged to have him examined on the other part, as a witness in some matters whereof he had been made privy as of counsel in the cause.

But ROLL, Chief Justice, answered: He is not bound to make answer for things which may disclose the secrets of his client's cause, and thereupon he was forborn to be examined.

SPARKE v. MIDDLETON.

(Court of King's Bench, 1664. 1 Keb. 505.)

Mr. Aylet having been counsel for the defendant, desired to be excused to be sworn on the general oath, as witness for the plaintiff, to give the whole truth, in evidence, which the Court after some dispute granted; and that he should only reveal such things as he either knew before he was of counsel, or that came to his knowledge since by other persons, and the particulars to which he was to be

brag, bluff, thaw, craps, or any banking or other game played with cards, dice, or any other device, whether the same shall be played for money, checks, credit, or any other representative of value, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than $500, and shall be imprisoned in the county jail until such fine and costs are paid; Provided, that such person so convicted shall be imprisoned one day for every $2 of such fine and costs: And provided further, that such imprisonment shall not exceed one year."

sworn were particularly proposed, viz., what he knew concerning a will in question that Poyns Gorge made; and the Court only put the question, whether he knew of his own knowledge.[39]

LORD SAY AND SEAL'S CASE.

(Court of Queen's Bench, 1712. 10 Mod. 40.)

Upon a trial at Bar in the Court of King's Bench, in an ejectment brought by the heirs at law against the Lord Say and Seal, who claimed as heir in tail;[40]

The single question was, whether or no a common recovery that was suffered in order to dock the intail, was good or not?

The objection to the recovery was, that there was no tenant to the præcipe.

To prove the recovery good, a deed bearing date the twenty-third of October, 1701, directing the uses of the recovery, and the fine, viz. the chirograph of the fine, and common recovery, were produced.

The counsel for the Lord Say and Seal desired to call one Knight, an attorney at law, to prove, that though the deed was dated the twenty-third of October, it was not executed until five months after, viz. in March.

N. B. The attorney was the person intrusted in suffering the common recovery.

The counsel for the heirs at law opposed the swearing the attorney, because as an attorney has a privilege not to be examined as to the secrets of his client's cause, so the attorney's privilege was likewise the client's privilege; for the client intrusts an attorney with the secrets of his cause, upon confidence not only that he will not, but also that though he would yet he should not, be admitted by the law to betray his client; and for this Holbeche's case was relied upon. Besides, it was said that his evidence would tend to accuse himself either of ignorance, negligence, or something worse; and in Moore's Reports, antedating deeds is felony.

THE COURT were of opinion, that Holbeche's case was good law; and that an attorney's privilege was the privilege of his client; and that an attorney, though he would yet should not be allowed to dis-

[39] Prentice, J., in Loomis v. Norman Printers' Supply Co., 81 Conn. 343, 71 Atl. 358 (1908): "Counsel for the plaintiff were within their rights in calling counsel for the defendant as a witness to testify to matters not of a confidential or privileged character. The impropriety which is recognized in the conduct of an attorney who volunteers to aid the cause of his client as a witness in his behalf is one which attaches to himself, and is not present when he is requisitioned by his adversary. A due recognition, however, of the status of an attorney representing his client in the trial of a cause demands that he be not required by adverse counsel to take the witness-stand unless there be a reasonable necessity for such action."

[40] Part of case omitted.

cover the secrets of his client. But notwithstanding this, they thought Knight's evidence was to be received; for that a thing of such a nature as the time of executing a deed could not be called the secret of his client, that it was a thing he might come to the knowledge of without his client's acquainting him, and was of that nature, that an attorney concerned, or anybody else, might inform the Court of.

Knight, being called in, swore, that it being feared the common recovery would be good for nothing, because it was doubted whether there was a good tenant to the præcipe, at the time of the common recovery suffered, it was agreed upon as the best expedient, that there should be a fine as of Sancti Michaelis levied to make a tenant to the præcipe, which was five months before the fine was actually levied; and that there should be a deed, which should declare the uses of the fine and recovery, and recite the fine to be of Sancti Michaelis; and that the deed was executed when the fine was taken, viz. in March. * * *[41]

VAILLANT v. DODEMEAD.

(Court of Chancery, 1743. 2 Atk. 524.)

The bill was to be relieved against a collusive assignment made by the defendant Dodemead of a lease to one Lascells, a prisoner in the Fleet, in order to avoid paying a ground rent to the plaintiff; the defendant Dodemead had examined Mr. Bristow, clerk in court in the cause, who demurred to the plaintiff's interrogatories on a cross examination.

The demurrer was, for that he knew nothing of the several matters inquired of by the interrogatories, besides what came to his knowledge as clerk in court, or agent for the defendant, in relation to the matters in question in this cause, and therefore submitted to the court, whether he should be obliged to answer thereto.

LORD CHANCELLOR.[42] These demurrers ought to be held to very strict rules; I am of opinion there are several objections to this demurrer, I think it covers too much, and is very loosely drawn, for all

[41] See, also, Doe v. Andrews, Cowper, 845 (1778), where the attorney for the defendant was one of the attesting witnesses to a deed, and was attached for contempt for refusing to testify on behalf of plaintiff as to the execution of such deed; Coveney v. Tannahill, 1 Hill (N. Y.) 33, 37 Am. Dec. 287 (1841); Patten v. Moor, 29 N. H. 163 (1854), where the attorney was present at the execution of an instrument to his client.

The attorney may be compelled to testify as to the contents of a notice served on him. Spenceley v. Schulenburgh, 7 East, 357 (1806); or as to what took place in court on a former trial, Brown v. Foster, 1 H. & N. 736 (1857); or as to the mental or physical condition of his client, Daniel v. Daniel, 39 Pa. 191 (1861); State v. Fitzgerald, 68 Vt. 125, 34 Atl. 429 (1896); or as to whether a document is in court, Dwyer v. Collins, 7 Exch. 639, (1852), post, p. 945.

[42] Lord Hardwicke. Part of opinion omitted.

demurrers of this sort ought to conclude, that he knew nothing but by the information of his client.

The first objection made against this demurrer is, That it appears in this case, that the matters inquired after by the plaintiff's interrogatories were antecedent transactions to the commencement of the suit, the knowledge whereof could not come to Mr. Bristow, as clerk in court, or solicitor.

The second objection, That this is a cross examination, and wherever at law the party calls upon his own attorney for a witness, the other side may cross-examine him, but that must be only relative to the same matter, and not as to other points of the cause.

The third objection, That it is too general; for the words are that he knew nothing but as clerk in court, or agent.[43]

Now, the word "agent" is very extensive and uncertain, for no persons are privileged from being examined in such cases, but persons of the profession, as counsel, solicitor, or attorney, for an agent may be only a steward, or servant.

The fourth objection, That one of the interrogatories was an enquiry concerning the proving of the deed of assignment, which was exhibited; I am of opinion, that he ought to answer to this, though he should be privileged as to other matters. * * *

POTTER v. INHABITANTS OF WARE.

(Supreme Judicial Court of Massachusetts, 1848. 1 Cush. 519.)

On the trial of this action, which took place in the court of common pleas, before Wells, C. J., the attorney who made the writ, and who was also actively engaged in the trial, as one of the counsel for the plaintiff, and opened the cause to the jury, was called by the plaintiff as a witness, and was allowed to testify as such, against the objection of the defendants. The plaintiff having obtained a verdict, the defendants excepted.[44]

METCALF, J. The only question that has been argued in this case is whether the plaintiff's attorney, who acted as counsel at the trial, was a competent witness for his client; and we know of no common law authority for excluding his testimony, besides the two very recent decisions in the English bail court, which were cited by the counsel for the defendants. By what authority the judges, sitting in that court, made those decisions, we do not know; whether by virtue of the rules which the judges of the three chief courts of law in England are em-

[43] It is held that, where one necessarily uses an agent to communicate with counsel, the party will be protected against disclosure by such agent. State v. Loponio, 85 N. J. Law, 357, 88 Atl. 1045, 49 L. R. A. (N. S.) 1017 (1913).

[44] Statement condensed.

powered, by recent statutes, to make for the uniform regulation of practice in all those courts, or by virtue of the superintending control which those courts exercise over their own officers. See Smith on Actions at Law, 11, 24. Whatever that authority may have been, we have no such authority. We cannot exclude a witness by reason of any views which we may entertain respecting the policy of permitting him to testify. We can only administer the law as we find it to be. And by the common law, persons are competent witnesses, unless they are made incompetent by want of capacity, or of religious faith, by infamy, or by direct interest in the result of the cause. Witnesses are every day permitted to testify, whose wishes for the success of the party who calls them are as strong as those of the party's attorney or counsel. And until the long established rules are changed by legislative enactment, we cannot exclude a witness merely because his testimony is to be given in behalf of his client. Whenever, except in the bail court, attorneys and counsel have been rejected as witnesses, it has been on the same ground on which others are excluded; namely, direct interest in the event of the suit, &c. See Chaffee v. Thomas, 7 Cow. (N. Y.) 358; Newman v. Bradley, 1 Dall. 240, 1 L. Ed. 118; Miles v. O'Hara, 1 Serg. & R. (Pa.) 32; Geisse v. Dobson, 3 Whart. (Pa.) 34; Slocum v. Newby, 5 N. C. 423; Reid v. Colcock, 1 Nott. & McC. (S. C.) 592, 9 Am. Dec. 729; Chadwick v. Upton, 3 Pick. (Mass.) 442; Jones v. Savage, 6 Wend. (N. Y.) 658; Comm'th v. Moore, 5 J. J. Marsh. (Ky.) 655; Brandigee v. Hale, 13 Johns. (N. Y.) 125. In the present case, the objection to the witness was, not that he was interested, or that he was in any way incompetent, except as attorney and counsel for the plaintiff.

In most cases, counsel cannot testify for their clients without subjecting themselves to just reprehension. But there may be cases in which they can do it, not only without dishonor, but in which it is their duty to do it. Such cases, however, are rare; and whenever they occur, they necessarily cause great pain to counsel of the right spirit.

Exceptions overruled.[45]

COBDEN v. KENDRICK.

(Court of King's Bench, 1791. 4 Durn. & E. 431.)

An action had been brought some time before by the present defendant, as indorsee of a promissory note for £150. against the present plaintiff as the maker; in which cause interlocutory judgment had been signed, and a writ of inquiry executed; after which the cause was compromised by Cobden's paying part, and giving a warrant of attor-

[45] But it is regarded as unprofessional for an attorney to testify on behalf of his client as to disputed facts; if it becomes necessary to use his testimony, he ought to withdraw as attorney. McLaren v. Gillispie, 19 Utah, 137, 56 Pac. 680 (1899).

ney to confess judgment for the residue of the £150. And in the interval between the time when the warrant of attorney was given and the time when the money became due, according to the defeasance thereof, Kendrick told Allen, who was his attorney in that suit, that he was glad it was settled, for that he had only given £10. in cash, and his promissory note for it, and that he knew it was a lottery transaction. This action was now brought to recover back the money so paid on the ground of want of consideration; and in proof that that was known to Kendrick at the time he took the note. Allen was called as a witness at the trial to speak to the conversation above-mentioned, and he was admitted by Lord Kenyon after argument upon his incompetency; and a verdict passed for the plaintiff.

Law now renewed his objection, and moved for a new trial; on the ground that Allen had been improperly permitted to give evidence of the conversation between him and the defendant, his client; contending that Allen fell within the rule of law which prohibited an attorney from betraying the confidence placed in him by his client, which confidence lasts so long as any proceedings may be had in the cause. Here the proceedings were not completely at an end when the conversation was held. The party might still have proceeded to judgment in the original suit; and the attorney had still his lien for the costs. So that the relation of attorney and client in respect of the parties to the original suit was not determined at the time when the communication was made by Kendrick to Allen his attorney.

PER CURIAM. The difference is whether the communication were made by the client to his attorney in confidence as instructions for conducting his cause, or a mere gratis dictum. The former was not the case here: on the contrary, the purpose in view had been already obtained; and what was said by the client was in exultation to his attorney for having before deceived him as well as his adversary, and for having obtained his suit.

Rule refused.[46]

[46] Bell, J., in Moore v. Bray, 10 Pa. 519 (1849): "* * * It seems, however, to have been thought that, because the facts disclosed, in reference to the consideration of the assignment of the mortgage, were unessential to the conduct of the suit, and the communications regarded by the counsel in the light of casual conversations, they are not entitled to protection. But this is a mistake. It is true, the rule does not embrace the disclosure of collateral facts, made during accidental conversations, held irrespective of the professional character of the recipient. But the circle of protection is not so narrow as to exclude communications a professional person may deem unimportant to the controversy, or the briefest and lightest talk the client may choose to indulge with his legal adviser, provided he regards him as such, at the moment. To found a distinction on such a ground, would be to measure the safety of the confiding party by the extent of his intelligence and knowledge, and to expose to betrayal those very anxieties which prompt those in difficulty to seek the ear of him in whom they trust, in season and out of season. The general rule is, that all professional communications are sacred. If the particular case form an exception, it must be shown by him who would withdraw the seal of secrecy, and, I think, should be clearly shown. This has not been done in the present instance."

WILSON v. RASTALL.

(Court of King's Bench, 1792. 4 Durn. & E. 753.)

This action was brought to recover penalties upon the bribery act, for bribing voters at the last election for the borough of Newark upon Trent to vote for one of the candidates. The bribery was charged to have been committed by the defendant and his agents, among whom was one W. Handley. At the trial before Thompson, B. at the last Nottingham assizes W. Handley was called as a witness, who deposed that previous to the dissolution of parliament in the Spring of 1790 he had received letters at Newark from the defendant in London, which he had had notice to produce with his subpœna: He had them not however to produce, but gave this account of them; that as to part he had restored them to the defendant before his subpœna; as to the rest he had given them to a Mrs. Elizabeth Handley at her desire, with a direction to destroy them after she had read them. That he had since endeavoured to procure them again for the like purpose of destroying them, but she had refused to give them up to him again; and he knew not whether they were destroyed or not. Two of these letters related to the subject of the election. The witness was then asked the contents of these letters; but that was objected to, as Mrs. Handley might be called upon to produce the letters or say what was become of them; and the objection was allowed. Mr. B. Handley, an attorney, was then called, who said, that he had the letters in question, which he had received from Mrs. Handley; and that Mr. W. Handley was at that time under a prosecution for bribery, and he wished to render him what assistance he could. That Mrs. H. had desired him to destroy the letters, but he still kept them. That there was no action now depending against Mr. W. H. but the two years were not yet expired. The letters were not (that he knew of) put into his hands with Mr. W. H.'s privity; but he had kept them with his privity and consent. Mr. W. H. had indeed desired him to destroy them, but he had not done so for the same reason as he had not complied with the like request from Mrs. H., namely, that he had soon after the election stated that Mr. W. H. acted only under the direction of Mr. Rastall in the election business. He further stated that he was not then concerned in carrying on any suit for W. H.; that he never was attorney in any action of indemnity; that he had been applied to by Mr. W. H. to be concerned, but had declined it, giving as a reason that he was under-sheriff and a material witness in the cause. That he had not employed W. H.'s attorney for him; but that W. H. had consulted him in his profession as a confidential person; and had applied to him both before and after he had received the letters. He had desired the witness to consult with his attorney, which he had done, as well as with W. H. himself. The letters were communicated to him in consequence of the defendant's consulting

him professionally. The witness objected to produce the letters; and the learned judge thought he was not bound so to do. Mr. W. Handley, being then called up again and asked as to the contents of those letters, refused to answer the question as tending to criminate himself; which objection was allowed by the judge. The plaintiff then went into other evidence (amongst which was parol evidence of those very letters) of the acts of bribery, which were strongly proved, and were not impeached by any contradictory evidence: The jury however found a verdict for the defendant. And a rule nisi was granted to shew cause why there should not be a new trial on the ground of mistake in the judge, in considering that B. Handley was bound by his character of attorney to withhold the letters required to be produced in evidence.[47]

BULLER, J. This doctrine of privilege was fully discussed in a case before Lord Hardwicke. The privilege is confined to the cases of counsel, Solicitor, and Attorney; but in order to raise the privilege, it must be proved that the information, which the adverse party wishes to learn, was communicated to the witness in one of those characters; for if he be employed merely as a steward, he may be examined. It is indeed hard in many cases to compel a friend to disclose a confidential conversation; and I should be glad if by law such evidence could be excluded. It is a subject of just indignation where persons are anxious to reveal what has been communicated to them in a confidential manner; and in the case mentioned, where Reynolds who had formerly been the attorney of Mr. Petrie, but who was dismissed before the trial of the cause, wished to give evidence of what he knew relative to the subject while he was concerned as the attorney, I strongly animadverted on his conduct and would not suffer him to be examined: he had acquired his information during the time that he acted as attorney; and I thought that the privilege of not being examined to such points was the privilege of the party and not of the attorney; and that that privilege never ceased at any period of time. In such a case it is not sufficient to say that the cause is at an end; the mouth of such a person is shut for ever. I take the distinction to be now well settled, that the privilege extends to those three enumerated cases at all times, but that it is confined to these cases only.[48]

[47] Statement condensed and part of opinion of Buller, J., and opinions of Lord Kenyon, C. J., and Grose, J., are omitted.

[48] During the argument Lord Kenyon observed: "In Madam du Barre's case, I considered the interpreter as standing in the same situation as the attorney himself; and I said at the trial, 'That he was the organ of the attorney.'"

See, also, State v. Loponio, 85 N. J. Law, 357, 88 Atl. 1045, 49 L. R. A. (N. S.) 1017 (1913), extending the privilege to cover one necessarily employed to write to the attorney.

In Goddard v. Gardner, 28 Conn. 172 (1859), it was held that where the interview between the attorney and client took place in the presence of the attorney's son, who had no connection with his father's business, there was no privilege which would exclude the testimony of the son.

There are cases to which it is much to be lamented that the law of privilege is not extended; those in which medical persons are obliged to disclose the information which they acquire by attending in their professional characters. This point was very much considered in The Duchess of Kingston's case, 11 St. Tr. 243, where Sir C. Hawkins, who had attended the Duchess as a medical person, made the objection himself, but was over-ruled, and compelled to give evidence against the prisoner. The question therefore here is, whether B. Handley were privileged with respect to any person. As to W. Handley, he certainly was not; for he said that the witness neither was, nor could be, his attorney; because he was at that time acting as undersheriff. Neither was he privileged as to this defendant for the same reason; and though it was said that the defendant (by W. Handley) consulted him in his profession as a confidential person, the meaning of that was that as B. Handley was more conversant with business of this kind than those who were not of his profession, W. Handley consulted him, but did not employ him as an attorney. But it was contended, on the part of the plaintiff, that supposing the witness were privileged in any action in which W. Handley was a party, the privilege did not extend to this action against Rastall. But to that I cannot accede; for if he were privileged, so as not to be examined to particular points in any action against W. Handley, he could not prove the same facts in an action against any other person. For the nature of this kind of privilege is that the attorney shall not be permitted to disclose in any action that which has been confidentially communicated to him as an attorney. However as B. Handley was neither the attorney of W. Handley or of the defendant, I am of opinion that he was improperly prevented from producing the letters in question. Then as to the other ground: I know of no case, except that of Jervois Q. T. v. Hall, 1 Wils. 17., in which the Court has ever refused to grant a new trial, which was moved for on account of the mis-direction or mistake of the judge. * * *

Rule absolute.

CROMACK v. HEATHCOTE.

(Court of Common Pleas, 1820. 2 Brod. & B. 4.)

Trespass against the sheriff for seizing goods under an execution. The defence set up was, that the goods had been conveyed by the father (against whom the execution issued) under a fraudulent assignment to the son. To prove the fraud, the defendant proposed, among other evidence, to call Smith, an attorney, to whom the father had applied to draw the assignment, and who had refused to draw it, knowing that an execution had been issued against the father. This attorney was not employed in the cause, and did not draw the assignment. Richards, C. B., before whom the cause was tried at the last Hert-

fordshire assizes, rejected this evidence, on the ground that it was a confidential communication made to an attorney. The jury found a verdict for the plaintiff.

Taddy, Serjt., now moved to set aside this verdict and have a new trial, on the ground (among other objections) that this evidence had been improperly rejected. He contended, that the rule, as to the exclusion of the evidence of solicitors touching matters on which they had been consulted, extends only to communications made in the progress of a cause; and urged that a solicitor had been examined touching a dissolution of partnership, and to prove the usurious consideration of a deed he had drawn, Duffin v. Smith, Peake N. P. C. 146: and that Lord Kenyon seemed to confine the rule to communications made in the conduct of a cause, Cobden v. Kendrick, 4 T. R. 431. He cited also Wilson v. Rastall, 4 T. R. 753, and Du Barré v. Livette, Peake N. P. C. 108.

DALLAS, C. J. The plaintiff came to employ Smith as an attorney, though Smith happened to refuse the employment. The inquiry made by Lord Kenyon in Wilson v. Rastall is, whether the party was as he stated consulted professionally; and is not this a consulting on professional business? One is staggered at first on being told that there are decided cases which seem at variance with first principles the most clearly established; but the cases cited do not at all bear out the proposition contended for, and I know of no such distinction as that arising from the attorney being employed or not employed in the cause. To confine ourselves to the present case: here is a client who goes to give instructions touching a deed, and the communication must be deemed confidential, as between attorney and client, though the attorney happens to refuse the employment. I have no manner of doubt on the subject; and it might be of most mischievous consequence, if, by granting a rule, we should be supposed to have cast any doubt on it.

BURROUGH, J. It would be most mischievous if it were once doubted whether or no a communication such as this were confidential as between attorney and client.

RICHARDSON, J. Suppose the case of an attorney consulted on the title to an estate, where there was a defect in the title, can it be contended that he would ever be at liberty to divulge the flaw? I never heard of the rule being confined to attorneys employed in a cause. I am of opinion, that the communication in this case was of a nature not to be divulged by the attorney to whom it was made.

Rule refused.[49]

[49] And so in Foster v. Hall, 12 Pick. (Mass.) 89, 22 Am. Dec. 400 (1831), where the authorities are elaborately reviewed.

In Doe v. Watkins, 3 Bingh., N. C. 421 (1837), the privilege was recognized in the case of an attorney who had acted for both the borrower and the lender.

But where an attorney was consulted by two persons for the purpose of having mutual wills drawn, the communications for this purpose were not privileged in an action between the representatives of such persons. Wallace v. Wallace, 216 N. Y. 28, 109 N. E. 872 (1915).

REG. v. COX AND RAILTON.

(Court of Crown Cases Reserved, 1884. 15 Cox, Cr. Cas. 611.)

STEPHEN, J.,[50] read the following judgment:

This case was tried before the Recorder of London at the February sessions of the Central Criminal Court. The defendants were convicted subject to a case reserved for our opinion. The case was argued first before five judges on the 5th day of April, and afterwards, on account of its great importance, before ten judges on the 21st day of June. We said on that occasion that we were unanimously of opinion that the conviction must be confirmed, but we deferred the statement of our reasons in order that they might be given with due fullness and deliberation. The facts were as follows: The two defendants, Richard Cobden Cox and Richard Johnson Railton, were indicted for a conspiracy with intent to defraud Henry Munster. The indictment was set out as part of the case. It contained six counts, and was objected to on grounds which we do not think it necessary to state, as we are all of opinion that some at least of the counts were good, and as the objections made to others were not insisted on in argument. The serious question was as to the admissibility of the evidence of a solicitor, which was given under the following circumstances: On the 9th day of April, 1881, the two defendants entered into a partnership in the business of newspaper proprietors with respect to a newspaper called the Brightonian. In February, 1882, Mr. Munster brought an action against Railton for a libel which appeared in that paper. On the 24th day of June, 1882, the action ended in a verdict for the plaintiff for 40s. and costs as between solicitor and client. The costs were taxed on the 18th day of August, and on the 20th execution was issued against Railton for the amount. The sheriff was met by a bill of sale from Railton to Cox, dated the 12th day of August, 1882, and withdrew.

An interpleader action to test the validity of the bill of sale was tried on the 15th day of January, 1883. At that trial the deed of partnership of the 9th day of April, 1881, was produced, bearing upon it an indorsement purporting to be a memorandum of dissolution of partnership, dated the 3rd day of January, 1882. The case for the prosecution was that the bill of sale was a fraudulent bill of sale of the partnership assets, entered into between Railton and Cox while they were partners, for the purpose of depriving Mr. Munster of the fruits of his judgment, and that the memorandum of dissolution of partnership was indorsed on the deed, not on the 3rd day of January, 1882, when it bore date, but subsequently to Mr. Munster's judgment. In order to prove this case, Mr. Goodman, a solicitor, was called, who said (his evidence having been objected

[50] Statement and part of opinion omitted.

to, and the objection having been overruled): "On the 28th day of June, or thereabouts, Railton and Cox came to me. Railton said, 'I suppose you have heard the result of the Munster case?' I said 'Yes.' He said 'Can anything be done to prevent the property being seized under an execution?' I said 'Only a sale to a bona fide purchaser.' He said, 'Could the property be sold and I remain in possession as manager?' I said, 'No; you must go out of possession.' He said, 'That won't do. Can I give a bill of sale to Mr. Cox?' I said, 'You cannot, because of the partnership.' Railton said, 'Does any one know of the partnership besides you and ourselves?' I said, 'No; not that I am aware of, only my clerks.' Cox said, 'Then you do not think a bill of sale will do?' I said, 'Certainly not.' They then asked my fee and paid it; and left the office. Nothing was said about a dissolution at that interview. The interview was with me as a solicitor, and I was paid my fee. It was expressly arranged that the partnership should be kept secret. Nothing either way was said about a dissolution."

The question for our decision was whether this evidence was rightly admitted. We must take it after the verdict of the jury, that, so far as the defendants Railton and Cox were concerned, their communication with Mr. Goodman was a step preparatory to commission of a criminal offence, namely, a conspiracy to defraud. The conduct of Mr. Goodman, the solicitor, appears to have been unobjectionable. He was consulted in the ordinary course of business, and gave a proper opinion in good faith. The question, therefore, is whether, if a client applies to a legal adviser for advice intended to facilitate or to guide the client in the commission of a crime or fraud, the legal adviser being ignorant of the purpose for which his advice is wanted, the communication between the two is privileged. We expressed our opinion at the end of the argument that no such privilege existed. If it did, the result would be that a man intending to commit treason or murder might safely take legal advice for the purpose of enabling himself to do so with impunity, and that the solicitor to whom the application was made would not be at liberty to give information against his client for the purpose of frustrating his criminal purpose.

Consequences so monstrous reduce to an absurdity any principle or rule in which they are involved. Upon the fullest examination of the authorities, we believe that they are not warranted by any principle or rule of the law of England; but it must be admitted that the law upon the subject has never been so distinctly and fully stated as to show clearly that these consequences do not follow from principles which do form part of the law, and which it is of the highest importance to maintain in their integrity. We must also observe that decisions have been given—one by the Court of Common Pleas, and several by single judges sitting in the Crown Courts, or at Nisi Prius

—which have afforded some countenance to the supposition that the law of England is committed to doctrines from which these consequences might be deduced. We propose accordingly first to state what, upon a full consideration of the cases, appears to us to be the principle upon which the present case must be decided, and then to examine the principal cases in which it has been applied, with the view of showing that our decision is not inconsistent with the great majority of them, though it undoubtedly does differ from others. * * *

From this examination of the authorities [51] it will be seen that we differ from one decision of the full Court of Common Pleas, and from two decisions at Nisi Prius, but we do so on the strength of other decisions which appear to us not only to be of greater authority, but also to be more in accordance with legal principles as well as with justice and expediency. We have one other matter to notice. We were greatly pressed with the argument that, speaking practically, the admission of any such exception to the privilege of legal advisers as that it is not to extend to communications made in furtherance of any criminal or fraudulent purpose would greatly diminish the value of that privilege. The privilege must, it was argued, be violated in order to ascertain whether it exists. The secret must be told in order to see whether it ought to be kept. We were earnestly pressed to lay down some rule as to the manner in which this consequence should be avoided.

The only thing which we feel authorised to say upon this matter is, that in each particular case the court must determine upon the facts actually given in evidence or proposed to be given in evidence, whether it seems probable that the accused person may have consulted his legal adviser, not after the commission of the crime for the legitimate purpose of being defended, but before the commission of the crime for the purpose of being guided or helped in committing it. We are far from saying that the question whether the advice was taken before or after the offence will always be decisive as to the admissibility of such evidence. Courts must in every instance judge for themselves on the special facts of each case, just as they must judge whether a witness deserves to be examined on the supposition that he is hostile, or whether a dying declaration was made in the immediate prospect of death. In this particular case the fact that there had been a partnership (which was proved on the trial of the interpleader issue), the assertion that it had been dissolved, the fact that directly after the verdict a solicitor was consulted, and that the exe-

[51] The omitted part of the opinion reviews Greenough v. Gaskell, 1 M. & K. 98 (1833); Follett v. Jefferyes, 1 Sim. N. S. 1 (1850); Russell v. Jackson, 9 Hare, 387 (1851); Gartside v. Outram, 26 L. J. Ch. 113 (1856); Cromack v. Heathcote, 2 B. & B. 4 (1820).

cution creditor was met by a bill of sale which purported to have been made by the defendant to the man who had been and was said to have ceased to be his partner, made it probable that the visit to the solicitor really was intended for the purpose for which, after he had given his evidence, it turned out to have been intended. If the interview had been for an innocent purpose, the evidence given would have done the defendants good instead of harm. Of course the power in question ought to be used with the greatest care not to hamper prisoners in making their defence, and not to enable unscrupulous persons to acquire knowledge to which they have no right, and every precaution should be taken against compelling unnecessary disclosures.

Conviction affirmed.[52]

HEMENWAY v. SMITH.

(Supreme Court of Vermont, 1856. 28 Vt. 701.)

Assumpsit. The declaration contained three counts, the first being for money had and received by the defendants to the plaintiff's use; the second for the rent, use, and occupation of the plaintiff's farm, called the Gould farm; and the third for money lent to, and paid for the defendants. Plea, the general issue; trial by jury, January term, 1856, Underwood, J., presiding.

The defendant Orcutt, was a witness on the part of the defendants, and gave evidence tending to sustain the issue on their part. The plaintiff's counsel, upon cross-examination, offered to prove by said Orcutt, that he consulted counsel soon after the suit was commenced, to ascertain whether they had a defense to said action; and, among other things, that he inquired of said counsel, whether they had a right to abandon said contract by its original terms, without any new agreement; and that, in consulting said counsel, he did not say or pretend to him that any such agreement had been made. To its admissibility the defendants objected on the ground that these were privileged communications.

The court overruled the objection, and the testimony was admitted, to which defendants excepted.

The jury, under these instructions, returned a verdict for the plaintiff for the whole amount claimed. Exceptions by the defendants.[53]

[52] For comments on this class of cases, see Alexander v. U. S., 138 U. S. 353, 11 Sup. Ct. 350, 34 L. Ed. 954 (1891).

That the privilege does not protect the opinion of counsel obtained to enable the client to perpetrate a civil fraud, though the attorney acted innocently, see Williams v. Quebroda Ry. Co., L. R. 2 Ch. (1895) 751, annotated in Costigan's Cases on Legal Ethics, p. 90.

[53] Statement condensed and part of opinion omitted.

BENNETT, J. We think Orcutt, though made a witness by the statute, cannot be compelled to disclose any consultation which he may have had with his counsel in relation to the cause.

The rule should be the same as it would have been if the counsel had been called to prove the consultation. * * *

Judgment reversed.[54]

WENTWORTH v. LLOYD et al.

(House of Lords, 1864. 10 H. L. Cas. 589.)

In this case a suit had been instituted by the appellant to set aside a sale of certain estates and other property formerly belonging to him in New South Wales, which sale was made on his behalf by one of the respondents to the others of them, and the appellant impeached the fairness of the transaction. The case was heard before the Master of the Rolls, who in September, 1863, directed the bill to be dismissed. Evidence had been taken in Sydney, and one of the witnesses was a Mr. Wright, who had acted for some years as the appellant's solicitor in the colony. Mr. Wright was asked a question, the answer to which was prevented from being given by an objection founded on the fact that he had acquired his knowledge through his professional employment. In commenting upon the case the Master of the Rolls said, "Mr. Wright is asked this question, 'Did Mr. Wentworth ever say anything to you on the subject of any of his dealings with Mr. Mort?' Before the answer was given the plaintiff interposed with this question, 'Were those communications between me and you professional?' To which Mr. Wright said, 'They were.' And the counsel for Mr. Lloyd of course did not press his question or obtain any answer. The plaintiff no doubt had a right to prevent Mr. Wright from stating what the plaintiff had told him about Mr. Mort. It is the client's privilege to prevent the solicitor from divulging confidential communications. But if the client chooses to adopt this conduct, he must be subject to the rule laid down in Armory v. Delamirie, Str. 505, where the keeping back of evidence must be taken most strongly against the person who does so. When I say this I wish to distinguish between the case of the suppression of evidence by a witness, and the case where he declines to answer the question on the ground that he is not bound to criminate himself; in which case no presumption of guilt can be fairly drawn from his refusal to answer, or the privilege would be at once destroyed. This is no case of crimination. By the terms of the obligation he is under in this suit he is bound to supply every species of evidence, written or parol, that he can, and I must treat his

[54] The rule in equity was that a defendant was not bound to give discovery as to communications with his counsel. Pearse v. Pearse, 1 De G. & Sm. 12 (1846); Nias v. Northern & E. Ry. Co., 3 Myl. & Cr. 355 (1838); Hughes v. Biddulph, 4 Russell, 190 (1827).

refusal to allow a witness to answer a question in the same light as if he had kept a material witness out of the way, or refused or prevented the production of a document in his possession."

LORD CHELMSFORD concurred, and with reference to excluding evidence, on the ground that the knowledge of the facts inquired into had been professionally obtained, said:

The use which the Master of the Rolls made of the exercise of the plaintiff's right to prevent the disclosure of confidential communications seems to me so entirely at variance with principle, and so utterly in contradiction to the well-known and invariably recognized privilege of professional confidence, that I cannot pass it by in silence; and, without dwelling upon the contrasted case, I think it would be found upon examination that the presumptions in the two instances to which his Honor referred, are exactly the reverse of what he assumed them to be. I confess that I am unable to conceive the analogy between a client closing the mouth of his solicitor upon a question as to professional communications, and the conduct of the jeweller in Armory v. Delamirie, who, upon a mounted jewel which had been found being brought to him, took out the stones and returned the empty socket to the finder, and not producing the jewel at the trial of the action brought to recover its value, was made to pay in damages the value of a jewel of the finest water, which would fit the socket, upon the rule omnia præsumuntur contra spoliatorem. But a person who refuses to allow his solicitor to violate the confidence of the professional relation cannot be regarded in that odious light. The law has so great a regard to the preservation of the secrecy of this relation, that even the party himself cannot be compelled to disclose his own statements made to his solicitor with reference to professional business.

As Lord Brougham says, when speaking, in Bolton v. The Corporation of Liverpool, 1 Myl. & K. 94, 95, of the supposed right to compel the disclosure of such communications: "It is plain that the course of justice must stop if such a right exists. No man will dare to consult a professional adviser with a view to his defence, or to the enforcement of his rights." The exclusion of such evidence is for the general interest of the community, and therefore to say that when a party refuses to permit professional confidence to be broken, everything must be taken most strongly against him, what is it but to deny him the protection which, for public purposes, the law affords him, and utterly to take away a privilege which can thus only be asserted to his prejudice. I have been drawn aside from considering the facts of this case through an apprehension that the authority of the Master of the Rolls might be hereafter asserted as establishing what appears to me to be a most serious departure from the principles of the law of evidence applicable to professional confidence.[55]

[55] And so in a case where a defendant failed to call his wife as a witness, under a statute making her competent on behalf of her husband. Knowles v. People, 15 Mich. 408 (1867); Johnson v. State, 63 Miss. 313 (1885).

PRADER v. NATIONAL MASONIC ACCIDENT ASS'N.

(Supreme Court of Iowa, 1895. 95 Iowa, 149, 63 N. W. 601.)

Action in equity to recover on a certificate of membership, and to compel the levying and collection of an assessment for the payment of the amount claimed to be due. There was a hearing on the merits, and a decree for the plaintiff. The defendant appeals.

ROBINSON, J.[56] * * * The appellant claims that the death of Prader was due to heart failure, which was the result of chronic alcoholism, and not to the accident in question. To sustain that claim, it offers the testimony of Dr. Mirick and Dr. Hunter. The knowledge of both in regard to the condition and cause of the death of Prader was acquired chiefly, if not wholly, while they were acting as his physicians. Dr. Mirick had been Prader's family physician for several years. Dr. Hunter was called to consult with Dr. Mirick a few hours before Prader's death, and his knowledge of the conditions and cause of death of Prader was derived from the history of the case as given him by Dr. Mirick and from a personal examination. The plaintiff objects to the testimony of these physicians, on the ground that their knowledge was obtained professionally, for the purpose of properly discharging their duties in the treatment of Prader, and that it is therefore privileged and incompetent. Section 3643 of the Code is as follows: "No practicing * * * physician * * * shall be allowed in giving testimony to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice. Such prohibition shall not apply to cases where the party in whose favor the same are made shall waive the right conferred." This statute, in its application to verbal communications made by patients to their physicians, has been considered in the following cases: Guptill v. Verback, 58 Iowa, 99, 12 N. W. 125; Raymond v. Railway Co., 65 Iowa, 152, 21 N. W. 495; McConnell v. City of Osage, 80 Iowa, 298, 45 N. W. 550, 8 L. R. A. 778. As applied to such communications its meaning is clear and settled.

But it is contended by the appellant that it has no application to knowledge acquired by physicians by a personal examination of their patients, or from any source other than statements made by them. The privilege did not exist at common law, but is created by statute and varies in different states. The general rule is said to be that "the privilege extends to facts necessary to enable the physician to prescribe, and which are communicated to him for the purpose of enabling him to perform his professional duties. Such facts are privileged, whether learned directly from the patient himself, or acquired by the physician

[56] Part of opinion omitted.

through his own observation or examination." 19 Am. & Eng. Enc. Law, 147. By a statute of New York, "any information" which the physician may have acquired in attending his patient in a professional character, and which was necessary to enable him to prescribe as a physician, is privileged. Under that statute, information may be privileged which is derived from the statements of the patient, from the statements of others about him, or from the observation of his appearance and symptoms. Edington v. Insurance Co., 67 N. Y. 194, Id., 77 N. Y. 568. The same rule is followed under a similar statute in Missouri. Gartside v. Insurance Co., 76 Mo. 446, 43 Am. Rep. 765.

Under a statute of Indiana, physicians are not competent witnesses "as to matters confided to them in the course of their profession, * * * unless with the consent of party making confidential communication." This has been held to apply to matters learned by observation and by examination of patients. Association v. Beck, 77 Ind. 203, 40 Am. Rep. 295. Although the statute of this state uses the word "communication," it means much the same as the word "information" in the statutes of other states to which we have referred. The prohibition of our statute refers, not merely to verbal communications, but to those of any kind by which information of the character of that specified in the statute is imparted. Information of the actual condition of a patient may be much more readily communicated to or acquired by a physician through a personal examination than by statements of the patient. In many cases exact knowledge can only be obtained by means of such examination, and it is clear that it is as much to the interest of the patient to have the information so obtained treated as confidential as it would be had he known and communicated it verbally. We conclude that the prohibition of section 3643 is not confined to verbal communications, but that it extends to facts which are learned by a physician in the discharge of his duties, from his own observation and examination of the patient. If the facts thus learned are of a confidential character, and are necessary and proper to enable the physician to discharge his professional duty to his client, they are protected. So far as the testimony given by Dr. Mirick is of that character, it cannot be considered by us, and the same is true of the testimony of Dr. Hunter. The information he received from his associate was necessary to enable him to discharge his duty properly, and cannot be used for any other purpose. It is protected by the statute. When the incompetent testimony is rejected, no evidence remains to sustain the claim that the death of Prader was caused by chronic alcoholism. * * *

Affirmed.[57]

[57] In Chlanda v. St. Louis Transit Co., 213 Mo. 244, 112 S. W. 249 (1908), it was held that defendant might prove by plaintiff's physician what he noticed as to her physical condition during a nonprofessional call.

GREEN v. METROPOLITAN ST. RY. CO.

(Court of Appeals of New York, 1902. 171 N. Y. 201, 63 N. E. 958, 89 Am. St. Rep. 807.)

GRAY, J.[58] I think this judgment should be reversed, and that a new trial should be had, for the error in excluding the testimony of the witness Moorhead when asked by defendant's counsel to state "what he [the plaintiff] said, if anything, as to how this accident happened." Moorhead was a surgeon attached to the J. Hood Wright Hospital, and was in charge of the ambulance which was summoned to convey the plaintiff after meeting with his accident. It will be observed that the question called for no information which was acquired by the surgeon to enable him to act as such. It called for evidence merely of what had preceded and had caused the accident, according to the plaintiff's knowledge.

Section 834 of the Code of Civil Procedure, whose privilege has been extended to cover this question, applies, by its language, to cases where information has been acquired by a physician or a surgeon while "attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." We may readily admit that Dr. Moorhead acquired the information which the question called for while attending the plaintiff in a professional capacity, and still we would be far from the point of the legislative purpose in enacting the section of the Code. That was that the information should be of a character necessary to enable Dr. Moorhead or the hospital staff to act professionally upon the case. As it was observed in Edington v. Insurance Co., 77 N. Y. 564, "it is not sufficient to authorize the exclusion that the physician acquired the information while attending the patient, but it must be the necessary information mentioned."

The object of the statute, as we are bound to presume, was the accomplishment of a just and salutary purpose, which was that the relations between physician and patient should be protected against public disclosure, so that the patient might unbosom himself freely to his medical adviser, and thus receive the full benefit of his professional skill. Surely it could not have been intended that any truthful version of a narrative of the events leading to an accidental injury should be excluded, and that was all this question called for, as it had come from the sufferer's lips, and when fresh in his recollection. It is rather, more consonant with the requirements of justice that no witness should be prevented from giving such evidence. The burden was upon the plaintiff, in seeking to exclude this evidence of Dr. Moorhead, to bring the case within the provision of the statute (People v. Koerner, 154 N. Y. 355, 48 N. E. 730); and he did not do so. It was proper to exclude testimony as to any information acquired which was of a na-

[58] Statement and the dissenting opinion of Werner, J., omitted.

ture to enable a surgeon to treat the plaintiff, but it is unreasonable to say that information of how the accident happened was such as must or might have affected the surgical treatment required.

Surely, there must be a line, which reason indicates as that where the statutory inhibition ceases. The plaintiff lost his leg by being run over by the car, and the question of defendant's legal liability was a narrow one, as presented by the trial court, in view of its assumption that the plaintiff was guilty of contributory negligence; hence all the light possible to exhibit how the injury was occasioned should have been permitted upon the case. It seems to me that the exclusion of this evidence was an application of the Code provision beyond all legitimate and reasonable limits, and was not in accord with the recent decision of this court in Griffiths v. Railway Co., 171 N. Y. 106, 63 N. E. 808.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

MERLE et al. v. MORE.

(Nisi Prius, 1826. Ryan & M. 390.)

Assumpsit. The act of bankruptcy, relied on by the plaintiffs, was an assignment by Brookes, by deed, of all his property, which it was contended was fraudulent. And in order to prove the circumstances under which the deed was executed, the attorney of Brookes, who prepared the deed, was called, and asked to a communication made to him by his client.

On its being objected that the communications spoken to were privileged, and therefore inadmissible, Wilde, Serjt., proposed that the bankrupt, who was present, should waive his privilege, and allow the attorney to give the evidence.

Vaughan, Serjt., resisted this, and argued that this would, in effect, be making the bankrupt a witness to prove his own bankruptcy, for which purpose he was by settled rule of law incompetent.

BEST, C. J. I think the privilege is the privilege of the client, and he may waive it. If the bankrupt is present, and consents to the witness giving the evidence, I shall receive it.

This was then done by the bankrupt, and the plaintiffs obtained a verdict.

MARSTON v. DOWNES et ux.

(Court of King's Bench, 1834. 1 Adol. & E. 31.)

Assumpsit. Plea, plené administravit. Replication of assets in hand. Issue joined thereon. At the trial before Patteson, J., at the last Spring assizes at Shrewsbury, the plaintiff proved a prima facie case of assets in the hands of the defendants. The defendants, in answer, showed payments made by them to the amount of the assets proved. In answer to this, the plaintiff called a witness, who was an attorney, and who swore to having paid to Downes the husband, after the death of the testator, a large sum of money (not included in the assets) which had been made on a mortgage made to the client of the witness. The witness brought the mortgage deed into Court, under a subpœna duces tecum, but refused to produce it. He was then questioned as to its contents, upon which the defendant's counsel objected that parol evidence could not be given of the deed. The learned Judge ruled, that the parol evidence was admissible. Upon which the witness himself asked, whether he ought to state the contents of the deed? His Lordship answered, that he thought he ought to do so. The witness then stated, that the deed was a mortgage of some real property of the testator. The mortgage was executed by the husband Downes, who was entitled to do so by another deed, giving him power to raise money by sale or mortgage, and apply the money so raised to the payment of the testator's debts.[59]

LORD DENMAN, C. J., on a subsequent day delivered the judgment of the Court. We are of opinion, first, that the evidence was admissible for the purpose for which it was produced; and, secondly, that, whether or not the privilege of the mortgagee extended to protect him from the attorney's giving parol evidence of the contents of the deed, still the evidence having actually gone before the jury, the defendants were not a privileged party; and they, therefore, had no right of objection, even on the supposition that the learned Judge had done wrong.

Rule refused.[60]

[59] Statement condensed.

[60] Beardsley, J., in State v. Barrows, 52 Conn. 323 (1884): "The state also claims that if the court erred in admitting the question referred to, it was an error which does not entitle the accused to a new trial, because the right of Mrs. Eaton only, and not that of the accused, was violated by the evidence of Mr. Jones. But the rule which holds communications by client to counsel privileged from disclosure, is one of public policy, in the interests of justice, and to maintain its administration. Goddard v. Gardner, 28 Conn. 172 (1859); Barnes v. Harris, 7 Cush. (Mass.) 576 [54 Am. Dec. 734 (1851)]. In the case of Bacon v. Frisbie, 80 N. Y. 394 [36 Am. Rep. 627 (1880)], in which an attempt was made to prove the statements of Ratnour, a codefendant with Frisbie, by his attorney to whom he made them, the court, rejecting the evidence, say (80 N. Y. 401): 'Had Ratnour not been a party to the action and so had no right to be at the trial and object, yet the objection would lie in the mouth of Frisbie, who by it would but call upon the court to keep untouched

PIERSON v. PEOPLE.

(Court of Appeals of New York, 1880. 79 N. Y. 424, 35 Am. Rep. 524.)

EARL, J.[61] William Pierson, the prisoner, was indicted in Livingston county for murder, in causing the death by poison of Leaman B. Withey, in February, 1877. He was tried in the Oyer and Terminer of that county in February, 1878, and was convicted and sentenced to be hung. His conviction was affirmed at the General Term of the Supreme Court. He has now brought his case into this court by writ of error, and seeks to have his conviction reversed for several errors which have been ably presented for our consideration by his counsel. * * *

While Withey was sick, suffering from the poison which is supposed to have been administered to him, Dr. Coe, a practicing physician, was called to see him by the prisoner; and he examined him and prescribed for him. On the trial, he was called as a witness for the people, and this question was put to him: "State the condition in which you found him at that time, both from your own observation and from what he told you?" The prisoner's counsel objected to this question on the ground that the information which the witness obtained was obtained as a physician, and that he had no right to disclose it; that the evidence offered was prohibited by the statute. The court overruled the objection, and the witness answered, stating the symptoms and condition of Withey, as he found them from an examination then openly made in the presence of Withey's wife and the prisoner, and as he also learned them from Withey, his wife, and the prisoner. There was nothing of a confidential nature in any thing he learned or that was disclosed to him. The symptoms and condition were such as might be expected to be present in a case of arsenical poisoning. It is now claimed that the court erred in allowing this evidence, and the statute (section 834 of the Code) is invoked to uphold the claim. That section is as follows: "A person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." This provision of the Code is a substantial reenactment of a provision contained in the Revised Statutes. 2 R. S. 406. Such evidence was not prohibited at common law. The design of the provision was to place the information of

a rule of public policy made and to be kept, not especially for his good but for that of all men.' There was error in the admission of the evidence and a new trial is granted."

See, also, Westover v. Life Ins. Co., 99 N. Y. 56, 1 N. E. 104, 52 Am. Rep. 1 (1885), reversing for the admission of a physician's testimony, under a statute making a physician incompetent without an express waiver by the patient, though the party to the action who objected was not the patient and did not represent him; and so in Myer's Will, 184 N. Y. 54, 76 N. E. 920, 6 Ann. Cas. 26 (1906).

[61] Part of opinion omitted.

the physician obtained from his patient in a professional way, substantially on the same footing with the information obtained by an attorney professionally of his client's affairs. The purpose was to enable a patient to make such disclosures to his physician as to his ailments, under the seal of confidence, as would enable the physician intelligently to prescribe for him; to invite confidence between physician and patient, and to prevent a breach thereof. Edington v. Mut. L. Ins. Co., 67 N. Y. 185; Edington v. Ætna Life Ins. Co., 77 N. Y. 564.

There has been considerable difficulty in construing this statute, and yet it has not been under consideration in many reported cases. It was more fully considered in the Edington case than in any other or all others. It may be so literally construed as to work great mischief, and yet its scope may be so limited by the courts as to subserve the beneficial ends designed without blocking the way of justice. It could not have been designed to shut out such evidence as was here received, and thus to protect the murderer rather than to shield the memory of his victim. If the construction of the statute contended for by the prisoner's counsel must prevail it will be extremely difficult if not impossible in most cases of murder by poisoning to convict the murderer. Undoubtedly such evidence has been generally received in this class of cases, and it has not been understood among lawyers and judges to be within the prohibition of the statute.

How then must this statute be construed? The office of construction is to get a meaning out of the language used if possible. If the words used are clear and unmistakable in their meaning, and their force cannot be limited by a consideration of the whole scope of the statute or the manifest purpose of the Legislature, they must have full effect. But in endeavoring to understand the meaning of words used, much aid is received from a consideration of the mischief to be remedied or object to be gained by the statute. By such consideration words otherwise far-reaching in their scope may be limited. Statutes are always to be so construed if they can be, that they may have reasonable effect agreeably to the intent of the Legislature; and it is always to be presumed that the Legislature has intended the most reasonable and beneficial construction of its acts. Such construction of a statute should be adopted as appears most reasonable and best suited to accomplish the objects of the statute; and where any particular construction would lead to an absurd consequence, it will be presumed that some exception or qualification was intended by the Legislature to avoid such consequence. A construction which will be necessarily productive of practical inconvenience to the community is to be rejected, unless the language of the law-giver is so plain as not to admit of a different construction. Potter Dwarr. Stat. 202.

The plain purpose of this statute as in substance before stated was to enable a patient to make known his condition to his physician without the danger of any disclosure by him which would annoy the feelings, damage the character, or impair the standing of the patient

while living, or disgrace his memory when dead. It could have no other purpose. But we do not think it expedient at this time to endeavor to lay down any general rule applicable to all cases, limiting the apparent scope of this statute. We are quite satisfied with the reasoning upon it of Judge Talcott in his able opinion delivered at the General Term of the Supreme Court, and we agree with him "that the purpose for which the aid of this statute is invoked, in this case, is so utterly foreign to the purposes and objects of the act, and so diametrically opposed to any intention which the Legislature can be supposed to have had in the enactment, so contrary to and inconsistent with its spirit, which most clearly intended to protect the patient and not to shield one who is charged with his murder, that in such a case the statute is not to be so construed as to be used as a weapon of defense to the party so charged, instead of a protection to his victim." This objection was therefore not well taken. * * * Judgment affirmed.[62]

BLACKBURN v. CRAWFORD.

(Supreme Court of the United States, 1865. 3 Wall. 175, 18 L. Ed. 186.)

Dr. Crawford, of Prince George's County, Maryland, died intestate, in December, 1859, the proprietor of large landed estates there; Greenwood Park, Waring's Grove, Federal Hill, Westphalia, Ranleigh, etc. He left no wife, nor child, nor brother nor sister surviving him. Claimants to such estates, however, were not long wanting. On the one hand were relatives of the name of Blackburn, confessedly his cousins-german; on the other, persons bearing his own respectable Scottish name of Crawford: George Thomas Crawford, Mary Elizabeth Crawford, Sarah Jane Crawford, and Anna Victoria Crawford, the children of a brother, Mr. Thomas B. Crawford, who had died before him. The title of these children—as nephews and nieces, and nearer of course than cousins—was clear, but for a single difficulty; the fact that their legitimacy was called in question. It was asserted that their mother had been the mistress not the wife of their father.

So, too, a solemn act of Mr. Crawford himself, and his directions when performing it, tended to the conclusion of no marriage. In June 1844, being desirous to make his will, he called on his friend and general professional adviser, Mr. Bowie, of Baltimore, to prepare a draft of it for him. On that occasion, as it appeared at a later day, and from Mr. Bowie's own narrative, he had a conversation with that gentleman as to the best mode of securing his property to his children;

[62] Compare People v. Murphy, 101 N. Y. 126, 4 N. E. 326, 54 Am. Rep. 661 (1886), to the effect that, in a prosecution for producing an abortion, it was error to admit the testimony of a physician who treated the woman immediately afterwards.

asking Mr. Bowie's advice in the matter. Upon this, Mr. Bowie advised him to make a will, and so to provide for the children. In accordance with this advice, Mr. Crawford directed Mr. Bowie to prepare the draft of a will, which he (Mr. Bowie) accordingly then did, agreeably to Mr. Crawford's instructions. Mr. Crawford especially instructed Mr. Bowie to describe the children, in this will, as his natural children by Elizabeth Taylor; and in consequence of this express direction the children were so described in the will, which was on record in the proper office in Prince George's County.

The defendant gave in evidence the will of Mr. Crawford, and proved by Mr. Bowie that it was drawn in conformity to the instructions of the testator. It spoke, as we have already said, of the defendants in error as his natural children by Elizabeth Taylor, and provided for them accordingly. It spoke of her as probably enceinte at that time, and provided for the unborn child. The defendant then offered to prove, by Mr. Bowie, what was said by the testator in their interviews preceding the preparation of the will concerning the illegitimacy of the children and his relation to their mother. The court excluded the evidence.[68]

Mr. Justice SWAYNE delivered the opinion of the court.

We will consider the exceptions, so far as we deem necessary—both as respects the testimony and the instructions—in the order in which they are presented by the record. * * *

The fifth point raised related to Mr. Bowie. Was the testimony of this gentleman—the attorney who drew the will of Mr. Crawford, and by whom the plaintiff in error offered to prove what was said by the testator in their interviews preceding the preparation of the will, and, in that connection, concerning the illegitimacy of the children and his relation to their mother—rightly excluded?

It is asserted that the communications upon these subjects to the attorney were covered by the seal of professional confidence, and that he could not, therefore, be permitted to disclose them.

The principle of privileged communications was ably considered by Lord Brougham in Greenough v. Gaskel, 1 M. & K. 98. He said: "The foundation of the rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers. But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence—in the practice of courts—and in those matters affecting the rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would

[68] Statement condensed and part of opinion omitted.

be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skillful person, or would only dare to tell the counsel half his case."

In Russel v. Jackson, 15 Jurist, 1, 117, the contest was between the heirs-at-law and a devisee. The heirs claimed that the devise was upon a trust, unexpressed, because illegal. The question was, whether the solicitor by whom the will was drawn should be allowed to testify what was said by the testator contemporaneously upon the subject? The devisee claimed the benefit of the rule. The Vice-Chancellor said: "When we pass from cases of conflict between the rights of a client and parties claiming under him—and those of third persons—to cases of a testamentary disposition of a client, do the same reasons apply? The disclosure in such cases can affect no right or interest of the client; and the apprehension of it can present no impediment to a full statement to the solicitor, unless he were contemplating an illegal disposition—a case to which I shall presently refer; and the disclosure would, when made, expose the court to no greater difficulty than it has in all cases when the views and intentions of parties, or the objects for which the disposition is made, are unknown. In the case, then, of a testamentary disposition, the very foundations on which the rule proceeds seem to be wanting; and, in the absence of any illegal purpose entertained by the testator, there does not seem to be any ground for applying the rule in such a case. Can it be said, then, that the communication is protected because it may lead to the disclosure of an illegal purpose? I think not; and that evidence, otherwise admissible, cannot be rejected upon such grounds. Another view of the case is, that the protection which the rule gives, is the protection of the client; and it cannot be said to be for the protection of the client that evidence should be rejected—the effect of which would be to prove a trust created by him, and to destroy a claim to take beneficially by the parties accepting the trust." [64]

This reasoning applied to the declarations of the testator here in question. How can it be said to be for his interest to exclude any testimony in support of what he solemnly proclaimed and put on record by his will? Especially can this be said in regard to property to which he never had or assumed to have any title, and in regard to a claim by others to that property, which he did all in his power, by his will, to foreclose?

[64] And so in a will contest the privilege does not apply to the attorney who drew the will. Doherty v. O'Callaghan, 157 Mass. 90, 31 N. E. 726, 17 L. R. A. 188, 34 Am. St. Rep. 258 (1892). And so in the case of the testator's physician in will contests. Winters v. Winters, 102 Iowa, 53, 71 N. W. 184, 63 Am. St. Rep. 428 (1897); Thompson v. Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552 (1889).

The contrary result was reached at one time in New York under a statute making the physician incompetent without an express waiver by the patient. Renihan v. Dennin, 103 N. Y. 577, 9 N. E. 320, 57 Am. Rep. 770 (1886); In re Coleman, 111 N. Y. 220, 19 N. E. 71 (1888).

But there is another ground on which we prefer to place our decision. The client may waive the protection of the rule. The waiver may be express or implied. We think it as effectual here by implication as the most explicit language could have made it. It could have been no clearer if the client had expressly enjoined it upon the attorney to give this testimony whenever the truth of his testamentary declaration should be challenged by any of those to whom it related. A different result would involve a perversion of the rule, inconsistent with its object, and in direct conflict with the reasons upon which it is founded. * * *

Judgment reversed.

HUNT v. BLACKBURN.

(Supreme Court of the United States, 1888. 128 U. S. 464, 9 Sup. Ct. 125, 32 L. Ed. 488.)

Hunt filed his bill in equity in the district court for the Eastern district of Arkansas, on the 25th of June, 1881, against Sallie S. Blackburn, Charles B. Blackburn, and W. P. Smith, claiming as a purchaser for value, with the knowledge and assent of Sallie S. Blackburn, of an undivided half of a plantation in Desha county, Ark., of which the defendant Sallie S. Blackburn owned the other half, and deraigning title by sundry mesne conveyances from one Shepard to W. A. Buck, whose wife said Sallie S. then was, by Buck and wife to Drake, Drake to Winfrey, who, as Hunt alleged, purchased for value with Mrs. Buck's knowledge and assent, Winfrey's assignee to Weatherford, and Weatherford to himself; setting up certain decrees hereinafter mentioned, and praying, after averments appropriate to such relief, that his title be quieted, and for partition. Defendant Sallie S. Blackburn answered April 25, 1883, asserting sole ownership of the lands under a deed from Shepard to W. A. Buck, her then husband, and herself, and charging, in respect to the decrees upon the title, that she was misled by her attorney and confidential adviser, Weatherford, as to her rights, and was not estopped thereby or by any conduct of hers, in faith of which either Winfrey or Hunt acted in purchasing. The cause was heard and the bill dismissed March 10, 1884, and from that decree this appeal is prosecuted.[65]

Mr. Chief Justice FULLER. * * * Defendant Blackburn insists, however, in her answer, that the part she took in the litigation of these two cases was the result of misplaced confidence in her counsel, by whom she alleges she was deceived, misadvised, and misled; that she was ignorant of her rights; and that she ought not to be held estopped in the premises; while at the same time it is objected on her behalf that her attorney, on the ground of privileged communications,

[65] Statement condensed and part of opinion omitted.

should not be permitted to defend himself by testifying to the facts and circumstances under which he advised her, and the advice which he actually gave.

The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure. But the privilege is that of the client alone, and no rule prohibits the latter from divulging his own secrets. And if the client has voluntarily waived the privilege, it cannot be insisted on to close the mouth of the attorney. When Mrs. Blackburn entered upon a line of defense which involved what transpired between herself and Mr. Weatherford, and respecting which she testified, she waived her right to object to his giving his own account of the matter. As, for instance, when she says that the original deed from Shepard was drawn by Weatherford, that she has not got it, and that she thinks she gave it to him, it is clear that her letter of July 6, 1875, calling for that deed, and Weatherford's reply of July 14th, inclosing it, are admissible in evidence. * * *

Reversed.[66]

[66] For a similar rule in the case of a physician, see Epstein v. Pennsylvania R. Co., 250 Mo. 1, 156 S. W. 699, 48 L. R. A. (N. S.) 394, Ann. Cas. 1915A, 423 (1913), where a large number of cases are reviewed.

But the patient does not waive the privilege as to his physician by introducing other evidence of his injuries, etc. Arizona & N. M. R. Co. v. Clark, 235 U. S. 669, 35 Sup. Ct. 210, 59 L. Ed. 415, L. R. A. 1915C, 834 (1915).

In an action against a physician for malpractice, there is a waiver as to all the physicians who treated the plaintiff. Capron v. Douglass, 193 N. Y. 11, 85 N. E. 827, 20 L. R. A. (N. S.) 1003 (1908).

SECTION 4.—EXAMINATION OF WITNESSES

I. OFFERS OF EVIDENCE AND OBJECTIONS [67]

TURNER et al. v. PEARTE.

(Court of King's Bench, 1787. 1 Durn. & E. 717.)

On a rule nisi for a new trial on affidavits to the effect that it had been discovered that five of the witnesses for the defendant were incompetent because of interest.[68]

BULLER, J. There has been no instance of this court's granting a new trial on an allegation that some of the witnesses examined were interested; and I should be very sorry to make the first precedent. An-

[67] As to the order in which evidence shall be offered, see Braydon v. Goulman, 1 T. B. Mon. (Ky.) 115 (1824), in which the following rules were stated by Mills, J.:

"(1) As to the admission of new witnesses after the parties professed to have gone through their evidence, it may be readily conceded, that it was against the strict practice which ought generally to be adhered to in conducting causes.

"He who has the affirmative, ought to introduce all his evidence to make out his side of the issue, then the evidence of the negative side is heard, and finally the rebutting proof of the affirmative, which closes the investigation, after giving each a fair opportunity to be thus heard. In doing this, neither side ought to be permitted to give evidence by piecemeal, then to apply for instructions, and again to mend and add to his proof, until, by repeated experiments, he shall make it come up to the opinion of the court.

"An adherence to these rules generally will be found necessary in all courts of original jurisdiction, and without them confusion, loss of time, and captious and irritable conduct must follow.

"(2) We say, generally, for it will often be found necessary and proper for the presiding court, for good reasons, to depart from them, to attain complete justice; and when they ought or ought not to be varied, must, in a great measure, be left to the sound discretion and prudence of the inferior court. And this court for such departure, ought never to interfere, except injustice is done by that departure.

"(3) The evidence admitted in this instance was pertinent. It is not objected to, because from its nature it ought not to be heard; but because it was heard at an improper time. In such a case, we ought not, and cannot, give any redress. We ought not, because the evidence has not done injustice, and that court had the disposition of its own time, and might or might not hear it, as time and other good reasons might require. We cannot, because if we were to reverse on that account, it would only open the way to admit the same evidence in a time and manner which could not be objected to, and the party who now complains has received no injury which ought to be redressed, and he would again have to submit to the same evidence."

In will contests, however, the practice in a number of states permits the proponent, after making out a prima facie case by the attesting witnesses, to reserve the balance of his evidence of capacity until after the contestant's evidence has been introduced. Hall v. Hall, 153 Ky. 379, 155 S. W. 755 (1913); Taff v. Hosmer, 14 Mich. 309 (1866) good explanation by Cooley, J.; Lareau

[68] Statement condensed and concurring opinion of Ashhurst, J., omitted.

ciently no doubt the rule was, that if there were any objection to the competency of the witness, he should be examined on the voir dire; and it was too late after he was sworn in chief. In later times, that rule has been a little relaxed; but the reason of doing so must be remembered. It is not that the rule is done away, or that it lets in objections which would otherwise have been shut out. It has been done principally for the convenience of the court, and it is for the furtherance of justice. The examination of a witness, to discover whether he is interested or not, is frequently to the same effect as his examination in chief: So that it saves time, and is more convenient, to let him be sworn in chief in the first instance; and in case it should turn out that he is interested, it is then time enough to take the objection. But there never yet has been a case in which the party has been permitted after trial to avail himself of any objection, which was not made at the time of the examination. But in the present case there is not the least foundation for this court to interpose; for it cannot be said that the witnesses were swayed by this interest in the least degree. I do not say that it might not have been a ground to object to their testimony on the trial, supposing the whole of what was suggested by the plaintiff was true: but it would have been necessary to have determined another question first, whether the houses in respect of which the witnesses are supposed to be interested were really houses formerly belonging to the knights of St. John of Jerusalem, before any decision could have been made on their competency; but at any rate we will not permit them to make the objection now. Where it appears that one or more material witnesses who were examined on a trial were interested, it may afterwards weigh with the court as a circumstance for granting a new trial, provided the merits of the case are doubtful; but as a substantive objection, I am clearly of opinion that it ought not to be allowed.

GROSE, J. As to the competency of the witnesses, it is not contended that in point of law we are bound to reject their testimony now. This then is an application to our discretion; and the question is, Whether that should induce us to reject their evidence after verdict. If this objection had been made before me at the trial, perhaps I might have admitted it; but then, by the rule of law, objections of this nature must be made at the trial. And if the plaintiff will insist upon the strict rule relative to the incompetency of witnesses, the defendant has an equal right to avail himself of the rule that the objection now comes too late. Formerly the rule was to examine on the voir dire; that indeed has been relaxed. But this application requires us to go farther; and

v. Lareau (Mo.) 208 S. W. 241 (1918); In re Gedney's Will (Sur.) 142 N. Y. Supp. 157 (1913). But see Craig v. Southard, 148 Ill. 37, 35 N. E. 361 (1893), contra.

If a plaintiff attempts to anticipate and negative a defense, he cannot as a matter of right introduce additional evidence on the same point at a later state of the trial. Holbrook v. McBride, 4 Gray (Mass.) 215 (1855).

the affidavit states no sufficient grounds in support of it. In the first place, it does not clearly appear that the plaintiffs did not know of the objection at the time of the trial. It is sworn very loosely; and if they knew of it at that time, that would be a decisive reason for refusing to allow it now. However, although no new trial has ever been granted on such an objection, I do not know but that, if a proper affidavit were made, it might have some influence on my mind, where the party applying has merits; but here the weight of the evidence is in favour of the verdict.

Rule discharged.[69]

GOODTITLE et al. v. WELFORD.

(Court of King's Bench, 1779. 1 Doug. 139.)

Rule nisi for a new trial on the ground of the incompetency of a witness because of interest.[70]

LORD MANSFIELD. This will has been tried three or four times; and there have been contradictory verdicts. On the trial, in the present instance, the jury were satisfied. But a motion has been made for a new trial, not on the merits, but on the incompetency of a witness. When the witness was produced, the counsel for the plaintiff read his surrender of the copyhold estate left to him by the will, but it was objected, that this surrender had not been accepted. The witness, on being questioned, said he had acted as executor, and that the legatees had received their legacies under the will. On this ground also, it was contended, that he was interested, because, if the will should be set aside, he would be answerable for having acted de son tort. But he was not objected to, at the trial, as being entitled to the residue of the personal estate. Now, on such a motion as the present, no objection to a witness should be received which was not made at the trial. If this new objection had been made then, it might perhaps have been shewn, that there was no residue, or a release might have been given, &c. As to the other objections. 1. The bequest to the witness would certainly have gone to his competency, if he had not parted with his interest; but, as he has parted with it, as far as depends upon him, third persons have a right to his testimony, and the surrenderee shall not deprive them of it, by refusing to accept the surrender. 2. It is contended, that, in an action concerning land, an executor is not a competent witness, because he may be sued for his administration of the personalty. But he certainly has no immediate

[69] Obviously the question of the competency of witnesses, or of the admissibility of evidence, could not be reviewed on writ of error unless a proper exception had been taken in the court below, and had been preserved by bill of exceptions. Bains v. Railway, 3 H. L. C. 1 (1850).

[70] Statement condensed and concurring opinions of Willes and Ashhurst, JJ., omitted.

interest in the action; and I remember its being determined by Lord Hardwicke, on a petition for a commission of review, and afterwards by the delegates, that it is no objection to an executor's testimony, that he may be liable to actions as executor de son tort.

The rule discharged.[71]

QUIN v. LLOYD.

(Court of Appeals of New York, 1869. 41 N. Y. 349.)

This action was brought to recover for work, labor, and services done and performed by the intestate going to England, services there, and returning, for the defendant, on account of which the balance alleged to be due was $333.07, in gold coin, and also for the sum of $296.31, alleged to be the further indebtedness of the defendant to the intestate for services rendered in New York.

The answer was a general denial.

The action was tried before a referee, and in the progress of the trial the defendant was sworn as a witness in his own behalf, and testified without objection to the time when the intestate commenced working for him, the fact of his going to England, and in what capacity, the time of his remaining there, and of his return, to the fact of payments by the defendant, and the rate of his wages in New York as draughtsman part of the time and as foreman after Culver left, and the time when Culver left, and the direct examination of the witness was closed. At the next meeting of the parties before the referee on a subsequent day, the plaintiff's counsel moved that the testimony of the defendant, Lloyd, be struck out, on the ground that under section 399 of the Code of Procedure "the defendant was an incompetent witness," and the motion was granted and defendant excepted.

The referee reported for the plaintiff, and from the judgment as modified in the General Term of the Superior Court of the city of New York, the defendant appealed to this court.[72]

[71] The rule is the same where the objection goes to the admissibility of the evidence, instead of the competency of the witness. Williams v. Wilcox, 8 Ad. & Ellis, 314 (1838). See, also, elaborate opinion to the same effect in Bain v. Railway, 3 H. L. C. 1 (1850), on a bill of exceptions, in which it was said by Lord Brougham: "See the consequence of not taking the objection in the proper form; and see how impossible it is for us to overleap the bounds by which, in deciding on the admissibility of such evidence, we are limited. If we were to act on this objection now, it might be answered: 'If this objection had been taken below, instead of the objection being confined to the ground of surprise, non constat that the court would have allowed the evidence, and then there would not have been any ground of exception; or, non constat that the respondents would not have withdrawn the witness, and then there would not have been any ground of exception; or, non constat that they would not have proved their point in another and an unexceptionable way.'"

[72] Statement condensed and part of opinion of Woodruff, J., and opinion of Lott, JJ., on another point omitted.

WOODRUFF, J. * * * The referee also erred in striking out the testimony of the defendant, not only because as to some of the facts to which he testified they did not appear to have formed part of transactions or conversations had by him personally with the deceased, but also for another reason, which was fatal to the motion.

The defendant was sworn and examined without objection. Certain questions put to him were excluded, but none of the testimony which he gave was objected to, and his direct examination was closed, and the reference was adjourned to a future day. There is no pretense of any surprise or misapprehension of the fact that the witness called and sworn was the defendant. Any and every objection which could be taken to his testifying or to his testimony, was apparent on the face of the proceedings; and yet at a subsequent hearing the referee struck out the testimony on the alleged ground that the defendant was incompetent to testify. This will not do. A party against whom a witness is called and examined cannot lie by and speculate on the chances, first learn what the witness testifies, and then when he finds the testimony unsatisfactory, object either to the competency of the witness, or to the form or substance of the testimony.

It is not the case, which sometimes occurs, where on cross-examination, or in a subsequent stage of the trial, the incompetency of evidence appears, though apparently competent when given; e. g., oral proof of an agreement, which on cross-examination appears to have been in writing, or proof of parol negotiations, etc., where it afterwards appears that the oral treaty was, are afterwards embodied in a written covenant or agreement, and like cases.

The counsel may have been careless in permitting testimony to be given without objection, which perhaps would have been excluded if objected to; but this will not authorize the referee to strike [73] it out after it has been received. This is a rule especially important, since parties are permitted to testify. The utmost fairness should be observed in the conduct of their examination, and if the adverse party desires to object to transactions with a deceased, he must do so in season, and not wait till he learns what they are, and then, if they bear unfavorably on his case, strike them out.

On these grounds the judgment must be reversed. All concur.

Judgment reversed.[74]

[73] A motion to strike out testimony is proper, where the witness answers before an objection could be made. Barkly v. Copeland, 86 Cal. 483, 25 Pac. 1, 405 (1890); Bigelow v. Sickles, 80 Wis. 98, 49 N. W. 106, 27 Am. St. Rep. 25 (1891).

Or where an improper answer is given to a proper question. State v. Sykes, 191 Mo. 62, 89 S. W. 851 (1905); Platner v. Platner, 78 N. Y. 90 (1879); Holmes v. Roper, 141 N. Y. 64, 36 N. E. 180 (1894).

Or where a witness volunteers an improper statement Greenup v. Stoker, 7 Ill. (2 Gilman) 688 (1845).

[74] Accord: Levin v. Russell, 42 N. Y. 251 (1870); Chicago Title & Trust Co. v. Sagola Lumber Co., 242 Ill. 468, 90 N. E. 282 (1909); Hickman v. Green,

BOSTON & A. R. CO. v. O'REILLY.

(Supreme Court of the United States, 1895. 158 U. S. 334, 15 Sup. Ct. 830, 39 L. Ed. 1006.)

Mr. Justice SHIRAS [75] delivered the opinion of the court.

The first three specifications of error complain of the action of the court in permitting the plaintiff, O'Reilly, to testify as to what he had made out of his business for several years before the accident, and to give an estimate of how much he made annually by his own individual exertions; and also, in view of the fact that he had sold the business, good will, and everything connected with the business before the accident occurred, to testify that, when he so sold out, he did it with the intention of continuing the business.

The first objection urged to the admission of this evidence is that it went to show special damage caused to the plaintiff by the loss and interruption of his business, whereas there were no allegations of such special damage contained in the declaration. It does not appear, however, that objection was specifically made to the evidence on the ground that the declaration contained no allegations of the special damage sought to be shown; and it is perfectly well settled in this court that where a case has gone to a hearing, testimony been admitted to a jury under objection, but without stating any reasons for the objection, and a verdict rendered, with judgment on the verdict, the losing party cannot, in the appellate court, state for the first time a reason for that objection which would make it good. Roberts v. Graham, 6 Wall. 578, 18 L. Ed. 791; Patrick v. Graham, 132 U. S. 627, 10 Sup. Ct. 194, 33 L. Ed. 460.

Objections were made in the present case to the admission of the evidence in question, but such objections did not, in our judgment,

123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39 (1894); Pillow v. Southwest Imp. Co., 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804 (1895); Benson v. U. S., 146 U. S. 325, 13 Sup. Ct. 60, 36 L. Ed. 991 (1893).

Apparently the English courts sanction the practice of making the objection to the competency of a witness at any time during his examination. Lord Abinger, in Jacobs v. Layborn, 11 M. & W. 685 (1843): "So, in any other case, I do not see why counsel should be restricted from inquiring at any moment into the witness' competency, and, if they see that he is swearing falsely, excluding his testimony if they can. A counsel who knows of an objection to the competency of a witness may very fairly say, 'I will lie by, and see whether he will speak the truth; if he does not, I will exclude his evidence.' I see no hardship or injustice at all in that course. In short, there is ample authority to show that the ancient, if not universal, practise has been to allow objections of this kind to be taken as was done in this case."

In that case the objection came after the witness had answered a number of questions in chief.

In the case of inadmissible evidence the rule is well settled that the objection must be made at the time. Wright v. Littler, 3 Burrow, 1244 (1761).

If an objection to the competency of a witness is made and overruled, it is not waived by a proper cross-examination. McCune v. Goodwillie, 204 Mo. 306, 102 S. W. 997 (1907).

[75] Statement and part of opinion omitted.

apprise the court of the specific ground of objection now urged, and hence did not afford an opportunity of permitting an amendment of the declaration, upon such terms as the interests of justice might seem to require.

If, then, this were the only ground on which we were asked to proceed in disposing of these assignments of errors, we should not feel disposed to disturb the judgment. * * *

Judgment reversed (on other grounds).[76]

[76] And so where a general objection is made to a document.

Field, J., in Noonan v. Caledonia Gold Mining Co., 121 U. S. 393, 7 Sup. Ct. 911, 30 L. Ed. 1061 (1887): "2. The objection to the introduction of the articles of incorporation at the trial was that they were 'immaterial, irrelevant, and incompetent' evidence. The specific objection now urged, that they were not sufficiently authenticated to be admitted in evidence, and that the certificates were made by deputy officers, is one which the general objection does not include. Had it been taken at the trial and deemed tenable, it might have been obviated by other proof of the corporate existence of the plaintiff or by new certificates to the articles of incorporation. The rule is universal, that where an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal, unless it be of such a character that it could not have been obviated at the trial. The authorities on this point are all one way. Objections to the admission of evidence must be of such a specific character as to indicate distinctly the grounds upon which the party relies, so as to give the other side full opportunity to obviate them at the time, if under any circumstances that can be done. United States v. McMasters, 4 Wall. 680 [18 L. Ed. 311 (1866)] Burton v. Driggs, 20 Wall. 125 [22 L. Ed. 299 (1873)]; Wood v. Weimar, 104 U. S. 786, 795 [26 L. Ed. 779 (1881)]."

The words "incompetent, irrelevant and immaterial" were defined in Stoner v. Royar, 200 Mo. 444, 98 S. W. 601 (1906), as follows: "We have said that the patent and deeds of defendant were introduced in evidence without objection, by which we do not mean that we have overlooked the objection in the general words 'incompetent, irrelevant and immaterial.' An objection to evidence that it is irrelevant is sufficiently specific; it means that it does not bear on any issue in the case, and 'immaterial' means nearly the same. It cannot be said of these documents that they were irrelevant, because they were the defendant's title to the land to which he claimed that the land in suit was an accretion, just as plaintiff's documentary evidence which did not call for this land, but did call for land to which the plaintiff claimed this land was an accretion. But an objection on the ground that the evidence offered is incompetent without a specification in what respect it is believed to be so is really no objection at all."

For cases where such an objection was held sufficient to raise the question on the theory that the reason was obvious and could not have been cured, see Bailey v. Kansas City, 189 Mo. 503, 87 S. W. 1182 (1905); Groh's Sons v. Groh, 177 N. Y. 8, 68 N. E. 992 (1903); Metropolitan St. Ry. Co. v. Gumby, 99 Fed. 192, 39 C. C. A. 455 (1900).

Compare Williams v. Wilcox, 8 Ad. & El. 314 (1838).

ROSENBERG et al. v. SHEAHAN et al.

(Supreme Court of Wisconsin, 1912. 148 Wis. 92, 133 N. W. 645.)

This was an action on a contract under which the plaintiff installed an elevator for the defendants. The case was tried in the civil court at Milwaukee and the plaintiff recovered for substantial performance. On appeal to the circuit court the case was heard on the record and the judgment affirmed. Defendants appealed.[77]

MARSHALL, J. * * * Appellants attempted to prove the existence of the ordinance by means of a booklet of a few pages having nothing about it to indicate that it was an official publication. There was a general objection. The court of original jurisdiction took the evidence, making no ruling. Whether in reaching the original conclusion embodied in the judgment in the initial jurisdiction, the evidence in question was considered does not affirmatively appear. If it should have been rejected, the presumption must be, as we have seen, that it was. The appellate court excluded the evidence under the general objection.

Counsel cite many cases to show that the court below erred in rejecting the evidence because the objection thereto was not specific.

The fact seems to have been overlooked that the cited cases are of trials where there was a general objection, the evidence was received and it was held proper because of competency for a court to do so, the objection not being specific; and overlooked the companion rule that if, in face of a general objection, only, the court rejects the evidence the ruling will not be reversed on appeal if it appears that the evidence was objectionable upon any specific ground. There, it is to be presumed, the specific infirmity was the deciding factor, and it was competent for the trial court to take efficient notice thereof though it was not bound to do so. Pettit v. May, 34 Wis. 666; Nicolai v. Davis, 91 Wis. 370, 64 N. W. 1001; Crawford v. Witherbee, 77 Wis. 419, 46 N. W. 545, 9 L. R. A. 561; Evans v. Sprague, 30 Wis. 303, and many similar cases which might be cited, are all instances where the evidence was received and it was held not error because the objection was general.

True, it is the rule that where evidence is rejected under a general objection and a contrary ruling would have been called for upon a specific objection, and counsel making the offer requests the court to specify the particular ground for the adverse ruling for the purpose of obviating it, it is improper to refuse to do so. Colburn v. C., St. P., M. & O. Ry. Co., 109 Wis. 377, 85 N. W. 354, but that is not this case, and is in harmony with the general rule stated.

This is elementary: "The rule that the objection should be specific has no application, however, where a general objection is sustained;

[77] Statement condensed and part of opinion omitted.

in that case the party against whom the ruling was made cannot urge that the objection was too general." Jones on Ev. § 897; 8 Ency. Pl. & Pr. 229; Wigmore on Ev. § 18. That rule seems to be thus rather more specifically stated in Tooley v. Bacon, 70 N. Y. 34, than in any of our own adjudications which we have in mind: "Where evidence is excluded upon a mere general objection, the ruling will be upheld upon appeal if any ground in fact existed for the exclusion; it will be assumed in the absence of any request by the opposing party or the court, to make the objection more definite, that it was understood, and that the ruling was placed upon the right ground."

There are other exceptions to the general rule that objections should be specific, and, if not, an adverse ruling will not be held error, as where evidence offered is manifestly improper the court may, in its discretion, exclude the same whether objected to or not. Farmers' Bank v. Whinfield, 24 Wend. (N. Y.) 421; Jones on Ev. § 896. And, further, where it is manifest that the evidence is not proper in any circumstances, a general objection, though overruled will be deemed to have been sufficient. Wigmore on Evidence, § 18.

The foregoing in favor of respondents disposes of the contention based on the claimed existence of a city ordinance affecting their right to recover; but there were good reasons for the exclusion. As the trial court held, the offered evidence was not a copy of a city ordinance authenticated in the manner provided by section 4137, Stats. 1898. The document did not purport to have been printed by authority of the common council, as the statute provides. That was sufficient to justify the exclusion. Quint v. City of Merrill, 105 Wis. 406, 81 N. W. 664. It was not a case of defective authentication with which the trial court had to deal, but of no authentication at all.
* * *

Judgment affirmed.[78]

[78] Accord: Davey v. Railway, 116 Cal. 325, 48 Pac. 117 (1897), and cases there cited.

The rule appears to be the same where evidence is excluded on an objection assigning the wrong ground. Eschbach v. Hurtt, 47 Md. 61 (1877).

Compare Read, J., in Bridgers v. Bridgers, 69 N. C. 451 (1873): "If the defendant had said, I object to this witness testifying as to a question of law, we may reasonably suppose that both the plaintiff and his honor would have seen the force of the objection. And then the plaintiff could have avoided the objection by asking the witness as to the facts and leaving the law to his honor. Or if his objection had been general, it might have led to the same result. But his objection was special, and untenable, and calculated to mislead."

For the various views on a somewhat similar question, where a nonsuit or a verdict has been directed on a general motion or on a motion specifying untenable grounds, see Wallner v. Traction Co., 245 Ill. 148, 91 N. E. 1053 (1910); Gerding v. Haskin, 141 N. Y. 514, 36 N. E. 601 (1894); Palmer v. Marysville Democrat Pub. Co., 90 Cal. 168, 27 Pac. 21 (1891).

PENN v. BIBBY.

(Court of Appeal in Chancery, 1866. L. R. 2 Ch. App. Cas. 127.)

On a bill to restrain the infringement of a patent, issues were directed to be tried before the court without a jury, and were found in favor of the complainant. The defendant moved before the Lord Chancellor for a new trial.[79]

LORD CHELMSFORD, L. C., after stating the circumstances, said, that the motion for a new trial upon the first question proceeded upon the ground that the verdict was against the weight of evidence. * * *

I have now disposed of every question connected with the patent; but there was one ground of application for a new trial which must be shortly noticed. It is said that the defendants were proceeding to cross-examine some of the plaintiff's witnesses as to their knowledge of the use of wood for bearings in paddle-wheels prior to the date of the patent, and that the Vice-Chancellor stopped them upon the ground that this was not within the notice of objections. I apprehend, that it is always competent upon cross-examination, to put a question in this general form. The counsel would not be entitled to inquire of the plaintiff's witnesses as to any specific instance of the prior use of the patented invention of which he had not given notice; but he has always a right to test the general knowledge of the witnesses upon the subject.

In order to ground this objection, however, the question proposed to be put should have been formerly tendered to the judge, and rejected by him as inadmissible. Now, it appears that his honour was never distinctly requested to admit any specific question, but from some cursory remarks it is assumed that he would not have permitted a particular line of cross-examination.

This, however, is not sufficient. The judge should have an opportunity of deciding upon some distinct question, and have refused to allow it, before there can be a motion made for a new trial on account of the rejection of evidence. This objection, therefore, has no foundation.

The motion for a new trial must be refused with costs.

Motion refused.[80]

[79] Statement condensed and part of opinion omitted.

[80] Mr. Justice Ricks, in Chicago City Ry. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087 (1903): "When this witness retired from the stand, appellee announced that he rested his case. Appellant's attorney then said: 'We desire to offer evidence, your honor, on the question of inspection of the cars, and so forth.' The court replied: 'Very well; I won't receive any evidence except as to the ownership of this line at this stage.' Exception was taken. * * * Appellant, in fact, offered no evidence upon the matter. No witness was put upon the stand; no question was asked. Nothing was done except a mere conversation or talk had between counsel for appellant and the court. Such procedure as that does not amount to an offer of evidence, and the remarks of the court did not amount to a refusal to admit evidence. There can

SCOTLAND COUNTY v. HILL.

(Supreme Court of the United States, 1884. 112 U. S. 183, 5 Sup. Ct. 93, 28 L. Ed. 692.)

This was an action on certain county bonds. The defence relied on was that the bonds had been negotiated in violation of an injunction, of which the holders had notice. The court excluded the record in the injunction case.

The defendant then "offered to prove by Charles Metz, the agent named in the pleadings, that he had actual notice of the pendency of the aforesaid suit of Levi Wagner et al. v. Metz et al., at the time he delivered the instruments (described in the defendant's pleading) to the Missouri, Iowa & Nebraska Railway Company, and offered to prove that the Missouri, Iowa & Nebraska Railway Company, and each subsequent holder, received the instruments referred to in the plaintiff's petition with actual notice of the pendency of the aforesaid suit, * * * as set up in the fourth count of the answer." This was also objected to and the objection sustained. To all these rulings excluding testimony exceptions were duly taken, and error is assigned here thereon.[81]

Mr. Chief Justice WAITE delivered the opinion of the Court. * * * The case of County of Warren v. Marcy, 97 U. S. 96, 24 L. Ed. 977, decides that purchasers of negotiable securities are not chargeable with constructive notice of the pendency of a suit affecting the title or validity of the securities; but it has never been doubted that those who buy such securities from litigating parties, with actual notice of the

be no refusal to admit that which has not been offered, and counsel cannot, by engaging in a mere conversation with the court, although it may relate to the procedure, by merely stating what he desires to do, get a ruling from the court upon which he can predicate error. If appellant desired to make the contention it now makes, it should have at least put a witness upon the stand and proceeded far enough that the question relative to the point it is now said it was desired to offer evidence upon was reached, and then put the question and allow the court to rule upon it, and then offer what was expected to be proved by the witness, if he was not allowed to answer the question asked. It was not stated to the court that appellant did inspect the cars or could prove that the cars had been regularly inspected or recently inspected, or that the inspection that was made was an examination of the trolley pole or its attachments, and to now hold that the case should be reversed upon the mere statement of counsel that he desired to offer evidence upon the question of the 'inspection of the cars, and so forth,' would, as we think, be setting a dangerous precedent, and one that would tend to irregularity in such matters. Stevens v. Newman, 68 Ill. App. 549 (1896); Beard v. Lofton, 102 Ind. 408 [2 N. E. 129 (1885)]; Morris v. Morris, 119 Ind. 341 [21 N. E. 918 (1889)]; Ralston v. Moore, 105 Ind. 243 [4 N. E. 673 (1886)]; Smith v. Gorham, 119 Ind. 436 [21 N. E. 1096 (1889)]; City of Evansville v. Thacker, 2 Ind. App. 370 [28 N. E. 559 (1891)]; Darnell v. Sallee, 7 Ind. App. 581 [34 N. E. 1020 (1893)]; First Nat. Bank of Kendallville v. Stanley, 4 Ind. App. 213 [30 N. E. 799 (1892)]; Lewis v. State ex rel. Daily, 4 Ind. App. 504 [31 N. E. 375 (1892)]; Huggins v. Hughes, 11 Ind. App. 465 [39 N. E. 298 (1895)]; 8 Ency. of Pl. and Pr. 236."

[81] Statement condensed and part of opinion omitted.

suit, do so at their peril, and must abide the result the same as the parties from whom they got their title. Here the offer was to prove actual notice, not only to the plaintiff when he bought, but to every other buyer and holder of the bonds from the time they left the hands of Metz, pending the suit, until they came to him. Certainly, if these facts had been established, the defense of the county, under its fourth plea, would have been sustained; and this, whether an injunction had been granted at the time the bonds were delivered by Metz or not. The defense does not rest on the preliminary injunction, but on the final decree by which the rights of the parties were fixed and determined.

It is claimed, however, that error cannot be assigned here on the exception to the exclusion of the oral proof, because the record does not show that any witness was actually called to the stand to give the evidence, or that any one was present who could be called for that purpose, if the court had decided in favor of admitting it, and we are referred to the cases of Robinson v. State, 1 Lea, (Tenn.) 673, and Eschbach v. Hurtt, 47 Md. 66, in support of that proposition. Those cases do undoubtedly hold that error cannot be assigned on such a ruling, unless it appears that the offer was made in good faith, and this is in reality all they do decide. If the trial court has doubts about the good faith of an offer of testimony, it can insist on the production of the witness, and upon some attempt to make the proof, before it rejects the offer; but if it does reject it, and allows a bill of exceptions which shows that the offer was actually made and refused, and there is nothing else in the record to indicate bad faith, an appellate court must assume that the proof could have been made, and govern itself accordingly.

It is evident from the whole record that the court below proceeded on the theory that the decree in the Wagner suit could not conclude the plaintiff, and that, consequently, it was a matter of no importance whether he had notice of the pendency of the suit or not. In our opinion, the error began with the exclusion of the record in that suit. As notice of the pendency of the suit was, however, necessary to bind the plaintiff by the decree, proof of that fact was offered, so that the question as to the effect of the decree upon this suit might be properly presented for review if deemed advisable. The court below seems not to have doubted the good faith of the offer, and so ruled against it without first requiring the defendant to produce his witnesses and show his ability to furnish the testimony if allowed to do so. It is a matter of no importance whether the decision in the Wagner suit was in conflict with that of this court in Scotland Co. v. Thomas, supra, or not. The question here is not one of authority but of adjudication. If there has been an adjudication which binds the plaintiff, that adjudication, whether it was right or wrong, concludes him until it has been reversed or otherwise set aside in some direct

proceeding for that purpose. It cannot be disregarded any more in the courts of the United States than in those of the state.

Without considering any of the other questions which have been argued, we reverse the judgment and remand the cause for a new trial.

LADD v. MISSOURI COAL & MINING CO.

(Circuit Court of Appeals of the United States, Eighth Circuit, 1895. 66 Fed. 880, 14 C. C. A. 246.)

CALDWELL, Circuit Judge.[82] This action was commenced in the United States circuit court for the Eastern District of Missouri by William M. Ladd, the plaintiff in error, against the Missouri Coal & Mining Company, the defendant in error, to recover $34,637 damages for the breach of an alleged contract of brokerage. At the close of the testimony, by direction of the court, the jury returned a verdict for the defendant, upon which final judgment was rendered, and thereupon the plaintiff sued out this writ of error. * * *

The plaintiff relies exclusively on the alleged sale to Hatch, and insists that he was prepared to prove, and offered to prove, that Murdock did approve and accept for the defendant the terms of sale agreed upon between the plaintiff and Hatch, and that the court erroneously excluded this evidence. Whatever the fact may have been, the record does not support this contention. On this subject the record discloses that while the plaintiff was on the stand as a witness, the following proceedings took place:

"Q. You also stated that on November 13th Mr. Murdock returned in the afternoon to your office? A. I did. Q. And you handed him the proposed contract with Mr. Hatch? A. I did. (Plaintiff offers to prove by his witness the conversation between him and Mr. Murdock relating to the contract, which conversation was had at St. Louis on November 14, 1892, but, defendant objecting, the court sustained the objection, and refused to allow plaintiff to testify to any conversation between him and said Murdock on November 14th, save such as related to the transmission of the contract from St. Louis to Port Henry, to which action of the court in so ruling plaintiff then and there duly excepted.)"

It will be observed that all that the plaintiff offered to prove was "the conversation between him and Murdock relating to the contract." This offer was not accompanied by any statement as to what that conversation was, or that it was material to any issue then being tried. The insufficiency of the exception is rendered apparent by a single consideration. If this court should reverse the case because the witness was not permitted to state the conversation, what is there in

[82] Part of opinion omitted.

this record to show or suggest that upon another trial, when the witness is allowed to state the conversation, a single word of it will be material to the case or admissible in evidence? The offer to prove the "conversation," without some statement as to what it was, and showing its materiality, was too general to be made the foundation of a valid exception. The rule is well settled that the bill of exceptions must show the materiality of the evidence which was tendered and rejected.

The evidence rejected, or a statement of what it tended to prove, must appear in the bill of exceptions. Packet Co. v. Clough, 20 Wall. 528, 22 L. Ed. 406; Railway Co. v. Smith, 21 Wall. 255, 22 L. Ed. 513; Thompson v. Bank, 111 U. S. 529, 4 Sup. Ct. 689, 28 L. Ed. 507; Clement v. Packer, 125 U. S. 309, 8 Sup. Ct. 907, 31 L. Ed. 721; Patrick v. Graham, 132 U. S. 627, 10 Sup. Ct. 194, 33 L. Ed. 460; Lyon v. Batz, 42 Mo. App. 606; Bener v. Edgington, 76 Iowa, 105, 40 N. W. 117. Moreover, it does not appear from the record before us that Murdock was the agent of the defendant for the purpose of selling the land, or that he had any authority to approve or confirm any sale thereof made by the plaintiff. It results that the circuit court did not err in directing the jury to return a verdict for the defendant, and its judgment is therefore affirmed.

Judgment affirmed.[83]

BUCKSTAFF v. RUSSELL.

(Supreme Court of the United States, 1894. 151 U. S. 626, 14 Sup. Ct. 448, 38 L. Ed. 292.)

This was an action to recover the price of certain boilers and machinery furnished to the defendants under a written contract. The defendants filed a counterclaim for breach of warranty. Verdict and judgment for plaintiff, to reverse which defendants sued out a writ of error.[84]

Mr. Justice HARLAN delivered the opinion of the Court. * * * The defendant Utt was sworn as a witness for the defense, and, as we

[83] Accord: Griffin v. Henderson, 117 Ga. 382, 43 S. E. 712 (1903); Crowley v. Appleton, 148 Mass. 98, 18 N. E. 675 (1888); Cincinnati, N. O. & T. P. Ry. Co. v. Stonecipher, 95 Tenn. 311, 32 S. W. 208 (1895); Dreher v. Fitchburg, 22 Wis. 675, 99 Am. Dec. 91 (1868).

When a document is excluded, its contents must be incorporated in the bill of exceptions, to enable the appellate court to pass on its materiality. Northwestern Union Packet Co. v. Clough, 20 Wall. 528, 22 L. Ed. 406 (1874); Thompson v. First Nat. Bank, 111 U. S. 529, 4 Sup. Ct. 689, 28 L. Ed. 507 (1884).

The rule requiring a statement of the excluded testimony is not applied where a proper question is excluded on cross-examination. Cunningham v. Austin & N. W. Ry. Co., 88 Tex. 534, 31 S. W. 629 (1895); Knapp v. Wing, 72 Vt. 334, 47 Atl. 1075, (1900).

[84] Statement condensed and part of opinion omitted.

infer, in support of the counterclaim. · Having stated that he and Buckstaff, in April, 1888, first commenced negotiations for the purchase of the boilers with Mr. Giddings, representing Russell & Co., the following questions were put, successively, to him: (1) "What conversation did you have with him, if any, about the purpose for which the machine must be used, and the necessity for steam capacity in the boilers?" (2) "You may state in what your damages consisted, and the amount, in consequence of the defective construction, and the failure of this machinery to perform its labor, and the labor required of it by the terms of the contract, from the time of its erection up to the first day of March." (3) "You may state what damage you sustained in consequence of the failure of this machinery to do the work at the paper mill." (4) "You may state what loss you suffered in consequence of the defective construction and failure in the machinery." (5) "In what particular did you and the defendant Buckstaff sustain loss by reason of the defects in the construction and the failure of this machinery?"

Each of these questions was objected to upon the ground that it was incompetent, irrelevant, and immaterial. No one of them was objected to upon the ground that it was a leading question.

In the case of Shauer v. Alterton, 151 U. S. 607, 14 Sup. Ct. 442, 38 L. Ed. 286, just decided, it was held to be the settled construction of the twenty-first rule of this court that an assignment of error based upon the exclusion of an answer to a particular question in the deposition of a witness would be disregarded here, unless the record sets forth the answer or its full substance. Packet Co. v. Clough, 20 Wall. 528, 542, 22 L. Ed. 406; Railroad Co. v. Smith, 21 Wall. 255, 262, 22 L. Ed. 513; Thompson v. Bank, 111 U. S. 529, 535, 536, 4 Sup. Ct. 689, 28 L. Ed. 507. Our rule, thus construed, is one to which parties can easily conform. Having access to the deposition containing the answer of the witness to the interrogatory, parties, as well as the trial court, are informed of the precise nature of the evidence offered. The requirement that an assignment of error based upon the admission or rejection of evidence must, in the case of a deposition excluded in whole or in part, state the full substance of the evidence so admitted or rejected, means that the record must show, in appropriate form, the nature of such evidence, in order that this court may determine whether or not error has been committed to the prejudice of the party bringing the case here for review.

But this rule does not apply where the witness testifies in person, and where the question propounded to him is not only proper in form, but is so framed as to clearly admit of an answer favorable to the claim or defense of the party producing him. It might be very inconvenient in practice if a party, in order to take advantage of the rulings of the trial court in not allowing questions proper in form, and manifestly relevant to the issues, were required to accompany each question with a statement of the facts expected to be established by the answer to

the particular question propounded.[85] Besides, (and this is a consideration of some weight), such a statement in open court, and in the presence of the witness, would often be the means of leading or instructing him as to the answer desired by the party calling him. If the question is in proper form, and clearly admits of an answer relevant to the issues and favorable to the party on whose side the witness is called, it will be error to exclude it. Of course, the court, in its discretion, or on motion, may require the party in whose behalf the question is put to state the facts proposed to be proved by the answer. But, if that be not done, the rejection of the answer will be deemed error or not, according as the question, upon its face, if proper in form, may or may not clearly admit of an answer favorable to the party in whose behalf it is propounded.

Tested by these views, the court below erred in not permitting the defendant Utt to answer the above questions. Each one of them was relevant to the counterclaim, and each admitted of an answer that tended to support it. * * *

Judgment reversed.

II. Examination in Chief

CASE OF THE CORPORATION OF BEWDLEY.

(Court of Queen's Bench, 1714. 10 Mod. 151.)

Those that produce a witness ought to examine him in chief only: but they, against whom he is brought, may examine him upon a voir dire, if they please, whether he is concerned in interest.

The matter in issue was, which was the charter by which the corporation of the town of Bewdley was to act, whether by the ancient one, or one of later date?

A witness was produced to establish the ancient charter.

His evidence was excepted against, as being a mortgagee under the old corporation.

This was proved by an answer of his to a bill in Chancery.

But it was insisted that this answer was so uncertainly penned, as that it might be true, and yet his mortgage of such a nature as not to

[85] Lamar, J., in Griffin v. Henderson, 117 Ga. 382, 43 S. E. 712 (1903): "Parties can often agree in the presence of the court as to what the witness would testify, or, if not, the witness, or examining attorney, can state what the answer would be; and where the subject-matter is important, the judge may, in his discretion, retire the jury until its admissibility has been settled. We are well aware that the rule may be perverted into a means of getting inadmissible evidence before the jury, or, by forcing their constant withdrawal, retarding the trial. The courts must rely upon the good faith of counsel not to bring about such a result. But it would never do to grant a new trial until it appeared, not only that the question was proper, but that the answer was material, and would have been of benefit to the complaining party."

prevent his evidence, and therefore that he might be called to explain the ambiguity of his answer.

THE COURT was of opinion that he might, since his answer depended upon his veracity, as much as the evidence he could then give; and if the one be to be credited, why not the other?

But afterwards his evidence was rejected upon another consideration, viz. that in his answer he lays the whole stress of his defence upon the matter then in issue, viz. the subsisting of the present corporation.[86]

ANONYMOUS.

(Court of Chancery, 1754. Amb. 252.)

Motion to suppress a deposition taken before commissioners, because the attorney for plaintiff had wrote down the whole in the exact form of the deposition before it was taken. And though it appeared that the witness had told him the facts and circumstances mentioned in it, yet his Lordship said, it would be of dangerous tendency to permit it to be read; for in depositions it is material to state the evidence as given by the witness: in this case the attorney had methodised and worded it, and is therefore no more than an affidavit.[87] He said, at law

[86] That a witness, prima facie incompetent, cannot be examined by the party calling to prove a fact necessary to make him competent, see Williams' Adm'r v. Williams, 67 Mo. 661 (1878).

But where the witness himself discloses the disqualification, his testimony may also remove it. Abrahams v. Bunn, 4 Burrow, 2251 (1768).

[87] In the Case of Eldridge, 82 N. Y. 161, 37 Am. Rep. 558 (1880) Costigan's Cases on Legal Ethics, p. 198, Finch, J., condemned such practice in the following language: "* * * Laying aside, then, all question of the truth or falsity of the answers, discarding every thing dependent upon Wheeler alone as unworthy of credit, the fact yet remains that an attorney of the court, having taken out a commission for the examination of a witness, writes out what, when printed, are twenty-six pages of answers to interrogatories, and eighteen pages of answers to cross-interrogatories, furnishes them to the witness, who has already drawn upon him for serious sums of money, reads a part of the answers to the commissioner, and leaves the rest for the witness to repeat, and so practically puts his own words, his own ideas, his own facts into Wheeler's mouth, and gets them before the surrogate disguised as honest testimony. Such conduct is inexcusable. The coloring sought to be given it by Eldridge that he merely meant to refresh the memory of the witness is not justified by the facts. He furnished answers, not notes. He controlled and mastered the memory of the witness; not merely refreshed it. The witness did not answer at all. Eldridge answered for him. We get neither the language nor the memory of the witness; we get only that of his teacher. Practically the examination was merely an affidavit drawn by Eldridge and sworn to by Wheeler. In its true character it was not admissible before the surrogate. When, therefore, it was disguised on the shape of testimony and the form of an examination, and so received into the case a fraud was committed on the surrogate, and the author of it was Eldridge. Grant that the answers are not shown to be false, and that Eldridge believed them to be true; yet he corrupts justice at the fountain by dictating the evidence of the witness. Upon the trial of an issue in open court a question merely leading is excluded. The law so carefully guards the independ-

a witness is allowed to refresh his memory by notes as to dates and names, because there is nothing to guide the memory as to them; but he never knew a Court of Law admit the whole evidence to be given from writing. Doe v. Perkins, 3 T. R. 752; Tanner v. Tayler, Id. 754; 8 East, 284, 289; Hedge's case, 28 Howell's St. Tr. 1367. See 24 Howell's St. Tr. 824. There is no certain rule how far evidence may be admitted from notes. Some judges had thought, and he was (he said) inclined the same way, that the witness might speak from notes which were taken at the time of the transaction in question, but not if they were wrote afterwards. Burrough v. Martin, 2 Campb. 112. Deposition suppressed.

STEER v. LITTLE.

(Supreme Judicial Court of New Hampshire, 1863. 44 N. H. 613.)

Trespass quare clausum. The plaintiff owned the north part and the defendant's wife the south part of a lot laid out and conveyed as a one hundred acre lot; but there was evidence tending to show that it contained more than one hundred acres—the exact number of acres not being agreed upon by the parties, nor clearly proved by the evidence. The question between the parties was the location of the dividing line between them. The defendant claimed and introduced evidence tending to prove that a line run by one Goodall, giving the plaintiff fifty acres, had been agreed upon by the parties as the dividing line. The plaintiff introduced evidence tending to show that no line had been agreed upon, and that a line dividing the lot into two equal parts was the dividing line.

The defendant objected to the following question, put to S. Whiting, as leading: "Have you traced the dividing line through your lot?" The court ruled that the question was leading, but that it might be put; and the defendant excepted.

One Rowell testified in a deposition to conversations when the plaintiff and the defendant and his wife were present. The defendant objected to the third and fifth interrogatories, as leading, and to the answer to the fifth interrogatory, on the ground that the declarations of the defendant's wife are inadmissible in the case. The court allowed the questions and answers to be read, and the defendant excepted. The interrogatories and answers were as follows:

"3. State what claim Mrs. Little and her husband made as to holding, by virtue of your deed to her, all but fifty acres of said lot?

"Ans. She stated that I had deeded to Stephen Steer, or to Maria

ent and unwarped testimony of a witness that it will not permit, even by the form of a question, the suggestion of its answer. Yet here the answers to thirty-three direct interrogatories, and forty-one cross-interrogatories are actually written out by the attorney for the use of the witness, and so imported into the case."

Smith, previous to her deed, fifty acres of the other end of the lot, and to her the residue to the Woods lot; and if I had not bounded her on the Woods lot I should still have held a gore there of the overplus. I deeded her fifty acres, to the Woods lot. She claimed the overplus because I bounded her on the Woods lot.

"5. State whether Mr. Little or Mrs. Little denied or disputed at that time the right of Mr. Steer to hold what his deed covered, by reason of any agreed line? If so, what line?

"Ans. They did not. I don't mean to be understood that she admitted it. She claimed that in my deed to Maria Smith I confined her to just fifty acres. She made no claim by virtue of any agreed line."

The jury returned a verdict for the plaintiff, which the defendant moved to set aside.[88]

BELL, C. J. To the general rule that leading questions shall not be put to a witness, there are certain exceptions, as well settled as the rule itself, in which the judge, in the exercise of his discretion, may permit such questions. These exceptions are fully discussed in the recent case of Severance v. Carr, 43 N. H. 65.

If the case shows that the ruling of the judge was made in the exercise of his discretionary power to admit leading questions in proper cases, the court will not revise the decision. It is often impracticable for the revising court to possess themselves of all the facts and circumstances which might properly have a bearing upon the decision. Hopkinson v. Steele, 12 Vt. 584; Parsons v. Huff, 38 Me. 138, and cases cited.

If objection is made to a question as leading, and it is merely overruled or the question allowed, the point decided is, that the question is not leading, and the party is entitled to his exception. No question of discretion is raised. Williams v. Eldridge, 1 Hill, 249; Page v. Parker, 40 N. H. 53. Where the question objected to as leading is admitted, the exception must be allowed, and the verdict set aside, if the exception is well founded, since no discretion is involved in that case, except where the question rejected was put in the cross-examination. Parsons v. Bridgham, 34 Me. 240.

Still, if the case, as stated, shows that the question was admissible, though leading, and that it must have been admitted in the exercise of a proper discretion, the verdict will not be disturbed.

Such seems to us the question put to Whiting. The court ruled that it was leading, but that it might be put. It must be understood that the judge allowed it in his discretion. It was merely introductory to something that might be material, and it was properly allowed.

Questions deemed leading, of most common occurrence, fall into three classes. Willis v. Quimby, 31 N. H. 485; 2 Stark. Ev. 123; Greenl. Ev. 481.

[88] Statement condensed and part of opinion omitted.

1. Where they call for no other answer than a simple affirmative or negative, as yes or no, or the like, the witness merely assenting to the language of another. The witness is to answer in his own language; the counsel is not allowed to substitute his own artful statement for that of the witness. Budlong v. Van Nostrand, 24 Barb. (N. Y.) 26; Page v. Parker, 40 N. H. 53; Dudley v. Elkins, 39 N. H. 84.

In the case of Spear v. Richardson, 37 N. H. 31, it was held that the question, "Did he" (the horse in question) "ever have a cough?" was not leading. It was not such as to instruct the witness which way to answer it. The form of the question was not suggestive of a negative rather than an affirmative answer. And this was true. But if the question had stood alone it would be liable to an objection which would equally render it leading; that it called for a simple yes or no to a question perhaps artfully worded by counsel to serve his purpose, instead of calling upon the witness to state his knowledge of the facts in his own language, which might have a materially different import. But the question was not open to this objection, because it was part of a question only, the whole of which, taken together, did call for a statement of the witness' knowledge, in his own words, so that this case is in harmony with other decisions on the subject.

2. Where the question is so framed or so put as to suggest to the witness the answer desired. Williams v. Eldridge, 1 Hill (N. Y.) 249; People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; Parsons v. Bridgham, 34 Me. 240.

3. Where the question assumes any fact which is in controversy, so that the answer may really or apparently admit that fact. Such are the forked questions habitually put by some counsel, if unchecked; as, What was the plaintiff doing when the defendant struck him? the controversy being whether the defendant did strike. A dull or a forward witness may answer the first part of the question, and neglect the last. People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

There is no form of question which may not be held leading—the court being constantly compelled to look beyond the form to the substance and effect of the inquiry. If a question suggests to the witness either the matter or the language desired, it is to be disallowed. Parsons v. Huff, 38 Me. 138; Hopper v. Commonwealth, 6 Grat. (Va.) 684, cited in 4 Wend. 247; Page v. Parker, 40 N. H. 53; Hopkinson v. Steel, 12 Vt. 584; Willis v. Quimby, 31 N. H. 485; Bartlett v. Hoyt, 33 N. H. 165.

We are well aware that it has been held elsewhere that the admission of a leading question is a matter resting in the discretion of the judge, and is no ground for a new trial,[89] Bliss v. Shuman, 47 Me.

[89] The Attorney General, in Horne v. MacKenzie, 6 Cl. & Fin. 628 (1839): "All that has been advanced on the other side is merely matter for a new

253; Parsons v. Huff, 38 Me. 138; that it is a matter always in the discretion of the court, subject, however, to be reviewed, and will not be regarded as error unless the discretion has been abused, Cope v. Sibley, 12 Barb. (N. Y.) 522; Budlong v. Van Nostrand, 24 Barb. (N. Y.) 26.

But we think neither of these views has ever been entertained here; that, on the contrary, verdicts have often been set aside on account of erroneous rulings in relation to the admission or rejection of evidence objected to as leading; that the discretion of the court has not been regarded as extending to every case, but has been confined to the cases enumerated in Severance v. Carr, 43 N. H. 65, and analogous cases; and that here no inquiry would be incidentally made into any such question as is spoken of in the New York cases, of abuse of discretion producing injustice. Here the inquiry is limited to the question whether the court assumed to act by virtue of its discretionary powers in a proper case.

It is never difficult for counsel to change the form of inquiry, so as to obviate any just objection. It is always their duty so to frame their questions at first as to leave no room for objection. It is essential to the fairness of trials that they should be held to make their inquiries properly. If a lax practice is allowed, there are counsel whose questions would be all leading; knowing they would be required to change their form, if objection was made, and trusting that the question and the discussion would teach the witness what was wanted. In such case the mischief is not obviated by changing the form of the question.

A strict regard to the rule of law in this respect is particularly important in the case of depositions, where the witness, being absent at the trial, the form of the question can not be changed to obviate the objection. It is fair to presume that the party who persists in putting a leading question in a deposition, after objection is made,

trial, and not for an appeal. The refusal by the judge to admit proper evidence is a fit subject for a bill of exceptions, but the mere mode of conducting the trial is not so, and by the practice of the courts in this country could not be introduced on a special verdict, nor in any shape brought before a court of error. It is a general rule that leading questions cannot be put to a witness; but there are exceptions to that rule, and here it could never be made the subject of a bill of exceptions, that in some particular instance a judge had permitted leading questions to be put. If they are put when they ought not to be, and the jury are misled by them, the verdict may be set aside, but it is no ground of going to a court of error. It is the same as with respect to the practice of turning witnesses out of court. If after an order to the witnesses to withdraw, one of them should remain, and the question should arise whether he might be examined or not, a different practice might be adopted by different judges. Some would exclude the testimony of such a person; but Mr. Baron Bayley said that he would not do so, but would fine the witness. That would not be a proper matter of appeal. It is a matter not of law, but of mere regulation."

That the discretion in permitting leading questions may be reviewed, see Peebles v. O'Gara Coal Co., 239 Ill. 370, 88 N. E. 166 (1909).

believes he shall gain more by his question if the answer is admitted, than he shall lose if the question and answer are both rejected. No doubt or presumption should prevent their rejection in such a case.

The third interrogatory to Rowell was free from objection, as admitting a mere affirmative or negative answer. It called for and received an answer in the language of the witness himself. But it was a leading question because it suggested to him that the answer desired related to "all but fifty acres of said lot," and assumed that the claim inquired of related to that. What claim was made was a matter in controversy. The question should have been modified at once, so as to obviate the objection. As that was not done the question and answer should be disallowed.

The fifth interrogatory was leading, because it admitted the answer yes or no. If the material point had been what line was denied, the closing part of the question would have prevented its being leading. The whole question together called for an answer in the language of the witness. But this interrogatory, though leading, was one which it was competent for the court to admit in the exercise of its discretion. The object of the question manifestly was to inquire what was not said; and it is not easy to conceive how such a question could be framed without turning the witness' attention directly to the very matter supposed not to have been said. A witness might be able to testify that certain things were said, and that nothing more was said. If he could not do that, no amount of testimony merely of what was said would prove that another thing was not said, and some form of question embracing the matter to be denied must be admissible. If it had been admitted on this ground there would be no objection.

* * *

New trial granted.

STATE v. BENNER.

(Supreme Judicial Court of Maine, 1874. 64 Me. 267.)

APPLETON, C. J.[90] Numerous exceptions have been alleged to the rulings and instructions of the justice presiding at the trial of the respondent. Those exceptions we propose to consider and discuss in the order of their presentation.

I. Henry J. Motz was called as a witness by the state. The objection is taken that he was cross-examined by the attorney general, and that leading questions were proposed to him.

The answers of a witness, honest and favorable to the party calling him, will obviously depend on the questions proposed. But the party calling will only propose those favorable to his interests. His interrogation will naturally be one sided and the answers partial and incom-

[90] Statement and part of opinion omitted.

plete—the inevitable result of incomplete and partial inquiry. Interrogation ex adverso, then, is indispensable—that thereby the errors of indistinctness, incompleteness, or incorrectness may be removed and the material facts developed fully, distinctly and correctly.

The witness called, being favorable to the party calling him and dishonest, the necessity of interrogation as a means of extracting the truth is at once perceived, and its value indefinitely increased. Is the witness indistinct, the needed inquiries remove all indistinctness. Is he incomplete, interrogation is the natural and obvious mode of obtaining the desired fullness and completeness. Is he incorrect, inquiry is the only way of detecting and rectifying incorrectness. Important as is the whole truth to correct decision, its attainment will be endangered unless the right of interrogation and cross-interrogation be conceded to the parties litigant to enable them to elicit such facts as from inadvertence, want of memory, inattention, sinister bias, or intentional mendacity may have been omitted.

But it may happen that the witness may be adverse in sympathy and interest to the party by whom he is called. Cross-examination of an opponent's witness is allowable. Why? Because, being called by him, it has been imagined that there was some tie of sympathy or interest, which would induce partiality on the part of the witness in favor of the party, who called him. If the witness is from any cause adverse to the party calling him, the same reasoning which authorizes and sanctions cross-examination, more or less rigorous, equally requires it when the party finds that the witness, whom the necessities of his case has compelled him to call, is adverse in feeling, is reluctant to disclose what he knows, is evasive or false. Important as interrogation may be, if the witness is friendly, to remove uncertainty and indistinctness, and to give fullness and clearness, doubly important is it, if the witness be dishonest and adverse, to extract from reluctant lips, facts concealed from sympathy, secreted from interest, or withheld from dishonesty. Cross-examination may be as necessary to elicit the truth from one's own, as from one's opponent's witness. When the necessity exists, equal latitude should be allowed in the one case as in the other. The occasion for the exercise of this right must be determined by the justice presiding. It can be by no one else. Its allowance is a matter of discretion, and not the subject of exception.

The presiding justice, finding Motz to be an unwilling witness for the state, allowed leading questions to be proposed; and permitted him to be cross-examined by the counsel calling him. This was in manifest furtherance of justice and in entire accordance with judicial decisions. Moody v. Rowell, 17 Pick. (Mass.) 490, 28 Am. Dec. 317; York v. Pease, 2 Gray (Mass.) 282; Green v. Gould, 3 Allen (Mass.) 465.

II. Where a witness, called by a party, appears adverse in interest to the party calling him, the presiding justice may, in his discretion, permit the party so calling him to ask leading questions. This permission

is discretionary on his part, and not subject to exception. The presiding judge seeing and hearing the witness, and observing his manner, is best able to determine whether he is hostile to the party calling him. In the present case, the presiding justice did determine that Motz was an unwilling witness, and one to whom leading questions might properly be proposed and his conclusion is not open to revision. * * *

Exceptions overruled.[91]

ANGELL v. ROSENBURY.

(Supreme Court of Michigan, 1864. 12 Mich. 241.)

The plaintiff, an assignee for the benefit of creditors, brought trespass against the sheriff for taking the assigned goods under process against the assignor. The defense set up was that the assignment was fraudulent. The plaintiff recovered in the court below.[92]

CHRISTIANCY, J. * * * The next error assigned is the rejection of the question put to the witness Hinman, asking him to state any reason or circumstance which led him to give particular attention to the four notes. To understand the nature of this objection, it is necessary to see how the question arose. Hinman had already testified that, in August, 1855, he was applied to by the plaintiff and Wilbur to aid in getting a compromise with the New York creditors. He told them that, to enable him to do so, they must make a statement of their matters; and they showed him four notes, as the basis of the plaintiff's claim. In this stage of the trial, as it would seem, while Hinman was still under examination as a witness, the plaintiff, under a notice from the defendant to produce the notes, produced the five notes which I have already described. The witness, after looking at the notes, testified: "I can not state whether the notes now produced are the same which were shown me by the plaintiff or not. If they are, I was mistaken in the date. My recollection is, that the four $1,000 notes shown me were dated June 15th, 1842. The same notes were soon afterwards shown me at the office of Harmon. The $750 note has the same appearance as the note just shown me. The other four differ, in my recollection, in the appearance of the paper and date. Those first shown me were clean. These are more dilapidated and worn. I gave the four notes particular attention as to their appearance, the ink, and the edges." He was then asked, on the part of the

[91] The judge may conduct the examination of a witness and may put leading questions, but he should not conduct the examination in that manner where it would be improper to permit counsel to do so. State v. Crotts, 22 Wash. 245, 60 Pac. 403 (1900).

For a collection of the cases on the right of the judge to call and examine witnesses and put leading questions, see notes to South Covington & C. St. Ry. Co. v. Stroh, 57 L. R. A. 875 (1902); Parker v. State, L. R. A. 1916A, 1190 (1915).

[92] Statement condensed and opinion on other points omitted.

defendant: "Will you state any reason or circumstance which led you to do so?" This was objected to, but the grounds are not stated, and the question was rejected.

We think the rejection of this question was erroneous. It was very important in determining the credit to be given to the witness's recollection, to know whether any, or what reason, existed at the time to induce the witness to give particular attention to the appearance of the notes. The value of his recollection would depend entirely upon the degree of attention with which he observed the facts, and the reasons which operated upon his mind to excite that attention, and to fix the facts in his memory. He should, therefore, have been allowed to state any facts [93] which had that effect, whether relevant to the issue or not. The rejection of the question was unfair, both to the defendant and the witness. We see nothing objectionable in the form or substance of the question. It was not leading; and the generality of its form was in some measure necessary to avoid suggesting any particular answer. * * *

Reversed.

COMMONWEALTH v. PHELPS.

(Supreme Judicial Court of Massachusetts, 1858. 11 Gray, 73.)

Indictment on St. 1855, c. 215, § 17, for being a common seller of spirituous and intoxicating liquors.

At the trial in the court of common pleas in Hampden, Morris, J., allowed the district attorney, against the defendant's objection, to ask witnesses for the commonwealth to recur in their own minds to their testimony before the grand jury, and then state when and how often they had obtained intoxicating liquors from the defendant.

SHAW, C. J.[94] 1. It is not a regular mode of assisting the recollection of a witness to recur to his recollection of his testimony before the grand jury. If it was not true then, it is not true now; if it was true then, it is true now, and can be testified to as a fact. Of what importance is the fact that he had a memorandum to aid him in testifying before the grand jury? To ask what he testified to before the grand jury has no tendency to refresh his memory. The fact of his having testified to it then is not testimony now. It is an attempt to substitute former for present testimony. * * *[95]

[93] But for this purpose the witness should not be allowed to detail prejudicial hearsay statements. Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99 (1868).

[94] Statement condensed and part of opinion omitted.

[95] But see Beaubien v. Cicotte, 12 Mich. 459 (1864), where counsel were allowed to call the attention of a witness to the notes of his former testimony where he had apparently forgotten a date.

PEOPLE v. KELLY.

(Court of Appeals of New York, 1889. 113 N. Y. 647, 21 N. E. 122.)

RUGER, C. J.[96] The defendant was indicted for the crime of murder in the first degree, for killing one Eleanor O'Shea, by striking her upon the head with a hammer, at the town of Geneva, in the county of Ontario, on the 6th day of November, 1888. At a trial in the court of oyer and terminer, held in said county in December, 1888, the defendant was convicted of the crime charged, and, in pursuance of the provisions of the Code of Criminal Procedure, as amended by chapter 493 of the Laws of 1887, has appealed directly to this court from the judgment entered upon his conviction. * * * The only other point made by the appellant of any importance is that raised by the objection to questions put to the witness Mahar by the people, respecting testimony previously given by him before the committing magistrate and the grand jury. Mahar had omitted to testify in detail to the movements of Kelly between the time when the deceased returned to the kitchen and the infliction of the fatal blow. With the obvious and avowed purpose of refreshing his recollection, the district attorney asked whether he had not previously sworn that Kelly moved coolly across from the north-east to the south-west corner of the room, where O'Shea stood, and also whether Kelly did not then address her in a low and quiet tone of voice. The witness admitted that he so testified, and, upon the further question as to whether that was the fact, he answered that it was. This was certainly quite material evidence, and, if it was true, was competent on the part of the people. The fact that he omitted to testify to it on his direct examination must be ascribed either to his forgetfulness or a disposition to befriend the accused by its suppression. He had given no evidence conflicting with his statement, and it tended in no degree to contradict his testimony. The manner in which it was drawn out might affect the credibility of the witness with the jury; but having affirmed the truth of the facts, aside from his admissions as to his testimony on the previous occasion, it was the province of the jury to give such credit to his evidence as it was entitled to. We are of the opinion, within the rule laid down in Bullard v. Pearsall, 53 N. Y. 230, that it was proper for the people to refresh the recollection of the witness in the manner pursued in this case. * * *

Affirmed.[97]

[96] Part of opinion omitted.

[97] See comments on this case in Putnam v. U. S., 162 U. S. 687, 16 Sup. Ct. 923, 40 L. Ed. 1118 (1896). See, also, Melhuish v. Collier, 15 Ad. & Ellis (N. S.) 878 (1850). Compare Com. v. Welsh, 4 Gray (Mass.) 535 (1855).

SANDWELL v. SANDWELL.

(Nisi Prius, 1697. Holt, 295.)

Case for scandalous words.

HOLT, C. J., said: Where a witness swears to a matter, he is not to read a paper for evidence, though he may look upon it to refresh his memory. But if he swears to words, he may read it, if he swears he presently committed it to writing, and that those are the very words.

LAWES v. REED.

(Court of Assizes, 1835. 2 Lewin, 152.)

ALDERSON, B., held in this case that a witness might refresh his memory from the notes of counsel taken on his brief at a former trial; and he mentioned the case of Balme v. Hutton, where a witness had been allowed to refresh his memory from a note taken by Mr. Baron Parke.

He, however, observed, that the witness must afterwards speak from a refreshed memory, and not merely from the notes.[98]

[98] Sir Gregory Lewin adds the following note to this case:

"Where the object is to revive in the mind of the witness the recollection of facts of which he once had knowledge, it is difficult to understand why any means should be excepted to whereby that object may be attained. Whether in any particular case the witness's memory has been refreshed by the document referred to, or he speaks from what the document tells him, is a question of fact open to observation, more or less, according to the circumstances. But if, in truth, the memory has been refreshed, and he is enabled in consequence to speak to facts with which he was once familiar, but which afterwards escaped him, it cannot signify in effect in what manner or by what means those facts were recalled to his recollection."

"Common experience tells every man, that a very slight circumstance, and one not in point to the existing inquiry, will sometimes revive the history of a transaction made up of many circumstances. The witnesses who come into the box to speak to facts of ancient date are generally schooled beforehand, and the means employed to refresh their memory are such as are deemed best calculated to accomplish that end. These persons afterwards swear to the facts from their own knowledge and recollection of them, and their testimony is received as a thing of course. Why, then, if a man may refresh his memory by such means out of court, should he be precluded from doing so when he is under examination in court? Bayley, J., held, that a witness might refresh his memory from a copy of a shop book; he having been originally acquainted with the facts themselves. 1 Lewin, C. C. 101. Starkie on that occasion referred the learned judge to the case of Tanner v. Taylor, Starkie on Ev. bk. 2, p. 128, 1st Ed. (1751), where Legge, B., held to the same effect.

"In a modern case, however, there is a dictum of Patteson, J., which directly contravenes the doctrine here contended for, and is also opposed to the cases in the text. That learned Judge is reported to have said: 'The copy of an entry not made by the witness contemporaneously does not seem to me to be admissible for the purpose of refreshing a witness's memory. The rule is, that the best evidence must be produced; and that rule appears

WELLMAN v. JONES.

(Supreme Court of Alabama, 1899. 124 Ala. 580, 27 South. 416.)

DOWDELL, J.[99] The contract here sued on is set out in the complaint as follows: "January 13, 1893. Huntsville, Ala. We, the undersigned, jointly and individually covenant and agree with Henry L. Jones that, if he will place his brother, John A. R. Jones, in the Hagey Institute, in the city of Huntsville, Ala., to be treated as a patient addicted to the excessive use of morphine and chloral, and the said Henry L. Jones will pay in cash the sum of one hundred dollars to the proper officer of the Hagey Institute, that we will return, on demand, to the said Henry L. Jones, the said sum of one hundred dollars, provided the said John A. R. Jones is not fully and permanently cured by the treatment of said Hagey Institute of the use and habit of morphine and chloral." * * *

The court also, against the objection and exception of the defendant, after proof of loss of the original contract, permitted plaintiff's witness Matthews to refer to that portion of the complaint setting out the contract as a memorandum to refresh the witness' memory, and also permitted the same to be read in evidence as a memorandum of the contract. The complaint was drawn by plaintiff's attorney, and this was some time after the loss of the original contract. The witness testified that some time before the suit was brought he was at the office of plaintiff's attorney, and there dictated his recollection of the contents of the lost contract, and the attorney wrote the same down. He did not identify the paper handed witness, which was the complaint, as being the one written at his dictation by the attorney. This witness, speaking with reference to the alleged memorandum, said: "I mean to say that these are the words that I gave Judge Richardson to put down. It is not my testimony that this is the paper [referring to the complaint which he then held in his hand] that was before me at that time. I do not know whether it is the same paper or not. I only testify to portions of the contract according to my recollection." The original contract is shown to have been placed in the hands of this witness under date of its execution, January 13, 1893; but it is not shown how long since he had seen it when he dictated his recollection of its contents written down by plaintiff's attorney. The complaint was filed January 4, 1894, a year after the execution of the contract. Presumably months had elapsed at the time of the dictation since the witness had seen the contract. Under this state of the evidence, the

to me to be applicable whether a paper be produced as evidence in itself or used merely to refresh the memory.' Burton v. Plummer, 2 A. & E. 341 (1834)."

In State v. Kwiatkowski, 83 N. J. Law, 650, 85 Atl. 209 (1912), it was held to be no objection to the testimony of a witness that he had examined certain notes and memoranda before appearing to testify.

[99] Statement and part of opinion omitted.

paper, not having been sufficiently identified as a memorandum made by the witness, or by another at his dictation, could not be used for the purpose of refreshing witness' memory as to the contents of the lost contract, and certainly was not admissible in evidence as a memorandum of the contents of the lost contract. Maxwell v. Wilkinson, 113 U. S. 656, 5 Sup. Ct. 691, 28 L. Ed. 1037; Calloway v. Varner, 77 Ala. 541, 54 Am. Rep. 78; Jaques v. Horton, 76 Ala. 238; Acklen's Ex'r v. Hickman, 63 Ala. 494, 35 Am. Rep. 54; 15 Am. & Eng. Enc. Law, 263. * * *

Reversed.[100]

DOE dem. CHURCH et al. v. PERKINS et al.

(Court of King's Bench, 1790. 3 Durn. & E. 749.)

The motion for a new trial came on the next day; when it appeared from the report that the title of the lessors of the plaintiff to the several premises for which the ejectment was brought was not in dispute; but that the only question was at what time of the year the annual holdings of the several tenants expired. That Aldridge, the witness, whose testimony was objected to, went round with the receiver of the rents to the different tenants, whose declarations respecting the times when they severally became tenants were minuted down in a book at the time; some of the entries therein being made by Aldridge, and some by the receiver. When Aldridge was examined the original book was not in court; but he spoke concerning the dates of the several tenancies from extracts made by himself out of that book, confessing upon cross-examination that he had no memory of his own of those specific facts; but that the evidence he was giving as to

[100] In State v. Patton, 255 Mo. 245, 164 S. W. 223 (1913), a witness having apparently forgotten some of the facts, the prosecuting attorney read to him from a paper not otherwise identified which purported to be the minutes of his testimony before the grand jury. Faris, J.: "The last clause of the above statement is not in accord with the view taken by Mr. Wigmore, the learned editor of the sixteenth edition of Greenleaf on Evidence (1 Greenleaf on Evidence [16th Ed.] 439c), where it is said that the memory of the witness may be refreshed by any paper, whether the same is known by the witness to be correct or not. This view of Mr. Wigmore has been followed by our St. Louis Court of Appeals. Eberson v. Colonial Investment Co., 130 Mo. App. loc. cit. 308 [109 S. W. 62 (1908)]. We do not find this statement of the learned author and of the Court of Appeals to be borne out either by the cases which he cites to support it, or by the great weight of the authorities which we have examined, and a few of which we cite. Wellman v. Jones, 124 Ala. 580, 27 South. 416 (1899); Acklen's Ex'r v. Hickman, 63 Ala. 494, 35 Am. Rep. 54 (1878); Doyle v. Illinois Cent. R. Co., 113 Ill. App. 532 (1904); Dryden v. Barnes, 101 Md. 346, 61 Atl. 342 (1905); Davis v. Allen, 9 Gray (Mass.) 322 (1857); Fritz v. Burriss, 41 S. C. 149, 19 S. E. 304 (1894); Greiner v. Insurance Co., 40 Pa. Super. Ct. 379 (1909); 40 Cyc. 2458. The ease with which, as Prof. Muensterburg tells us, the human mind is influenced by suggestion, would seem to form an insuperable psychological objection to the use of data for this purpose, of the correctness of which the witness is ignorant."

those facts was founded altogether upon the extracts which he had made from the above mentioned book. This evidence was objected to at the time on the part of the defendants, upon the ground that, as the witness did not pretend to speak to those facts from his own recollection, he ought not to be permitted to give evidence from any extracts, but that the original book from whence they were taken ought to be produced. The learned judge however being of a different opinion, the evidence was admitted, and the plaintiff had a verdict.[1]

On the following day Mr. Justice Buller read another MS. note of Tanner v. Taylor, Hereford Spring Assizes 1756. "In an action for goods sold, the witness who proved the delivery took it from an account which he had in his hand, being a copy [2] as he said, of the day book, which he had left at home; and it being objected that the original ought to have been produced, Mr. Baron Legge said, that if he would swear positively to the delivery from recollection, and the paper was only to refresh his memory, he might make use of it. But if he could not from recollection swear to the delivery any further than as finding them entered in his book, then the original could have been produced; and the witness saying he could not swear from recollection the plaintiff was nonsuited." And

LORD KENYON, C. J., said that the rule appeared to have been clearly settled, and that every day's practice agreed with it. And that comparing this case with the general rule, the court were clearly of opinion that Aldridge the witness ought not to have been permitted to speak to facts from the extracts which he made use of at the trial.

PER CURIAM. Rule absolute for a new trial.[3]

MAUGHAM v. HUBBARD et al.

(Court of King's Bench, 1828. 8 Barn. & C. 14.)

Assumpsit for money had and received Plea, not guilty. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after last term, it appeared that the action was brought to recover from the assignees of the bankrupt £20 paid by the plaintiff to the bankrupt before his bankruptcy. The bankrupt being called as a witness on the part of the plaintiff stated, that he had dealt with the plaintiff several years; that in November 1822, £20 was received from the plaintiff, which was not carried to the account. A rough cash-book kept by the plain-

[1] Statement condensed. During the course of the argument Lord Kenyon read a manuscript note of the case, reported anonymously in Ambler, 252, ante, p. 317.

[2] See Folsom v. Apple River Log-Driving Co., 41 Wis. 602 (1877), where a witness was allowed to use a copy of a memorandum made by him.

[3] In Beech v. Jones, 5 C. B. 696 (1848), it was held that a witness who had no present recollection could not testify from his examination of an entry in a book not produced in court.

tiff was then put into his hands; in which there was the following entry: "4th of November 1822. Dr.—R. Lancaster. Check £20 R. L." The bankrupt then said, "The entry of £20 in the plaintiff's book has my initials, written at the time; I have no recollection that I received the money; I know nothing but by the book; but seeing my initials, I have no doubt that I received the money." It was contended that the paper on which this entry was made ought to have been stamped as a receipt; but Lord Tenterden, C. J., was of opinion, that though it was not itself admissible in evidence to prove the payment of the money the witness might use it to refresh his memory; and that his having said that he had no doubt that he received the money was sufficient evidence of the fact. A verdict was found for the plaintiff, but liberty was reserved to the defendant to move to enter a nonsuit, if the Court should be of opinion that this evidence ought not to have been received.

LORD TENTERDEN, C. J. In order to make the paper itself evidence of the receipt of the money it ought to have been stamped. The consequence of its not having been stamped might be, that the party who paid the money, in the event of the death of the person who received it, would lose his evidence of such payment. Here the witness, on seeing the entry signed by himself, said that he had no doubt that he had received the money. The paper itself was not used as evidence of the receipt of the money, but only to enable the witness to refresh his memory; and when he said that he had no doubt he had received the money there was sufficient parol evidence to prove the payment.[4]

BAYLEY, J. Where a witness called to prove the execution of a deed sees his signature to the attestation, and says that he is, therefore, sure that he saw the party execute the deed, that is a sufficient proof of the execution of the deed, though the witness add that he has no recollection[5] of the fact of the execution of the deed.

Rule refused.

[4] In the report of this case in 2 Man. & Ry. 5, the opinion of Lord Tenterden is given as follows: "The bankrupt, upon looking at the plaintiff's books, said, that seeing his own initials to the receipt there, he had no doubt whatever that he had received the money. I think that amounted to a statement that he knew and recollected, independently of the book, that the money had been paid to him. If that be so, the question with respect to the stamp becomes immaterial, because then the book may be regarded as used only for the purpose of refreshing the witness's memory, which it was allowable to do, though it had no stamp. If it had been wished to use the book as evidence per se, it would undoubtedly have required a receipt stamp, because the entry amounted to a receipt in meaning."

[5] Where the witness has no present recollection, he must be able to testify that the facts were correctly set down in the memorandum. Diamond Glue Co. v. Wietzychowski, 227 Ill. 338, 81 N. E. 392 (1907).

HAVEN v. WENDELL et al.

(Supreme Judicial Court of New Hampshire, 1840. 11 N. H. 112.)

Assumpsit, on a bank check, drawn by Isaac Wendell, and indorsed by the defendants, who are partners under the firm of A. & J. Wendell.

There was also a count for money lent.

On the trial the plaintiff produced the bank check mentioned in the first count, the signature and indorsement of which were admitted. He also produced as a witness, John Have, who testified that he had a conversation with Abraham Wendell, one of the defendants, on the pavement in front of the New Hampshire Bank, on the subject of this check, some time after the failure of the defendants. He could not now recollect the particulars of that conversation, or when it took place, further than that said Wendell said he considered himself holden as indorser thereon; and that he the witness supposing the facts then stated might be useful to the plaintiff, went immediately into the bank, and made a memorandum of them, in writing, which he gave to the plaintiff. That the conversation was stated when the matter was fresh in his recollection; and if he had been called upon, soon after, to testify upon the subject, he should have sworn from memory to every particular there stated.

A paper being shown to him, he said that was the memorandum, but he could not from reading it undertake to say that he now recollected the facts, or knew them, otherwise than by finding them in his hand writing; but he had no doubt they were true, and that he should have sworn to them from recollection at or near the time. The memorandum referred to was as follows:

"Abraham Wendell said to me, this 30th day of October, 1828, that he left, some time since, with William Haven, cashier of the New Hampshire Bank, a check, signed by Isaac Wendell, on the Branch Bank, Portsmouth, drawn payable in a few days, which check was in favor of Abraham and Jacob Wendell, and indorsed by them; that said William Haven paid them the amount of said check, in a note against their mother and in cash; that at or before the time the check was due, he called on Mr. Have, and requested, as from his brother Isaac, that he would delay for a few days longer the presentation of the check, which he consented to, during which delay they all failed; that he now considered the firm of A. & J. Wendell held as indorsers of said check. J. H."

Said memorandum, with the testimony of the witness, as before mentioned, was admitted as evidence; to which the defendants excepted, and moved for a new trial.

PARKER, C. J.[6] If a witness may use a memorandum, made by him at the time when the facts are alleged to have taken place, for the

[6] Part of opinion omitted.

purpose of refreshing his memory only, this verdict must be set aside. The memorandum itself was here admitted in evidence, in connection with his testimony that he heard certain matters, that he made a memorandum of those matters, that this is that paper, and that it is a true statement of what then took place. The memorandum, therefore, became part of the testimony of the witness; and the question is, whether the paper itself may be received to show the particulars of what then occurred, the witness testifying that he has now no recollection of all the particulars, but that he has no doubt the facts there stated are true, and that he should, within a short time subsequent, have sworn to them from his recollection.

It is not to be doubted that the ruling in some cases heretofore would exclude the testimony. But the cases on this branch of evidence have not been uniform, and it becomes necessary to make an extended examination of some of them. * * *

These are some of the principal authorities [7] bearing upon this question. If it be conceded that none of them come up precisely to this case, there are several so near that the difference is hardly sufficient for the foundation of a sound distinction.

And we are of opinion that the admissibility of the paper in evidence, in connection with, and as a part of the testimony of the witness, may be established upon the soundest principles.

It is not disputed that the witness might have been admitted to testify to these facts as existing in his recollection. If the paper be authentic, his record of the fact, made at the time when he was much less liable to mistake, is much better than his recollection of the facts so long afterwards.

It is agreed, and no doubt exists, that he might refer to the paper to refresh his recollection, and then testify to the facts there stated, as existing in his recollection. But if he has not a recollection without the use of the paper, the evidence is after all derived mainly from the paper, and is no better than his declaration that he made the paper at the time—that he has no doubt it contains the facts as they took place—that he should have sworn to them soon after, from memory, although he does not now recollect them except by the paper.

So far from the admission of such testimony being dangerous, there is less danger than in the admission of the evidence of the witness that he recollects the facts, without the production of the paper as part of

[7] In the omitted passage the court reviewed Doe v. Perkins, 3 D. & E. 749 (1790); Tanner v. Taylor, cited in Doe v. Perkins; Hart v. Wilson, 2 Wend. (N. Y.) 513 (1829); Russell v. Coffin, 8 Pick. (Mass.) 143 (1829); Wheeler v. Hatch, 12 Me. 389 (1835); Maughan v. Hubbard, 8 B. & C. 14 (1828); Burton v. Plummer, 2 Ad. & E. 341 (1834); Lawrence v. Barker, 5 Wend. (N. Y.) 301 (1830); Feeter v. Heath, 11 Wend. (N. Y.) 485 (1833); Merrill v. Ithaca & O. R. Co., 16 Wend. (N. Y.) 586, 30 Am. Dec. 130 (1837); Sandwell v. Sandwell, 2 Comb. 445 (1697); Clark v. Vorce, 15 Wend. (N. Y.) 193, 30 Am. Dec. 53 (1836); Wilbur v Selden, 6 Cow. (N. Y.) 165 (1826); Clute v. Small, 17 Wend. (N. Y.) 238 (1837); Alvord v. Collins, 20 Pick. (Mass.) 418 (1838).

his statement; for the opposite party has the advantage of an inspection of the paper, and of cross examination founded upon its appearance, and respecting all the particulars stated in it.

If the witness is unprincipled enough to fabricate a memorandum, or use a fabricated paper, he can as readily swear to the facts it contains as existing in his recollection, and that he made the paper which he uses at the time, as he can that he made the one which he produces, and which becomes part of his testimony by his statement that he made it at the time, and has no doubt it contains a true statement of what took place. If false, he may as readily be convicted of perjury in the latter case as in the former, and perhaps more readily, as the paper itself may assist.

A plot may be quite as easily framed, and carried into execution, where the recollection is required to come up to the contents of the paper, as if the paper itself may be received. There is as little difficulty in manufacturing testimony in that way as the other.

By the opposite course of excluding the evidence, a just case is made to depend upon the strength of memory of the witness, or upon his being less scrupulous than another in his statements. One case is saved because the memory of the witness is strong, and another lost because the memory is less retentive. This undoubtedly is true in relation to many cases, but the instances should not be multiplied without necessity. One witness, after having examined the memorandum, and having no doubt the facts are true, will finally imagine, and swear, that he recollects them; while another, of a more scrupulous conscience, will not go beyond the testimony given by the witness in this present case.

If it be said that such evidence ought not to be admitted, because the witness, however honest, may have set down but a part of what took place, and after the lapse of time forgotten all the residue; the same remark applies with equal force when he uses a written memorandum, and thereby brings his flagging recollection up to a statement of its contents.

It will be for the jury to judge, from the matter and manner of the testimony, as connected with all the circumstances of the case, how much dependance is to be placed upon the testimony thus derived.[8]

[8] A witness was probably always allowed to read certain memoranda to the jury as a part of his testimony, as appears from the statement by Lord Holt in Sandwell v. Sandwell, Holt, 295 (1697). But there has been more or less uncertainty as to whether the paper was technically in evidence and whether it could be exhibited to the jury in connection with the testimony. This quibble was disposed of by the Supreme Court of Connecticut on the following common-sense reasoning in Curtis v. Bradley, 65 Conn. 99, 31 Atl. 591, 28 L. R. A. 143, 48 Am. St. Rep. 177 (1894): "All courts concur in holding that the witness may read the statement of such paper to the jury, and that the jury may draw the conclusion that the statement so read to them is a true statement of the facts; but some courts hold that the paper is not evidence. It seems to us to be pressing the use of a legal fiction too far, for a court to permit the statement made by such paper to be read as

DYER v. BEST.

(Court of Exchequer, 1866. 4 Hurl. & C. 189.)

At the trial before Channell, B., at the last Staffordshire Summer Assizes, it appeared that the action was brought under "The Commissioners Clauses Act, 1847" (10 & 11 Vict. c. 16), to recover penalties in respect of the defendant having, whilst disqualified, acted as a Commissioner under "The Town of Burton upon Trent Act, 1853" (16 & 17 Vict. c. cxviii), with which "The Commissioners Clauses Act, 1847," is incorporated. The defendant carried on the business of a carpenter and builder in partnership with one Bowler, and at various times between the years 1859 and 1865 they were employed by Commissioners to do work for which they were paid. The plaintiff proved that he was present at a board meeting of the Commissioners in July, 1860, and that the defendant was also present at that meeting, and acted as a Commissioner. The plaintiff also stated that the defendant attended board meetings, and acted as a Commissioner

evidence, while holding that the law forbids the admission as evidence of the paper which is the original and only proof of the statement admitted. In other words, it would seem as if in admitting the paper to be so read, the court of necessity admitted the paper as evidence, and therefore, by the concurrent authority of all courts, the paper is itself admissible."

And so in Halsey v. Sinsebaugh, 15 N. Y. 485 (1857). Compare Savage, C. J., in Lawrence v. Barker, 5 Wend. (N. Y.) 301 (1830): "The next question is whether the last witness called by the defendant should have been permitted to read his memorandum or state its contents. The rule is that a written memorandum may be referred to by a witness to refresh his memory, but he must swear to the truth of the facts or his statement is not evidence. 1 Stark. 129; 3 T. R. 749. It is not sufficient for him to swear that he made a memorandum which he believes to be true, and that he relies upon it without any present recollection of the facts. This is the extent to which the witness could go. The judge, therefore, properly refused to receive his statement as evidence. The case of Tanner v. Taylor, stated in Doe v. Perkins, 3 T. R. 754 (1790); was an action for goods, and the witness had in his hand a copy of the day book. Baron Legge said that if he would swear positively from recollection, he might use the paper to refresh his recollection; but if he could only swear to the delivery from seeing the charges in a book, the original entries must be produced. That case does not prove that the original memorandum should have been received in this case. In case of goods sold and delivered, a merchant's books are evidence to a certain extent, but that is very different from a memorandum made by a witness, for his own convenience, not sanctioned by the parties, and where no necessity exists requiring the admission of such a paper, as is frequently the case in respect to merchants' books."

The reason does not apply to papers and memoranda merely used to stimulate memory, though it might be proper for the adverse party to show them to the jury in connection with the cross-examination. Hawken v. Daley, 85 Conn. 16, 81 Atl. 1053 (1911).

There seems to be no reason for allowing a paper to be read to the jury where the witness testifies from present memory. People v. McLaughlin, 150 N. Y. 365, 44 N. E. 1017 (1896); Mattison v. Mattison, 203 N. Y. 79, 96 N. E. 359 (1911). The effect would be to corroborate the witness by the fact that he had previously stated the same thing in writing, as to which see section on Corroboration and Support, post, p. 412.

on the 3d day of September, 1862, the 6th of May, 1863, the 6th of January, 1864, the 3d of February, 1864, and the 24th of June, 1864. On cross-examination, the plaintiff stated that he had no recollection of the particular days on which the defendant acted as a Commissioner; but he had a recollection of seeing the defendant so acting on several occasions, and he regularly took in a weekly newspaper which contained reports of what took place at the meetings of the Commissioners, and whenever there was a report of the proceedings at meetings at which he was present he used to read it. He made no memorandum at the time; but by referring to those newspapers, which he had ever since kept, he was enabled to fix the particular days on which the defendant acted as a Commissioner. The defendant's counsel submitted that the witness was not at liberty to refresh his memory by referring to these newspapers, but the learned Judge overruled the objection, and admitted the evidence.[9] [A verdict was entered for plaintiff for £200., with leave to defendant to move to reduce the amount.]

Gray, in the following Term, moved for a rule nisi accordingly, and also for a new trial * * * on the ground of the improper reception of evidence. The learned Judge ought not to have allowed the witness to refresh his memory by referring to the newspapers. A witness may refresh his memory by looking at memoranda made by himself or some person in his presence; but here the witness made no memorandum whatever at the time he read the newspapers. [POLLOCK, C. B. If a man, at the time he has a recollection of certain facts, reads a document containing a statement, which he knows to be true, of those facts, he may again refer to it to refresh his memory, although at the time he first read it he made no memorandum.]

PER CURIAM. We are all of opinion that upon this point there ought to be no rule.[10]

INSURANCE CO. v. WEIDES.

(Supreme Court of the United States, 1871. 14 Wall. 375, 20 L. Ed. 894.)

A fire having occurred and the goods insured having been burnt, the Weides sued the companies on the policies. On the trial it became material to prove what was the quantity and value of the goods which the plaintiffs had when the fire occurred. As bearing upon this, evidence was introduced, without objection, tending to show that the

[9] Statement condensed and opinions omitted.

[10] For the use of newspapers or reports made by a third person, to aid in recalling matters, see Miner v. Phillips, 42 Ill. 123 (1866); Huff v. Bennett, 6 N. Y. 337 (1852); The J. S. Werden, 219 Fed. 517, 135 C. C. A. 267 (1914), in which a large number of cases are collected.

plaintiffs took a correct inventory of their stock on the 28th of February, 1866, which was correctly reduced to writing by one of them in an inventory book; that the prices or values were correctly footed up therein; that at the same time the footings were correctly entered by one of the plaintiffs upon the fly-leaf of an exhausted ledger, and afterwards transferred also by one of the plaintiffs to the fly-leaf of a new ledger; that neither of the plaintiffs could remember the amount of such inventory or footings, and that both the inventory book and the exhausted ledger had been destroyed. The plaintiffs then offered the entry of the footings upon the fly-leaf of the new ledger, which the court, in the face of objection by the other side, received.

The reception of this evidence made the first exception.[11]

Mr. Justice STRONG delivered the opinion of the court.

It is contended in the first place, that there was error in the court's receiving the entry of the footings upon the fly-leaf of the new ledger. It will be observed that the footings upon the fly-leaf of the ledger were not offered or received as independent evidence. They were accompanied by proof that they were correct statements of the values of the merchandise, and that they were correctly transcribed either from the inventory book or from the fly-leaf of the exhausted ledger, both of which appear to have been originals. How far papers, not evidence per se, but proved to have been true statements of fact, at the time they were made, are admissible in connection with the testimony of a witness who made them, has been a frequent subject of inquiry, and it has many times been decided that they are to be received. And why should they not be? Quantities and values are retained in the memory with great difficulty. If at the time when an entry of aggregate quantities or values was made, the witness knew it was correct, it is hard to see why it is not at least as reliable as is the memory of the witness. It is true a copy of a copy is not generally receivable for the reason that it is not the best evidence. A copy of the original is less likely to contain mistakes, for there is more or less danger of variance with every new transcription. For that reason even a sworn copy of a copy is not admissible when the original can be produced. But in this case the inventory book and the fly-leaf of the exhausted ledger had both been burned. There was no better evidence in existence than the footings in the new ledger. And we do not understand the bill of exceptions as showing those footings to have been copied from a copy. It does not appear whether they were taken from the inventory book or from the fly-leaf of the old ledger. And it is of little importance, for as those entries were made at the same time, neither ought to be regarded as a copy of the other, but rather both should be considered originals. We do not, however, propose to dis-

[11] Statement condensed and part of opinion omitted.

cuss this exception at length, for we regard it as settled by the decision in Insurance Company v. Weide, 9 Wall. 677, 19 L. Ed. 810, that the evidence under the circumstances was properly received. * * *

Affirmed.[12]

PECK v. VALENTINE.

(Court of Appeals of New York, 1884. 94 N. Y. 569.)

The complaint in this action alleged, in substance, that defendant was employed by J. Melner Peck, the original plaintiff and the present plaintiff's intestate, as his agent to conduct and carry on the lumber business at the lumber yard of said Peck; that said defendant sold a large quantity of lumber and received the pay therefor, for which he failed to account, but embezzled and converted the same to his own use.

The facts, so far as material, are stated in the opinion.

ANDREWS, J. The plaintiff, for the purpose of proving that the defendant had not entered in the cash-book all the moneys received by him from sales of lumber, called one Leggett as a witness, who testified that in July, 1879, he was employed by the plaintiff in his lumber yard, and kept on a loose piece of paper an account of moneys received by the defendant from sales of lumber from the 1st to the 18th of that month; that the entries were made each day continuously, except Sunday, and were correct; that he gave the paper to the plaintiff, and that the defendant never saw it. The plaintiff testified, that he received the memorandum from Leggett, and had lost it, but that he copied the figures correctly into a memorandum-book (which he produced) and that the entries had not been altered. The entries in the memorandum-book were then offered and received in evidence, under the defendant's objection.

We think the entries were not competent evidence. The original memorandum, if it had been produced, could have been used by Leggett to refresh his recollection; or if he had forgotten the facts stated, and could not on seeing the memorandum recall them, yet if he had been able to state that it was a true statement of the transactions, known to him at the time, it could have been read in evidence in connection with, and as auxiliary to his testimony. Guy v. Mead, 22 N. Y. 462. But the adverse party on production by the witness of the memorandum would have had the right of inspection and cross-examination, a right of great importance as a protection against fabricated evidence. Stephens on Evidence, art. 136; Cowen, J., Merrill

[12] In Erman v. State, 90 Neb. 642, 134 N. W. 258, Ann. Cas. 1913B, 577. (1912), it was held that a reporter might make similar use of an article in a newspaper, his original manuscript having been destroyed.

For the general rules requiring the production of original documents, and excluding copy if the original is available, see chapter VI, section 1.

v. Ithaca, etc., R. R. Co., 16 Wend. 600, 30 Am. Dec. 130. In this case the memorandum was not produced and Leggett was not sworn as to its contents, for the reason doubtless that he could not remember what it contained. The only evidence to connect the entries in the plaintiff's book with the original memorandum, or establish, the amount of money received by the defendant during the time stated, was the oath of the defendant that the entries were a true transcript from the memorandum in connection with the testimony of Leggett, and the memorandum was a true statement of the transactions at the time. The original memorandum was the mere declaration of Leggett in writing of certain facts observed by him. The case is not distinguishable in principle from what it would have been if there had been no memorandum and the plaintiff had been permitted to prove the oral representations of Leggett to him of the same facts. This would be mere hearsay, and the fact that the statement instead of being oral was written does not alter the character of the evidence.

A similar question was presented in Clute v. Small, 17 Wend. 238. The plaintiff in that case sought to prove an admission of the defendant made to the sheriff at the time of the service of the writ, and was permitted to prove the contents of a letter written by the sheriff to the plaintiff's attorneys on returning the process, in which he reported the admission made by the defendant. The letter was lost and the sheriff testified that he could not recollect the contents of the letter or what the defendant had said, but that what he wrote was undoubtedly as stated by the defendant. The evidence of the sheriff was held to be inadmissible; Cowen, J., saying: "There was only one of two ways in which he could be allowed to speak; that is, either from positive recollection or from seeing the letter and knowing it to be his own statement." And again: "The inquiry here was no more than the common one to a witness; would you have asserted such a matter unless it had been true? and on obtaining the witness' affirmative answer, going on to prove what he did say."

The substantive fact sought to be proved in this case was the receipt by defendant of moneys for which he had not accounted. It could be proved by any competent common-law evidence. But the original memorandum of Leggett was not original or primary evidence to charge the defendant. It was not a writing inter partes, nor one creating rights or of which rights could be predicated, as a will, contract or deed; nor was it a record of transactions in the ordinary course of business, as books of account, nor a paper made by the defendant, or to which he was in any way privy. It was apparently a private statement of an exceptional transaction, made by an agent in aid of his memory, for the information of his principal. The facts stated were relevant and could be proved by any one who could testify to their existence, either directly, as matter of personal recollection, or from a memorandum made by him, which he could verify as true. The entries in the plaintiff's book were not authenticated by

Leggett. Whether they were a correct transcript of his original memorandum depended solely upon the plaintiff's evidence. The original memorandum was not a writing the contents which if lost, could be proved by secondary evidence. The rule upon that subject relates to writings which are in their nature original evidence, and in case of loss, their contents are from necessity allowed to be proved by parol. We think the admission of the entries from the plaintiff's book was not justified by any rule heretofore established, and to extend the rule so as to admit a copy of a memorandum not in its nature original evidence of the facts recorded, and not verified by the party who made the original and knew the facts, would open the door to mistake, uncertainty and fraud, a consequence far more serious than would flow from a restriction which in a particular instance might seem to prevent the ascertainment of truth.

For the error in admitting the entries the judgment should be reversed and a new trial ordered. All concur.

Judgment reversed.[18]

MAXWELL'S EX'R v. WILKINSON et al.

(Supreme Court of the United States, 1885. 113 U. S. 656, 5 Sup. Ct. 691, 28 L. Ed. 1037.)

This is a writ of error by the executors of a former collector of the port of New York to reverse a judgment in an action brought against him by the defendants in error on January 11, 1855, to recover back the amount of duties paid by them on imported iron on October 23, 1852.

Upon a second trial, the main question was whether the duties had been paid under protest. The plaintiffs introduced evidence tending to show that the entry of the goods, to which any protest would have been attached, could not be found at the custom house, and called William S. Doughty, a clerk of their consignees, who produced a copy of a protest, purporting to be dated October 13, 1852, and to be signed by the consignees, and having upon it these two memoranda: First, in pencil, "Handed in on the 23rd day of October, 1852." Second, in ink, "The above protest was handed to the collector the 23d day of October, 1852. New York, June 16th, 1854. Wm. S. Doughty."

Doughty, on direct examination, testified that he handed the original, of which this was a copy, to the collector on October 23, 1852. Being then cross-examined by leave of the court, he testified that the memorandum in ink was written by him on June 16, 1854; that he had previously made the memorandum in pencil so as to be able to make a statement in ink at some future time; that he did not know

[18] If a witness never had personal knowledge of a fact, he cannot supply that lack by reference to a paper or memorandum. Kaplan v. Gross, 223 Mass. 152, 111 N. E. 853 (1916).

when he made the pencil memorandum; that he could not tell, otherwise than as his memory was refreshed by the memorandum, that he ever filed a protest with the collector; that he had no recollection now that he filed such a protest; but that he must have done it because it was his duty to do it; and that he was willing to swear positively that he did so, because he had signed a statement to that effect, and his habit was never to sign a statement unless it was true. The witness then, by permission of the court, voluntarily stated as follows: "The fact that the statement was made two years after was when there was sufficient data for me unquestionably to make that statement at the time two years afterwards. Probably there were memoranda which were destroyed long ago."

The defendant's counsel thereupon objected to the admission in evidence of the alleged copy of the protest.

The court overruled the objection, and admitted the copy of the protest in evidence, and, a verdict being returned for the plaintiffs, allowed a bill of exceptions to its admission.[14]

GRAY, J. The witness, according to his own testimony, had no recollection, either independently of the memoranda, or assisted by them, that he had filed a protest with the collector; did not know when he made the memorandum in pencil; made the memorandum in ink 20 months after the transaction, from the memorandum in pencil, and probably other memoranda, since destroyed and not produced, nor their contents proved; and his testimony that he did file the protest was based exclusively upon his having signed a statement to that effect 20 months afterwards, and upon his habit never to sign a statement unless it was true. Memoranda are not competent evidence by reason of having been made in the regular course of business, unless contemporaneous with the transaction to which they relate. Nicholls v. Webb, 8 Wheat. 326, 337, 5 L. Ed. 628; Insurance Co. v. Weide, 9 Wall. 677, 19 L. Ed. 810, and 14 Wall. 375, 20 L. Ed. 894; Chaffee v. U. S., 18 Wall. 516, 21 L. Ed. 908.

It is well settled that memoranda are inadmissible to refresh the memory of a witness, unless reduced to writing at or shortly after the time of the transaction, and while it must have been fresh[15] in

[14] Statement condensed and part of opinion omitted.

[15] See elaborate opinion to same effect in Putnam v. U. S., 162 U. S. 687, 16 Sup. Ct. 923, 40 L. Ed. 1118 (1896), reviewing a large number of cases.

For a different view, see Mahoney's Adm'r v. Rutland R. Co., 81 Vt. 210, 69 Atl. 652 (1907), where a witness had been permitted to refer to a transcript of his testimony on a former trial. Munson, J.:

"It remains to consider the reliability of the writing as affected by the time when the statement of the witness was made and recorded. It seems clear to us, notwithstanding the high authority cited by defendant's counsel in support of his position, that the want of contemporaneous origin is not an adequate ground for excluding a writing like this from the use in question. Such a writing will often be a safer reminder than an incomplete private memorandum made soon after a transaction to preserve the writer's recollection of what he saw of it or the part he took in it. It presents a state-

his memory. The memorandum must have been "presently committed to writing," Lord Holt in Sandwell v. Sandwell, Comb. 445; S. C. Holt, 295; "while the occurrences mentioned in it were recent, and fresh in his recollection," Lord Ellenborough in Burrough v. Martin, 2 Camp. 112; "written contemporaneously with the transaction," Chief Justice Tindal in Steinkeller v. Newton, 9 Car. & P. 313; or "contemporaneously or nearly so with the facts deposed to," Chief Justice Wilde (afterwards Lord Chancellor Truro) in Whitfield v. Aland, 2 Car. & K. 1015. See, also, Burton v. Plummer, 2 Adol. & E. 341; S. C. 4 Nev. & Man. 315; Wood v. Cooper, 1 Car. & K. 645; Morrison v. Chapin, 97 Mass. 72, 77; Spring Garden Ins. Co. v. Evans, 15 Md. 54, 74 Am. Dec. 555.

The reasons for limiting the time within which the memorandum must have been made are, to say the least, quite as strong when the witness, after reading it, has no recollection of the facts stated in it, but testifies to the truth of those facts only because of his confidence that he must have known them to be true when he signed the memorandum. Halsey v. Sinsebaugh, 15 N. Y. 485; Marcly v. Shults, 29 N. Y. 346, 355; State v. Rawls, 2 Nott & McC. (S. C.) 331; O'Neale v. Walton, 1 Rich. (S. C.) 234.

In any view of the case, therefore, the copy of the protest was erroneously admitted, because the memorandum in ink, which was the only one on which the witness relied, was made long after the transaction which it purported to state; and its admission requires that the judgment be reversed, and a new trial ordered.

ment made by the witness when summoned to the best effort of his recollection by the caution and obligation of an oath, when his attention was directed to the material facts by competent inquiries, and when his remembrance was tested and corrected by an examination in the interest of the party against whom he was called. If not his freshest recollection, it was such as he had when called upon by the law to give his recollection, and such that it was received by the court for use in the determination of the case. It is hardly consistent to say that a party may have the full benefit of the transcript on another trial if the witness dies or removes from the State, but cannot be allowed the use of it to refresh a weak or confused recollection.

"The conflict upon this subject has centered mainly around the case of Melhuish v. Collier, 15 Q. B. 578, 19 L. J. Q. B. 493 (1850). The most extended review of the cases is that in Putnam v. United States, 162 U. S. 687, 16 Sup. Ct. 923, 40 L. Ed. 1118 (1896), where inquiries of this character were held inadmissible, three of the judges dissenting. Mr. Justice White, the writer of the majority opinion, argues that the contrary view rests upon the mistaken construction of the English decision. But Mr. Wigmore thinks the mistaken construction is that presented in the Putnam Case. Section 761, note."

To the same effect, Portsmouth St. Ry. Co. v. Peed's Adm'r, 102 Va. 662, 47 S. E. 850 (1904), transcript of former testimony; Johnston v. Farmers' Fire Ins. Co., 106 Mich. 96, 64 N. W. 5 (1895), memorandum made shortly before the trial.

III. Cross-Examination

CAZENOVE et al. v. VAUGHAN.

(Court of King's Bench, 1813. 1 Maule & S. 4.)

Park in the last term obtained a rule nisi for entering a non suit in this action, which was upon a policy of assurance, (in which the plaintiffs had recovered a verdict before Lord Ellenborough, C. J., at the London sittings,) upon an objection made to the admissibility of the deposition of one Lewis Plitt, which had been received in evidence for the plaintiffs; respecting which it appeared by his Lordship's report, that the plaintiffs, after the commencement of this action on the 5th of May last filed a bill in the Court of Chancery against the defendant, for a commission to examine witnesses abroad, and for the examination of the said Plitt de bene esse, to which the defendant did not put in any answer; on the 15th of May the plaintiffs obtained an order of the Court for the examination of Plitt de bene esse, and gave regular notice thereof to the defendant, and served him with a copy of the interrogatories in chief; and the witness was examined on the evening of that day; at which time no cross-interrogatories were filed, nor did any one on the part of the defendant attend such examination. On the 25th of June following the plaintiffs obtained a further order for publication, which after reciting that it was prayed that the depositions of Plitt, taken de bene esse in the cause, under the order of that Court might be published, in order that the same might be read as evidence for the plaintiffs at the trial of this and other actions mentioned in the bill; the order then proceeded thus, "whereupon and upon hearing counsel for the defendant, this Court doth order that the depositions of L. Plitt in this cause be forthwith published." On the day after his examination Plitt, who was a foreigner, left London for the coast, from whence he embarked in a few days for Sweden, where he still remains.

Lord Ellenborough, C. J.[16] Perhaps it may be as well to state what the rule of the common law is upon this subject, which puts an end to the question. The rule of the common law is, that no evidence shall be admitted but what is or might be under the examination of both parties; and it is agreeable also to common sense, that what is imperfect, and, if I may so say, but half an examination, shall not be used in the same way as if it were complete. But if the adverse party has had liberty to cross-examine, and has not chosen to exercise it, the case is then the same in effect as if he had cross-examined; but otherwise the admissibility of the evidence would be made to depend upon his pleasure, whether he will cross-examine or not; which would be a most uncertain and unjust rule. Here then the question is

[16] Opinions of Le Blanc and Bayley, JJ., omitted.

whether the defendant had an opportunity of cross-examining. Now it appears that the plaintiffs filed their bill for the express purpose of examining the witness; and when they obtained the order for his examination, gave the defendant a regular notice of it, and of the interrogatories intended to be put to the witness. But it is said that the defendant had no time to file cross-interrogatories, and therefore the notice was of no use; yet if he had intimated a wish to cross-examine, and addressed himself to the Court praying for further time for that purpose, there can be no doubt that he might have obtained it; but he contents himself simply with paying no attention to the notice. Then comes the order for publication, which is obtained, as it appears from the terms of the order after hearing counsel on the part of the defendant, who therefore had an opportunity of shewing cause against it. The order for publication recites, "that it was prayed that the depositions of the witness may be published in order that the same may be read as evidence for the plaintiffs at the trial," and directs as follows: "Whereupon this Court doth order that the depositions be forthwith published." The order therefore purports in its mandatory part, to act upon and adopt the purpose for which it is prayed in the reciting part; i. e., the special purpose of having the deposition read in evidence at the trial; for it is not limited by the Judge who directed it, to any object short of that for which it was prayed. I must conclude then that the Judge was satisfied before he directed such order to be made, that the adverse party had all the liberty to cross-examine which the practice of that Court requires; and upon the principle of the common law I have already stated that there is no objection.[17]

RUSH v. SMITH.

(Court of Exchequer, 1834. 1 Cromp. M. & R. 94.)

Trespass for seizing and carrying away two horses and certain other property of the plaintiff. Plea—Not guilty.

At the trial before Vaughan, B., at the last Lent Assizes for the county of Suffolk, the officer who had made the distress for which this action was brought, was subpœnaed to produce the warrant of distress, and, being put into the box, was by mistake sworn; and the following question was put to him by the plaintiff's counsel—"Were you employed as bailiff, and had you any warrant?" but no answer was made. Storks, Serjt., for the defendant, insisted on his right to cross-examine the witness, as he had been sworn; but the learned Judge ruled, that, as he had not been examined, such right did not exist; and Storks

[17] Modern statutes frequently prescribe the notice to be given to the adverse party on the taking of depositions; in such cases the party cannot be treated as waiving cross-examination, in the absence of proper notice, unless he actually attends the proceeding.—*Ed.*

afterwards called him as his own witness. A verdict having been found for the plaintiff, Storks obtained a rule for a new trial, on the ground that he had been improperly excluded from the cross-examination of this witness.

ALDERSON, B.[18] The whole evidence has been fairly laid before the jury, though not in the order contended for by the defendant; and that being the case, there is no ground for disturbing the verdict. I do not say how I should have ruled had the question arisen before me. The practice is now well settled, that, where you call a witness under a subpœna duces tecum, and he produces the required documents, which he is bound to do at his peril, and you do not examine him, but identify the documents by other witnesses, the person producing the documents is not subject to cross-examination. I ruled accordingly in a case which occurred before me at Carlisle. Here, the witness was merely called for the purpose of producing the warrant.

Rule discharged.

GALE v. STATE.

(Supreme Court of Georgia, 1910. 135 Ga. 351, 69 S. E. 537.)

LUMPKIN, J.[19] Prince Gale was convicted of the murder of Calvin Brown, and upon recommendation of the jury, was sentenced to life imprisonment. He moved for a new trial, which was refused, and he excepted.

Pending the cross-examination of a witness for the state, she collapsed physically and had to be taken from the courtroom. Just before she was removed from the stand, she did not answer several questions of the cross-examining attorney. This, however, was apparently the result of her condition, rather than of contumaciousness. The presiding judge endeavored to compel her to answer, but she seemed to be unable to do so. The judge had a physician called, who examined the condition of the witness and reported that she would be unable to testify further that day. This was about the middle of the afternoon, and the court took a recess until next morning. On the reconvening of court next day the witness was not present. The testimony of the physician and other evidence was heard, from which the presiding judge became satisfied that the witness was still unable to testify, and that it was entirely uncertain whether she would be able to do so. The judge then caused the jury to retire from the courtroom and stated to counsel for defendant, in the hearing of the latter, that a mistrial would be granted, if the defendant desired it. Defendant's counsel stated that a mistrial was not desired, and the case proceeded; the judge allowing the evidence of the witness, so far as given, to stand and refusing to

[18] Opinion of Gurney, B., omitted.

[19] Part of opinion omitted.

rule it out. A number of the grounds of the motion for a new trial arise out of this incident, an account of which appears in a note appended by the judge to the motion.

Undoubtedly the right of cross-examination is a valuable right, and, if it be improperly denied, a reversal must result. There is authority in England to the effect that if a witness dies, or becomes incapable of being further examined, at any stage of his examination, the evidence given before he became incapable is good; but it has been said that in this country the rule is different, where there has been no opportunity for cross-examination. Clark's Crim. Proc. 549; Stephen's Dig. Ev. (Beer's Ed.) 434; Rex v. Doolin, 1 Jebb. Cr. Cas. 123; 8 Enc. Pl. & Pr. 99. In 2 Wigmore on Evidence, § 1390, p. 1742, it is said: "Where the witness' death or lasting illness would not have intervened to prevent cross-examination but for the voluntary act of the witness himself or the party offering him—as, by a postponement or other interruption brought about immediately after the direct examination —it seems clear that the direct testimony must be struck out. Upon the same principle, the same result should follow where the illness is but temporary and the offering party might have reproduced the witness for cross-examination before the end of the trial. But, where the death or illness prevents cross-examination under such circumstances that no responsibility of any sort can be attributed to either the witness or his party, it seems harsh measure to strike out all that has been obtained on direct examination. Nevertheless, principle requires in strictness nothing less. The true solution would be to avoid any inflexible rule, and to leave it to the trial judge to admit the direct examination so far as the loss of cross-examination can be shown to him to be not in that instance a material loss. Courts differ in their treatment of this difficult situation, except that, by general concession, a cross-examination begun but unfinished suffices if its purposes have been substantially accomplished. Where, however, the failure to obtain cross-examination is in any sense attributable to the cross-examiner's own consent or fault, the lack of cross-examination is, of course, no objection—according to the general principle (ante, section 1371) that an opportunity, though waived, suffices." This is quoted somewhat at length on account of the clearness with which the author has stated his views, and also because of the collection of authorities in the note, among them being Randall v. Atkinson, 30 Ont. 242; Scott v. McCann, 76 Md. 47, 24 Atl. 536; Fuller v. Rice, 4 Gray (Mass.) 343; Lewis v. Insurance Co., 10 Gray (Mass.) 508, 511; People v. Kindra, 102 Mich. 147, 151, 60 N. W. 458. See, also, 1 Gr. Ev. (16th Ed.) §§ 163c, 163d, p. 280.

In People v. Cole, 43 N. Y. 508, where, on a trial for larceny, the wife of the prosecutor, having given material evidence, on behalf of the people on her direct examination, immediately went into convulsions before the prisoner had an opportunity to cross-examine her, and so remained until the close of the trial, it was held to be error to permit

her evidence to go to the jury. This case is often cited. From the report of facts it appears that counsel for the defendant called for the production of the witness in court for examination, moved that her evidence be stricken out, asking a postponement of the trial until she should recover, and asked that the prisoner be discharged. Each of these motions was overruled. In Sturm v. Atlantic Mut. Ins. Co., 63 N. Y. 77, the same court said: "It may be taken as the rule that where a party is deprived of the benefit of the cross-examination of a witness, by the act of the opposite party, or by the refusal to testify or other misconduct of the witness, or by any means other than the act of God, the act of the party himself, or some cause to which he assented, the testimony given on the examination in chief may not be read." See, also, Bradley v. Mirick, 91 N. Y. 293; Hewlett v. Wood, 67 N. Y. 394. We will not stop to discuss the difference between common-law and equity practice.

It is clear that, while the right of cross-examination is not to be violated, yet it may be waived expressly, or by the conduct of the party entitled to it; and that (in the language of Prof. Wigmore), if "the failure to obtain cross-examination is in any sense attributable to the cross-examiner's own consent or fault, the lack of cross-examination is of course no objection."

When the witness collapsed during the progress of the cross-examination, there was no error in having her removed from the stand and examined by a physician, and suspending the trial until the next day, upon hearing his testimony in regard to her condition. When court reconvened next day, there was no error in hearing evidence touching her condition, she not being present; nor, under the evidence adduced, can we say that the court did not decide properly that she was unable to return to the courtroom and testify, and that it was uncertain when she would be able to do so. She was the principal witness for the state, being an eyewitness to the commission of the homicide. The court was thus, in the expressive language of a distinguished American, confronted with a condition, not a theory. It was impracticable to suspend the case indefinitely. No motion for a postponement was made by counsel for the defendant, as was done in People v. Cole, supra. Counsel for the accused asked that the entire previously given evidence of the witness should be ruled out, and that a verdict be directed finding the accused not guilty; the witness being the only one introduced by the state in chief. The presiding judge recognized the right of cross-examination, and did not desire to cut off such right or to force the accused to proceed with the trial under such circumstances. What appeared to him to be the only practicable method of accomplishing that result was to declare a mistrial, if the defendant desired it. This would have resulted in starting the trial afresh at a later date. If the state could not then have produced the witness, the consequences of the inability would have fallen upon it. If it did produce her, she would have been subject to cross-examination. But

this was not what the defendant desired. His counsel asked for no postponement, and announced that he did not want a mistrial. What he evidently wanted was for the case to terminate, when it was impossible to cross-examine the witness, to have the main evidence for the state ruled out, and for an acquittal to result because of the illness of the witness.

The severity of punishment for felonies which was inflicted in England at one time (when they were generally punishable by death) begat in practice certain technical loopholes for escape for criminals, in no way affecting the merits of the case. This has, to some extent at least, passed away, save where rules of procedure have been crystallized by constitutional provisions, or legislative enactments, or by the decisions of courts of last resort. But we think that neither in England nor in America have the decisions on the subject of interruption of an examination by sickness or death carried the rule to the extent contended for in this case. Every person accused of crime is entitled to a fair and impartial trial, according to the rules of law. But an accused person is not entitled to be set free, regardless of his guilt or innocence, because of a providential interference with the cross-examination of the state's principal witness, and the unwillingness of the defendant to accept a reasonable method of securing a complete cross-examination.

When, through his counsel, the accused announced that he did not want a mistrial, which appeared from the evidence to be the only method by which the witness could be again produced and examined, we think that he waived the right, or at least that his conduct was such as to obstruct the possibility of its exercise. Under the circumstances, the court did not err in refusing to strike the evidence which had been given by the witness for the state and to direct a verdict for the accused.

3. After the trial proceeded, with the evidence of the witness remaining in, the judge correctly ruled that it was for the jury to determine the weight to be given to it. The case was not one for the exclusion of a witness as incompetent to testify. * * *

Judgment affirmed.[20]

[20] In Reg. v. Mitchell, 17 Cox, C. C. 503 (1892), it was held by Cave, J., that a deposition taken by the examining magistrate could not be read at the trial, where cross-examination was prevented by the sudden illness and death of the witness.

In Sperry v. Moore's Estate, 42 Mich. 353, 4 N. W. 13 (1880), the direct examination was excluded where cross-examination was postponed at the request of the party offering the witness and the witness died in the interim.

In Wray v. State, 154 Ala. 36, 45 South. 697, 129 Am. St. Rep. 18, 16 Ann. Cas. 362 (1908) the condition of the witness was such as to make cross-examination dangerous to his life, and it was held that the defendant was justified in refusing to cross-examine, and the direct examination should have been excluded.

In State v. O'Connor, 105 Mo. 121, 16 S. W. 510 (1891), cross-examination was prevented by the action of the court in committing the witness, and this was held error. In Fuller v. Rice, 4 Gray (Mass.) 343 (1855), it was held

SCOTT v. BASSETT et al.

(Supreme Court of Illinois, 1898. 174 Ill. 390, 51 N. E. 577.)

Ejectment for a tract of land. The plaintiff, in order to lay the foundation for secondary evidence of the contents of certain deeds, was sworn and testified as to his lack of knowledge of the whereabouts of the originals.[21]

Mr. Justice MAGRUDER. * * * We are also of the opinion that the trial court erred in refusing to allow the defendant below to cross-examine the appellee Bassett when he was testifying upon this subject. Section 36 provides that any party to the cause, or his agent or attorney in his behalf, shall orally in court, or by affidavit to be filed in the cause, testify and state under oath that the original is lost, etc. To lay a foundation for the introduction of the record or a certified copy of the deed, the party has his option either to file an affidavit, or to take the stand and testify orally in court. In the present case the appellee Bassett, instead of filing an affidavit as provided in section 36, was sworn as a witness, and gave his evidence orally in court. After he gave his evidence, the record shows that defendant's counsel said, "We desire to cross-examine this witness." The court replied, "I don't think you have a right to cross-examine." Defendant excepted to the ruling of the court forbidding him to cross-examine the witness. We think this ruling was erroneous. We know of no reason why a witness testifying upon the subject here indicated, in behalf of one party, is not subject to cross-examination by the opposite party. When one of the appellees voluntarily placed himself upon the witness stand, instead of filing an affidavit as he might have done, counsel for the defendant had a right to test the correctness and accuracy of his statements by a proper cross-examination.

For the reasons above indicated the judgment of the circuit court is reversed, and the cause is remanded to the circuit court. Reversed and remanded.[22]

that the testimony might be considered where there had been a substantial cross-examination, the completion of which was prevented.

It seems that in chancery the deposition was admissible, though cross-examination had been prevented by the illness or death of the witness. Scott v. McCann, 76 Md. 47, 24 Atl. 536 (1892). In some of the chancery cases the ruling is based on the doctrine of waiver by consenting to the delay. Celluloid Mfg. Co. v. Arlington Mfg. Co. (C. C.) 47 Fed. 4 (1891).

For a collection of cases on the general subject, see note to Wray v. State, 15 L. R. A. (N. S.) 493 (1908).

[21] Statement condensed and part of the opinion omitted.

[22] For the contrary view, see Com. v. Morrell, 99 Mass. 542 (1868).

Prior to the statute referred to in the principal case, it had been held that a party to the action, who was incompetent to testify in the case, might from necessity make an affidavit as to the loss of a document, but that this exception could not be extended to a third person who was competent. Becker v. Quigg, 54 Ill. 390 (1870).

DEAN AND CHAPTER OF ELY v. STEWART.

(Court of Chancery, 1740. 2 Atk. 44.)

LORD CHANCELLOR [23] laid down the following rules in this cause: Where the lease of a dean and chapter are of long standing, and have been continued down to this time without any variation as to the form, they cannot have a decree in this court for a specifick performance of covenants for repairs, against the present tenants, but must be left to their legal remedy of an action at law for a non-performance.

Where at law [24] a witness is produced to a single point by the plaintiff or defendant, the adverse party may cross-examine, as to the same individual point, but not to any new matter; so in equity, if a great variety of facts and points arise, and a plaintiff examines only as to one, the defendant may cross-examine to the same point, but cannot make use of such witness to prove a different fact. * * *

[23] Part of opinion omitted.

[24] It seems probable that Lord Hardwicke was mistaken as to the practice at law, since the text-writers and nisi prius cases seem to take it for granted that the cross-examination might extend to any fact relevant to the case. The editor has not been able to find any case where the question came before a court in banc. The practice in the trial courts is indicated by the following case:

Dickinson v. Shee, 4 Espinasse, 67 (Nisi Prius. 1801): "Assumpsit for servant's wages.

"Plea of non assumpsit as to all except £5. 5s., and as to that sum a tender.

"To prove the plaintiff's case, his counsel called a servant who had lived in the defendant's family. She was examined, cross-examined, and proved the plaintiff's service, so as to entitle him to recover.

"When the plaintiff had finished his case, the defendant's counsel was proceeding to prove the tender. A witness was called, who failed in doing it; so that it became necessary to call back the servant who had been first called by the plaintiff, to prove the tender.

"Garrow, for the defendant, was proceeding to put this question as a leading one, 'Did you not see your master tender the plaintiff the sum of £5. 5s. on account of his wages?' "

"Mingay, for the plaintiff, objected to this mode of examining the witness, contending, that the witness having been examined, cross-examined, and quitted, by being brought back to be examined, to prove the defendant's plea, she should be examined as a witness called in chief to prove the issue; and that the question should not be put in that leading shape.

"Lord Kenyon ruled: That the witness having been originally called by the plaintiff, and examined as his witness, the privilege of the defendant to cross-examine, remained in every stage of the cause, and for every purpose; and that the question was therefore properly put by the defendant's counsel."

ELLMAKER v. BUCKLEY.

(Supreme Court of Pennsylvania, 1827. 16 Serg. & R. 72.)

Writ of error to the District Court of Lancaster county, in an action of debt on an award of arbitrators, brought by Daniel Buckley, the defendant in error, against Leonard Ellmaker, the plaintiff in error.

The plaintiff, having on the trial in the court below, proceeded with his proof to establish the existence and loss of the award, and evidence to supply that loss by the examination of the referees, the defendant's counsel offered to cross-examine the witnesses on the subject-matter of this suit, and in avoidance of the award, before he had opened his defence. This being opposed by the plaintiff's counsel, the court was of opinion that the defendant was not entitled to cross-examine the plaintiff's witnesses before he had opened his defence, to which the counsel of the defendant excepted.[25]

GIBSON, C. J. * * * The next bill of exceptions brings into question the right of a party to introduce his case, by cross-examining the adverse party's witnesses, and before he has opened it to the jury. It is laid down, that in cross-examinations, great latitude is allowed in putting questions; but that relates to the manner, and not to the matter. A witness may not be cross-examined to facts which are wholly foreign to the points in issue (and I would add, to what he has already testified), for the purpose of contradicting him by other evidence. And here I take occasion, in broad terms, to dissent from the doctrine broached in Mr. Phillip's Law of Evidence, 211, that a witness actually sworn, though not examined by the party who has called him, is subject to cross-examination by the adverse party; and that the right to cross-examine is continued through all the subsequent stages of the cause, so that the adverse party may call the same witness to prove his case, and for that purpose, ask him leading questions. In respect to the first of these two propositions, Mr. Phillips himself explicitly and truly states, that the use of the cross-examination is to sift the evidence and try the credibility of the witness, but in this view, it would be palpably absurd, when applied to a person who had given no evidence at all. And in regard to the second, the law will not inflexibly infer that a witness is a willing one, merely because he is produced by the party who thinks his evidence material; such an inference would be neither practically nor theoretically true. It is not to be presumed, that a party is in a condition to prove his case by the testimony of his friends; on the contrary, he is under the necessity of resorting to those who may happen to know something of the transaction, and these are for the most part just as likely to be his enemies. And the bias supposed to be created by being called to tes-

[25] Statement condensed and part of opinion omitted.

tify on one side, is too slight, to serve as the foundation of a rule unlimited in its extent. Certainly, no bias is to be presumed, after the witness has been called by both parties, as he undoubtedly is, when produced a second time, not for the legitimate purposes of a cross-examination, but to testify to new matter on the adverse part; at least, it would be unreasonable, to raise such a presumption against a party who is the first to use the testimony of the witness, only because he is compelled to do so by a necessity arising out of the order of proof. In ordinary cases, the witness may be cross-examined by the party adverse to him, whose witness he is at the time, and even then, only to discredit him, or to bring out something supposed to be withheld; but under special circumstances, such as an apparent unwillingness to testify frankly and fully, the court may, at its discretion, suffer the inquiry to take the shape of a cross-examination, without distinction as to the party by whom the witness is called; and for myself, I would not, without further consideration, pronounce the exercise of the discretion, depending as it does on circumstances which cannot be fully made to appear in a court of error, to be a legitimate subject of a bill of exceptions. If, then, a party may not prove his case by evidence extracted on a cross-examination, after he has proposed his case to the jury, a fortiori, he may not do so before.

Judgment affirmed.[26]

[26] In Floyd v. Bovard, 6 Watts & S. (Pa.) 75 (1843), the same judge expounded the subject as follows: "* * * The difficulty is to find a reason for those English decisions which hold the parties to a different course, and allow the witness to be cross-examined to every transaction within his knowledge in the hands of the party who is first compelled to call him. This would seem to be foreign to the end of a cross-examination, which is not to give the party an advantage in the manner of introducing the facts of his case, but to test the credibility of the witness as to what he has testified; for, it is said, that he shall not be cross-examined to collateral facts, or to matters unconnected with the subject of inquiry, because it would lead to complication and prolixity (1 Stark. Ev. 154); and, I may add, that to reward a party with the privilege of putting leading questions for bringing forward a branch of his case out of its order, would reward him for throwing the cause into confusion. Where the testimony of a witness is required to establish a fact which is part of the plaintiff's case, and also another fact which is part of the defence, it is a dictate of justice that no advantage be given to either party in the manner of eliciting it. But an advantage is, in truth, given, and for no adequate reason, when a party is allowed to bring out his part of the case by cross-examination, merely because the opposite party had been compelled to call the witness in the first instance. In Rex v. Brooke, 2 Stark. Ca. 473 (1819), and Phillips v. Eamer, 1 Esp. Ca. 357 (1795), the witness was allowed to be cross-examined because he had been merely sworn, though he even had not been examined. The object could not have been to sift what he had said, for he had said nothing; or to test his credibility, for it had no connection with anything that had transpired in the cause. There ought to be better authority for such a course, than one or two hasty decisions of a single Judge in the course of a trial. But the authority of these Nisi Prius cases is shaken to its center by Reed v. James, 1 Stark. Ca. 132 (1815), Davis v. Davis, 1 Moody & Mal. 541 (1829), and Simpson v. Smith, 1 Stark. Ev. 162, note 'n' (1822). It would be better to say that each party should call the

BEAL v. NICHOLS.

(Supreme Judicial Court of Massachusetts, 1854. 2 Gray, 262.)

At the trial in the court of common pleas, before Bishop, J., of an action of tort for the conversion of certain castings and wrought iron, the defendants, in order to prove the execution of two written contracts between the plaintiff and the defendants, the signatures to which the plaintiff refused to admit, were compelled to call the attesting witness, and called him for this purpose only, and asked him no other questions. "The plaintiff then proceeded to examine the witness upon other independent matters, having no reference to the execution of said contracts, and which did not take place at the time of execution. After this examination by the plaintiff, the defendants proposed to cross-examine the witness upon the new matters upon which he had been examined by the plaintiff. To this the plaintiff objected, and the court ruled, as a matter of law, that the defendants had no right so to cross-examine." The jury returned a verdict for the plaintiff, and the defendants excepted to this ruling.

BIGELOW, J. We see no valid reason for changing the rule, as it has long been settled and practised upon in this commonwealth, that a party calling a witness, even for formal proof of a written instrument, or of other preliminary matter, thereby makes him his witness. In such case, he cannot be permitted to impeach his general character for truth. Brown v. Bellows, 4 Pick. 194; Whitaker v. Salisbury, 15 Pick. 544. Nor can he put leading questions to him, unless permitted so to do by the court in the exercise of a sound discretion. Moody v. Rowell, 17 Pick. 498, 499, 28 Am. Dec. 317.

It follows that the adverse party has the right to cross-examine the witness upon all matters material to the issue. Experience has shown that this rule is convenient and easy of application in practice, and works no disadvantage to the party who produces a witness. On the other hand, a different rule, by making it necessary for the court, during the examination of a witness, constantly to determine what is or is not new matter upon which the opposite party has the right to put leading questions, leads to confusion and delay in the progress of trials. The ruling of the court below in the present case was in conformity with our well established practice.

The argument, by which the counsel for the plaintiff sought to sustain the exceptions, that the judge declined to exercise his discretion concerning the right of the plaintiff to put leading questions to the

witness to serve his turn, and make him his own for the time being, than to entangle the justice of the case in those distinctions with which the English Judges have surrounded it. * * *"

witness, seems to us to be untenable. The ruling was not that the court might not, in its discretion, permit the witness to be so examined by the party producing him; but that it could not be claimed as a matter of legal right.

Exceptions overruled.[27]

HOUGHTON v. JONES.

(Supreme Court of the United States, 1863. 1 Wall. 702, 17 L. Ed. 503.)

On writ of error to review a judgment in ejectment in favor of the plaintiff, rendered by the Circuit Court for the Northern District of California.[28]

Mr. Justice FIELD. * * * It appears that the subscribing witness to the deed introduced was present in court during the trial, and was examined with reference to certain matters, but not touching the execution of the deed. The defendant thereupon claimed the right to cross-examine him with reference to such execution. The court held that the defendant must, for that purpose, call the witness, and could not properly make the inquiry upon the cross-examination. In this particular the ruling of the court below was correct. The rule has been long settled, that the cross-examination of a witness must be limited to the matters stated in his direct examination. If the adverse party desires to examine him as to other matters, he must do so by calling the witness to the stand in the subsequent progress of the cause.

Judgment affirmed.[29]

[27] In Webster v. Lee, 5 Mass. 334 (1809), Parker, C. J., stated the rule as follows:

"The first objection made to the verdict by the defendant is, that it was not competent for the plaintiff to cross-examine Drummond, whether the note was or was not submitted to the referees, as he was interested in that question.

"It is true that Drummond was an interested witness; and if the plaintiff had produced him, and the defendant had objected to his being sworn, the objection must have prevailed. But a witness may, if he consents, testify against his own interest. In this case, when Drummond was produced by the defendant, the plaintiff could not object, for the witness was interested that the plaintiff should recover; and as Drummond did not object, he was very properly admitted. As he was sworn in chief, the defendant having admitted his competency, and having waived all objections to his credit by producing him, the plaintiff might very properly cross-examine him as to all matters pertinent to the issue on trial. We are therefore of opinion, that there is no weight in this objection."

The question was elaborately considered by Justice Shaw in Moody v. Rowell, 17 Pick. 490, 28 Am. Dec. 317 (1835), and the same conclusion reached.

[28] Statement condensed and part of opinion omitted.

[29] The reporter's footnote cites Philadelphia & T. R. Co. v. Stimpson, 14 Pet. 448, 10 L. Ed. 535 (1840), in which Justice Story made the following statement of the rule: "But it is now said, that the evidence was in fact offered for the purpose of rebutting or explaining certain statements made by one Ross Winans, a witness called by the defendants, in his answers upon his

cross-examination by the plaintiff's counsel. Now, this purpose is not necessarily, or even naturally, suggested by the purpose avowed in the record. Upon his cross-examination, Winans stated: 'I understood there were arrangements made with the Baltimore company. I heard the company paid $5,000.' Now, certainly these statements, if objected to by the defendants, would have been inadmissible upon two distinct grounds: (1) First, as mere hearsay; (2) and secondly, upon the broader principle, now well established, although sometimes lost sight of in our loose practice at trials, that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine him as to other matters, he must do so by making the witness his own, and calling him, as such, in the subsequent progress of the cause."

This was probably based on Ellmaker v. Buckley, 16 Serg. & R. (Pa.) 72 (1827) cited in the brief for the defendant in error.

Clifford, J., in Wills v. Russell, 100 U. S. 621, 25 L. Ed. 607 (1879):

"Testimony was introduced by the plaintiffs to prove that they paid the duties, and they read the protest in evidence to show that they had complied with that condition precedent to a right to recover back the amount paid. Witnesses were called by them to prove payment and protest; and one of them having testified to the payment of the duties, and to the fact of protest and appeal, the defendant claimed the right to cross-examine him as to whether jute rejections were a vegetable substance similar to the articles enumerated in the second clause of the eleventh section of the Tariff Act, under which the duties were exacted. Objection was made by the plaintiffs; but the court overruled the objection and admitted the evidence. Exception was taken by the plaintiffs to the ruling of the court, and that exception constitutes the basis of the first assignment of error.

"Authorities of the highest character show that the established rule of practice in the Federal courts and in most other jurisdictions in this country is that a party has no right to cross-examine a witness, without leave of the court, as to any facts and circumstances not connected with matters stated in his direct examination, subject to two necessary exceptions. He may ask questions to show bias or prejudice in the witness, or to lay the foundation to admit evidence of prior contradictory statements. Subject to those exceptions, the general rule is that if the party wishes to examine the witness as to other matters, he must in general do so by making him his own witness and calling him as such in the subsequent progress of the cause. The Philadelphia & T. Ry. Co. v. Stimpson, 14 Pet. 448, 459 [10 L. Ed. 535 (1840)]; Houghton v. Jones, 1 Wall. 702, 706 [17 L. Ed. 503 (1863)]; 1 Greenl. Evid. §§ 445–447; 1 Whart. Evid. § 529.

"It has been twice so ruled by this court, and is undoubtedly a valuable rule of practice, and one well calculated to promote regularity and logical order in jury trials; but it is equally well settled by the same authorities that the mode of conducting trials, and the order of introducing evidence, and the time when it is to be introduced, are matters properly belonging very largely to the practice of the court where the matters of fact are tried by a jury. Both of the cases referred to by the plaintiffs show that the judgment will not be reversed merely because it appears that the rule limiting the cross-examination to the matters opened by the examination in chief was applied and enforced; but those cases do not decide the converse of the proposition, nor is attention called to any case where it is held that the judgment will be reversed because the court trying the issue of fact relaxed the rule and allowed the cross-examination to extend to other matters pertinent to the issue.

"Cases not infrequently arise where the convenience of the witness or of the court or the party producing the witness will be promoted by a relaxation of the rule, to enable the witness to be discharged from further attendance; and if the court in such a case should refuse to enforce the rule, it clearly would not be a ground of error, unless it appeared that it worked serious injury to the opposite party. Nothing of the kind is shown or pretended in this case."

DETROIT & M. R. CO. v. VAN STEINBURG.

(Supreme Court of Michigan, 1868. 17 Mich. 99.)

COOLEY, C. J.[80] The action in the court below was brought by Van Steinburg to recover of the railroad company for injury done him by one of their engines at Holly station, on September 15, 1865. The plaintiff, it appears, was a hotel-keeper at that place. The track passed between his house and the depot, and only about thirty feet therefrom. He heard the whistle of an approaching train when it called the station; started to cross over the track to the depot; was caught by the engine as it came up, and had one foot taken off, and the toe of another. The defendants insisted that the injury was attributable to his own carelessness; while he, on his part, claimed that the defendants were negligent and he was not. [There was a verdict and judgment for plaintiff, and defendant sued out a writ of error.] * * *

I think the judge erred, however, in restricting the cross-examination of S. H. Coon, as he did in other particulars. On his direct examination, this witness had testified that he went to the depot the morning of the accident with his carriage. It stood north of the west end of the depot platform, backed up to it at the northwest corner. He heard the whistle east of the mile-post, but the train was not in sight; he stood in his carriage and was looking for the train. It came in sight just east of the switch. And he then narrated the subsequent facts, including the injury to the plaintiff. On his cross-examination he was asked, "From the hotel, what obstructions are there to prevent seeing the train as well as from the platform?" This question was ruled out, as not proper cross-examination within the rule laid down in People v. Horton, 4 Mich. 67.

The case of People v. Horton, we think, is overruled, so far as it has any bearing upon the present question, by the cases of Chandler v. Allison, 10 Mich. 477; Dann v. Cudney, 13 Mich. 239, 87 Am. Dec. 755; and Thompson v. Richards, 14 Mich. 172. The case itself we have always regarded as a departure from the true rule of cross-examination, and it has had a tendency, greatly and unreasonably, to embarrass the elucidation of the truth by the sifting of witnesses ever since the case was decided. When a party places a witness upon the stand to testify to facts which tend to support his side of the issue involved, and questions him concerning such facts, it is the right of the opposite party, on cross-examination, to go as fully into the subject as may be necessary to draw from the witness all he may know concerning the transaction about which he has testified, and to put before the jury any pertinent facts which will have a tendency to controvert the testimony which has been given by the witness in favor of the party calling him. A more restricted rule renders cross-examination in many cases nearly

[80] Statement and part of opinion omitted.

valueless, and enables a party, by careful questions to his witness, to give to the jury a one-sided and partial view of the facts within the knowledge of the witness, and effectually to preclude the opposite party from supplementing the witness's statement with the further facts within his knowledge concerning the same transaction, unless he shall make the witness his own, in which case he is supposed to vouch for him as credible, and has also less privilege of searching examination.

In the present case, the facts which the plaintiff sought to establish, were that he was injured, and that the negligence of the defendants was the proximate cause. Necessarily intermingled with this, however, was the question whether the plaintiff had not also been guilty of negligence which materially contributed to the injury; and this question was so involved in the examination of the plaintiff's witnesses, that it was impossible to keep it out of view for a moment. Prima facie one who walks in front of a train which he knows is coming, and is run over, is guilty of some want of prudence; and the plaintiff found it necessary in this case to put in evidence such facts concerning the management of the train by defendants as would tend to relieve him from this apparent liability to censure. The distance at which the train could be seen from the plaintiff's hotel, as well as from the depot platform, was an important fact bearing upon this issue; and as such, the defendants were entitled to inquire into it of any witness who had been put upon the stand to testify to the negligence of the persons in charge of their train. * * *

Reversed.[31]

[31] Christiancy, J., in Campau v. Dewey, 9 Mich. 381 (1861):

"It is further essential to the development of the true logical idea of cross-examination to observe, that it is the tendency of the direct examination which determines the subject of it, as a test of cross-examination: for example, it is that essential or ultimate fact in the plaintiff's case which the direct examination tended to prove, which determines the logical limits of the cross-examination, and not merely the particular minor facts and circumstances tending to the proof of that fact. As the plaintiff is at liberty to adduce any number of these particular or secondary facts, however disconnected with each other, so that they tend to the proof of the essential resultant fact which he is bound to establish, so must the defendant be equally entitled, on cross-examination, to elicit any number of such particular facts, as may tend to disprove that resultant fact, or to weaken the tendency, in its favor, of the particular facts stated on the direct examination.

"And where two or more main facts are essential to the plaintiff's prima facie case, such as the title of the plaintiff, and conversion by the defendant, in trover, and the direct examination has been confined to matters tending only to the proof of one of these main facts, the defendant should not be allowed to cross-examine as to the other; as this would have no relation to the evidence in chief, and could not therefore, in any logical sense, be denominated a cross-examination. Such, I think, are the purely logical principles of a cross-examination."

TENNANT v. HAMILTON.

(House of Lords, 1839. 7 Clark & F. 122.)

The LORD CHANCELLOR.[82] The object of the action in this case was to try a question of nuisance to a garden in the neighbourhood of a manufactory, which, it was said, emitted vapour and smoke prejudicial to the property of the pursuer. A witness, David Smith, was called for the defenders, and he was examined as to certain premises in the neighbourhood of the manufactory; but he was not examined by the party producing him with respect to the place called Glasgow-field—not the place in question in the action, but a place situated near the manufactory. Both parties went into evidence for the purpose of showing what was the effect of this manufactory emitting smoke and vapour upon the lands similarly circumstanced to those of the party complaining. Whether that was a legitimate mode of inquiry need not now be considered; for both parties pursued it, and for one purpose it was undoubtedly a legitimate mode of inquiry, viz. for ascertaining what the effect was of the smoke and vapour emitted by this manufactory. This witness was examined as to several lands in the neighbourhood; and then a cross-examination took place, and the witness says in answer, "he knows Glasgow-field; never knew of any damage done there." That was not the answer which the pursuer, cross-examining the defenders' witness, wished him to give. He had fixed him with the knowledge of Glasgow-field; he intended to use him to show that Glasgow-field had been injured by the vapour and smoke emitted from the manufactory; but, however, the answer given was not for the benefit of the party cross-examining him. Then the counsel for the pursuer proposed to ask the witness "whether he had known of any sum having been paid by the defenders to the proprietors of Glasgow-field, for alleged damage there occasioned by the works?" The witness had already said that he knew of no damage done there. If that question had been asked him by the defenders, no doubt a great latitude in cross-examination might have been permitted to the pursuer, for the purpose as well of ascertaining what he meant by "he did not know," as for the purpose of testing the accuracy of his statement; but it so happens, when he says he knows Glasgow-field, and never knew of any damage done there, it is an answer given by him to a question of the pursuer in cross-examining him. The pursuer is entering into a line of examination for the first time, and having got an answer which did not suit his purpose, he endeavours to get rid of the effect of that answer by putting a question upon a point short of what was the witness's knowledge, viz. "whether he had known of any sum having been paid by the defenders to the proprietors of Glasgow-field, for alleged damage?" The

[82] Statement and part of opinion omitted.

pursuer meant, if he could get an answer favourable to his view, to make that part of his case; he meant, not being able to get the witness to say that he knew of any damage, to get him to say that which he conceived would be the next best evidence, but which, in fact, would be no evidence at all. If the witness had answered in the affirmative, that he had known of money being paid for alleged damage, it would be no evidence; because money paid upon a complaint made, paid merely to purchase peace, is no proof that the demand is well founded; it is not, therefore, to be given in evidence in support of the fact of damage being sustained.

Upon general principles, the rule of law in this country and in Scotland must be the same: if a pursuer calls a witness, and asks him as to money being paid for alleged damage, his answer in the affirmative is not evidence of actual damage. If the pursuer had made a claim upon the owners of the manufactory for damage done to his field from the smoke and vapour emitted, and the owners had given money to quiet his complaint, that would be no evidence of the damage; it is money paid to buy peace and to stop complaint; it is very often a wise thing, however unfounded a complaint may be, for parties to pay a sum of money in order to quiet the party making the complaint. But this does not rest merely upon general principles. The rule of law in this country has been cited by the appellants; and from the authorities cited by them, it appears there is no distinction between the two countries in this respect.

The question clearly could not be put in order to elicit evidence for the party making the complaint; but it is said it was admissible in order to test the credit of the witness. Now the witness had said nothing in his examination by the party for whom he was called, touching this matter. He had spoken of other properties, but he had said nothing which could lead to this cross-examination, and therefore it was not for the purpose of testing the accuracy or truth of anything he had said. The question cannot be supported upon that ground, nor was that the ground, as I understood the argument, upon which it was attempted to be supported, but that it might be put as a matter of inquiry, with a view to test the witness's credit. But if it be not evidence, it is an inquiry perfectly collateral; an inquiry into a matter which was not relevant to the subject-matter in dispute. It does not relate to the subject-matter; and it is an acknowledged law of evidence that you cannot go into an irrelevant inquiry for the purpose of raising a collateral issue to discredit a witness produced on the other side.

On these grounds the learned Judge who tried the cause was of opinion that the question was not admissible under the circumstances of this examination; and to that ruling of the learned Judge,—unfortunately for all parties, because leading to great and unnecessary expense,—a bill of exceptions was tendered, and the Court of Session

was of opinion that the question was admissible. The party against whom that decision was made necessarily came here in order to have that judgment considered; because the Court of Session, being of opinion that the ruling of the learned Judge before whom the issue had been tried was erroneous, and that the bill of exceptions was well founded, had no alternative but to direct a venire de novo. * * *

Reversed.[33]

POWERS v. UNITED STATES.

(Supreme Court of the United States, 1912. 223 U. S. 303, 32 Sup. Ct. 281, 56 L. Ed. 448.)

Defendant was convicted on a charge of violating the statutes in reference to distilling liquors, etc. Defendant had testified on his own behalf before the commissioner and was cross-examined by a representative of the government. Several objections were made to the extent of this cross-examination, but were overruled by the commissioner. At the trial this examination of the defendant was introduced in evidence as an admission.[34]

Mr. Justice DAY. * * * But it is contended by the defendant that the bill of exceptions shows that the alleged cross-examination was entirely irrelevant and improper, and not a legitimate cross-examination of the defendant's testimony in his own behalf. It appears that Powers testified, being charged with illegal conduct concerning the distillation of spirits, as already stated, that he was at a place about thirty steps from the still, beating apples, as testified by the government's witness; that Preston Powers had hired him to work for him at the price of 75 cents a day, and that he put him to beating apples; that the witness had no interest in the apples or the product thereof, and no interest in the still, but was merely hired to work by the day at the price of 75 cents. Having taken the stand in his own behalf, and given the testimony above recited, tending to show that he was not guilty of the offense charged, he was required to submit to cross-examination, as any other witness in the case would be, concerning matter pertinent to the examination in chief. The cross-examination, in the answer elicited, tended to show that defendant had worked at a distillery the fall before with Preston Powers, the man he alleged he was working for at beating apples on the occasion when the government witness saw him near the still, and had made brandy near his house, and had paid Preston Powers to assist him. This, we think, might be regarded as having some relevancy to the defendant's claim as to the innocent character of his occupation at the time charged. It has a ten-

[33] See the earlier case of Spenceley v. De Willott, 7 East, 108 (1805), excluding cross-examination as to contracts other than the one in issue.

[34] Statement condensed and part of opinion omitted.

dency to show that defendant knew the character of the occupation in which he was then engaged, having worked before with Preston Powers at a distillery and made brandy with him, and did not exceed the limits of a proper cross-examination of the witness. As to the suggestion that section 860 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 661) prevented the introduction of the testimony given by defendant before the commissioner, that section, providing that no pleading, nor any discovery or evidence obtained from a party by means of a judicial proceeding shall be used in evidence against him in a criminal proceeding, can have no bearing where, as in the present case, the accused voluntarily testified in his own behalf in the course of the same proceeding, thereby himself opening the door to legitimate cross-examination. See Tucker v. United States, 151 U. S. 164, 168, 38 L. Ed. 112, 114, 14 Sup. Ct. Rep. 299.

Judgment affirmed.

MacDONNELL v. EVANS.

(Court of Common Pleas, 1852. 11 C. B. 930.)

This was an action of assumpsit upon a bill of exchange, by endorsee against acceptor.

The cause was tried before Jervis, C. J., at the sittings in London after last Trinity Term. A witness called on the part of the plaintiff, being asked on cross-examination by the defendant's counsel, who produced a letter purporting to be written by the witness,—"Did you not write that letter in answer to a letter charging you with forgery?" —the counsel for the plaintiff objected, that, inasmuch as this was an attempt to get in evidence the contents of a written paper without producing the paper itself, the question was not admissible.

The Lord Chief Justice, holding the objection to be a good one, refused to allow the question to be put; and the plaintiff had a verdict.

Bramwell, in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground that the evidence was improperly rejected.

JERVIS, C. J.[35] I am of opinion that this rule should be discharged. It is unnecessary, as it seems to me, for the court to lay down any general rule upon this subject; it is enough to dispose of the question which was raised at the trial. If even it had been necessary for us to declare the general principle, we should not have permitted ourselves to be influenced by the suggestion of hardship, to bend the rule to meet the supposed justice of the particular case. The question put and objected to at the trial, was this,—"Did you not write that letter in answer to a letter charging you with forgery?" I yielded to the objection, and refused to allow the question to be put. Notwithstanding

[35] Opinion of Maule, J., omitted.

some opinions which have been expressed upon the subject, I have never entertained any doubt that the inquiry was inadmissible. The rule of evidence which governs this case, is applicable to all cases where witnesses are sworn to give evidence upon the trial of an issue. That rule is, that the best evidence in the possession or power of the party must be produced. What the best evidence is, must depend upon circumstances. Generally speaking, the original document is the best evidence; but circumstances may arise in which secondary evidence of the contents may be given. In the present case, those circumstances do not exist. For anything that appeared, the defendant's counsel might have had the letter in his hand when he put the question. It was sought to give secondary evidence of the contents of a letter, without in any way accounting for its absence, or showing any attempt made to obtain it. It is enough for us to decide upon the application of the general rule. The best evidence of the contents of the document was not tendered. Much of that which has been urged by Mr. Macnamara may be very well founded, and may form cogent argument for a legislative consideration of the subject; but it is in direct conflict with authorities to which we feel ourselves bound to defer. It is said that the question ought to have been allowed, because the answer might have shown the witness to be unworthy of credit. But The Queen's case [36] determines that that course cannot be permitted. The argument which has been urged here to-day seeks to show that the opinion of the judges in that case was erroneous. It seems to me, however, that that reasoning cannot prevail.

WILLIAMS, J. I concur with the rest of the court, though I must confess it is not without some difficulty that I have brought my mind to this conclusion. I had thought that the rules as to primary evidence were to be relaxed somewhat with respect to the cross-examination of a witness as to facts in themselves foreign to the issues in the cause, and going only to his credit. That is in accordance with what is laid down in the 7th edit. of Phillipps on Evidence, and adopted in 2 Russell on Crimes, p. 927,—for which adoption I am in some degree responsible; though I should observe that my contributions to that work, which were made at a very early period of my professional life, were carefully revised (as appears from the preface to the 2d edition) by the learned author; than whom I may venture to say no one possessed more careful and accurate habits of mind, and few had more experience in the practice of the criminal law. That notion was founded mainly upon the existence of the practice of cross-examining a witness, for the purpose of discrediting him, as to his having been convicted of crime, or become bankrupt, or insolvent, and the like. I assumed that it was matter of right, as it certainly was matter of practice, so to

[36] In the Queen's Case, 2 Br. & Bing. 284 (1820), the advisory opinion of the judges to the House of Lords was to the effect that the document should be submitted to the witness for identification, and cross-examination as to its contents should not be allowed.

cross-examine a witness, without producing any record [87] of conviction, or any proceedings in the bankrupt or insolvent court. I have never known such things to be produced; and I do not see how they could be. I did not conceive that this relaxation was at all inconsistent with the rule laid down by the judges in The Queen's case, of the propriety of which I have never entertained a doubt; for, it appears to me that that refers to cases where the examination is with a view to lay a foundation for showing by independent evidence that the witness has made former statements at variance with his present testimony, and not to cases where it goes merely to discredit the witness by his own admission, and where his denial is conclusive. But the cogent observations of my Lord and my learned Brothers, in the course of this discussion, have convinced me that I was wrong in supposing that the practice to which I have adverted was matter of right; and I now entertain serious doubts as to the correctness of my former impression. It is unnecessary, however, upon the present occasion to determine whether or not that opinion ought to be altogether abandoned, because I agree with the rest of the court that the particular question which was proposed to be put to the witness in this case, regard being had to its form, and to the object with which it was put, was objectionable, and was properly disallowed.

Rule discharged.[88]

CLEMENS et al. v. CONRAD.

(Supreme Court of Michigan, 1869. 19 Mich. 170.)

Assumpsit for the breach of a contract for the sale of a quarry.

A witness, called by the defendants, was asked, on cross-examination, "Were you indicted, in 1865, in Sandusky, for smuggling?" This question was objected to, but allowed by the circuit judge.[89]

[87] In Rex v. Inhabitants of Careinion, 8 East, 78 (1806) it was held that a conviction to disqualify a witness could not be proved by the examination of the witness himself, but the record must be produced. The rule as to the examination in regard to the contents of documents appears to have been more liberal on the voir dire than on cross-examination.

Howell v. Look, 2 Campbell, 14 (1809):

"A surveyor called on the part of the plaintiff stated, in cross-examination, that he was her son-in-law, and that she carried on the business for the benefit of her late husband's estate. He was then asked, what interest he and his wife took under the will of the deceased?

"Lord Ellenborough. The contents of written instruments may certainly be enquired into in an examination upon the voir dire; but if there is to be such an examination, it must take place in its due order—before the examination in chief. If at any time it appears incidentally that the witness is interested, I will strike out his evidence; but in cross-examination I cannot allow you the privileges of an examination upon the voir dire. The question is irregular."

[88] See comments on the principal case in Henman v. Lester, 12 C. B. (N. S.) 776 (1862).

[89] Statement condensed and opinions on other points omitted.

COOLEY, C. J. * * * The right to inquire of a witness on cross-examination whether he has not been indicted [40] and convicted of a criminal offense, we regard as settled in this state by the case of Wilbur v. Flood, 16 Mich. 40, 93 Am. Dec. 203. It is true that in that case the question was, whether the witness had been confined in State prison; not whether he has been convicted; but confinement in State prison presupposes a conviction by authority of law, to justify the one inquiry and not the other would only be to uphold a technical rule, and at the same time point out an easy mode for evading it without in the least obviating the reasons on which it rests. We think the reasons for requiring record evidence of conviction have very little application to a case where the party convicted is himself upon the stand and is questioned concerning it, with a view to sifting his character upon cross-examination. The danger that he will falsely testify to a conviction which never took place, or that he may be mistaken about it, is so slight, that it may almost be looked upon as purely imaginery, while the danger that worthless characters will unexpectedly be placed upon the stand, with no opportunity for the opposite party to produce the record evidence of their infamy, is always palpable and imminent. We prefer the early English rule on this subject (Priddle's Case, Leach, C. L. 382; King v. Edwards, 4 T. R. 440); and for the reasons which were stated in Wilbur v. Flood. * * *

CAMPBELL and CHRISTIANCY, JJ., concurred with the Chief Justice.

GRAVES, J. (dissenting). * * * On the cross-examination of a witness for the plaintiffs in error, he was asked if he had not been indicted at Sandusky, in 1865, for smuggling, and if he was not convicted, and both questions were objected to by plaintiffs in error, on the ground that they supposed the existence of better evidence of the facts called for; but the objection was overruled, and the witness stated that he had been convicted of smuggling.

This ruling is supposed to be supported by Wilbur v. Flood, 16 Mich. 40, 93 Am. Dec. 203, but I think the cases are quite distinguishable. In the case cited, the defendant on cross-examination, was asked if he had ever been confined in the State prison, and my brethren were of opinion that the question was not objectionable as an offer to prove by parol what rested in record evidence. It is true that the opinion of my brother Campbell may seem to have gone further than this, but the point decided did not. Whether the witness had been confined in State's prison, was fact of personal experience and involving a question of identity, and no higher or better evidence in contemplation of law could be furnished than the parol evidence of the witness. If it be said that the question implied a confinement under sentence, and hence that an affirmative answer must have tended to prove a convic-

[40] In People v. Morrison, 195 N. Y. 116, 88 N. E. 21, 133 Am. St. Rep. 780, 16 Ann. Cas. 871 (1909), it was held that a witness could not be cross-examined as to indictments against him, for the reason that an indictment is no proof of guilt.

tion; the reply is that the circumstance that a piece of evidence might tend by way of argument or inference to prove a fact not lawfully susceptible of proof by such evidence, would be no ground for excluding it, if admissible for another purpose, nor could its admission for the legitimate purpose establish its application to the illegitimate one.

In deciding the point in Wilbur v. Flood, I think the court did not purpose to assume that the nature of the evidence requisite to show a conviction was at all involved, since the raising of the question which was there decided, did not depend on the presence or absence of record evidence of conviction, but was wholly independent of any consideration of that kind. The point was not whether the witness had been convicted, but whether the question put to him supposed any higher attainable evidence of his own confinement than his own testimony, and the case on that branch of it, is only authority in my judgment, for a negative answer to that proposition. Indeed, such seems to be the necessary deduction, since it does not appear to have been claimed by counsel, or advanced by my brethren, that the settled distinction between primary and secondary evidence was inapplicable to cross-examination.

In the present case the party resorted in the first instance to verbal testimony to prove the proceedings and judgment of a court of record, and not a distinct and independent fact of personal experience like that of detention in a particular place. Whether the witness had been indicted and convicted was an inquiry which involved several considerations of legal import, the technical nature of which, he could not be supposed to know, while the proof which that inquiry called for could be legally made by exhibiting the record, or if necessary by submitting evidence of its contents. The plaintiffs in error were entitled to insist, that the credibility of their witness should not be assailed by a species of proof not authorized by the rules of evidence; and in my view it was not competent under any circumstances to require the witness to state, what at best could be nothing more than his inference in a matter of law, and, in any aspect of the case, that the contents of the record were not provable by any sort of verbal testimony so long as better evidence was not shown to be unattainable.

The general rule is undisputed, and the necessities of cross-examination have not hitherto been deemed sufficient to dispense with it.

If we now discard the principle upon an assumption in favor of the party cross-examining, that he cannot prepare before hand to meet its requirements, we can only do so by imperiling the existence of the rule, and by ignoring the reasons for its enforcement which are plainly apparent in the uncertainty and danger of personal unprofessional testimony in such a case, and also quite probably existing in the inability of the party calling the witness to anticipate an attack of the mode and kind made in this action. The King v. The Inhabitants of

Castell Careinion, 8 East, 77; Hall v. Brown, 30 Conn. 551; Doe ex dem. Sutton v. Reagan, 5 Blackf. 217, 219, 33 Am. Dec. 466; Newcomb v. Griswold, 24 N. Y. 298; Clement v. Brooks, 13 N. H. 92, Commonwealth v. Quin, 5 Gray, 478. * * *

Judgment affirmed.[41]

ELLIOTT v. BOYLES.

(Supreme Court of Pennsylvania, 1857. 31 Pa. 65.)

Error to the Common Pleas of Somerset County.

This was an action of slander, by Peter Boyles and Sarah C., his wife, against John Elliott. A narr. was filed, in which it was alleged that Elliott had charged that a man by the name of Cramer had had criminal intercourse with Mrs. Boyles, before her marriage with Boyles. An additional count was filed, by leave of the court, in which it was alleged the defendant said, "If the dirty strumpet knew that I hold her future happiness or misery in my hands, she would keep her mouth shut."

The speaking of the words laid in the first count, was proved by Dr. Gorman, and on his cross-examination, the counsel for the defendant proposed to ask him, whether he "did not commit wilful and corrupt perjury, in a case in the Quarter Sessions of Somerset county." This question was objected to, and rejected by the court, and at the instance of defendant's counsel, a bill of exceptions was sealed. [The jury returned a verdict for plaintiff, upon which judgment was entered.]

LOWRIE, J.[42] * * * Witnesses often suffer very unjustly from this undue earnestness of counsel, and they are entitled to the watchful protection of the court. In the court, they stand as strangers, surrounded with unfamiliar circumstances, giving rise to an embarrassment known only to themselves, and in mere generosity and common humanity, they are entitled to be treated, by those accustomed to such scenes, with great consideration; at least, until it becomes manifest that they are disposed to be disingenuous. The heart of the court and jury, and all disinterested manliness, spontaneously recoils at a harsh and unfair treatment of them, and the cause that adopts such treatment is very apt to suffer by it; it is only where weakness sits

[41] For a collection of the cases on this vexed question, see note to Dotterer v. State, 30 L. R. A. (N. S.) 846 (1909).

In a number of states cross-examination as to conviction is expressly allowed by statute; e. g., Rev. St. Mo. 1909, § 6383; Hurd's Rev. St. Ill. 1913, ch. 51, § 1. But see People v. Goodman, 283 Ill. 414, 119 N. E. 429 (1918), that the statute only applies to civil cases, and that in criminal cases the record must be produced.

Where a defendant has testified as a witness, his prior conviction, to discredit him, cannot be proved by his extrajudicial admission. People v. Cardillo, 207 N. Y. 70, 100 N. E. 715, Ann. Cas. 1914C, 255 (1912).

[42] Statement condensed and part of opinion omitted.

in judgment, that it can benefit any cause. Add to this, that a mind rudely assailed, naturally shuts itself against its assailant, and reluctantly communicates the truths that it possesses.

We do not at all feel authorized to say, that these remarks are demanded by anything that took place on the trial of this cause; but they are suggested by the question put by the counsel of the defendant below, and by the view taken of it by the opposite counsel. We do not at all know, who put the question, or how it was put; but we are sure that the counsel who argued the cause here are most respectable and considerate.

The question put to the witness on his cross-examination, and rejected by the court at the instance of the opposite party, was: Whether he did not commit wilful and corrupt perjury in a case in the Quarter Sessions?

The counsel who proposed it were entirely mistaken in supposing that a negative answer would open the door for proving the affirmative, in order to contradict the witness; for the answer would have been conclusive of the fact, it being a fact entirely collateral to the issue. 1 Greenl. Evid. § 449. If such a mode of discrediting a witness were allowable, it is easy to see that, on the single question of the credibility of a single witness, the number of collateral issues to be tried might be entirely indefinite.

But the purpose of the question, if seriously put, was to obtain an answer that would disgrace the witness, and expose him to a criminal prosecution; and it is only in exceptional cases that such questions can be properly asked of a witness. This, however, is the privilege of the witness, and not the right of the other party. We think that we ought to say, that such a question as this ought never to be asked of any witness; for no witness ought to answer it even if allowed to do so. 1 Greenl. Evid. §§ 451–455; 1 Phil Evid. 279.

And the question is entirely illegitimate as a mode of attacking the credibility of a witness. If a man is received among his neighbours as fully entitled to credit for veracity, a court and jury can have no grounds for discrediting him, except such as may arise from his want of intelligence or candour, from his contradictions or partisanship in testifying before them. The fact that those who are well acquainted with his home reputation, know it be now undoubted, is not set aside by any single crime, or even many of them, that he may long ago have committed. If his reputation still rises above that, he is credible still, for the taint of criminality is not entirely indelible.

Hence the most proper test of character, before human tribunals is reputation, and not single acts. And it is the only practicable one; for the witness or the party calling him can be prepared for no other, and the court can administer no other; for it cannot possibly try collateral issues or the events of every witness's life, in order to decide

the controverted cause. 1 Greenl. Ev. §§ 461–469. It would be absolutely intolerable that a man, by being brought into court as a witness, should be bound to submit all the acts of his life to the exposure of malice, under the pretence of testing his credibility. If such were the test, courts would often present in language and temper, scenes of unmitigated ruffianism, and the means of enforcing law and order in society, would be denounced as sources of corruption and disorder. * * *

Judgment affirmed.

STATE v. ABBOTT.

(Supreme Court of Kansas, 1902. 65 Kan. 139, 69 Pac. 160.)

JOHNSTON, J.[48] John Abbott was prosecuted upon the charge of rape, committed on the person of Desdemonia Harrolson, a girl under 18 years of age, and he was convicted of an attempt to commit that offense. Mrs. Sadie Stutzman was the mother of the girl and the prosecuting witness. It was claimed that Mrs. Stutzman and the defendant had been unduly intimate for several months prior to the commission of the alleged offense, and that their illicit relations had been brought to the knowledge of her husband; that Mrs. Stutzman met the defendant in the woods near her house, in the absence of her husband, and demanded money from the defendant, which was not furnished; and that then she began the prosecution against the defendant for the offense against her daughter. She claims to have known of the alleged offense within a few hours after its commission, and it is said she made no complaint for more than a month, nor until the demand for money was refused. It is claimed by the defendant that the prosecution was malicious; that it was brought to blackmail him, and to appease Mrs. Stutzman's husband, who had learned of her infidelity. After she had testified in behalf of the state, she was asked on cross-examination if it was not a fact that, from October of the previous year until within a few days before demanding the money from the defendant, she had met him in the timber near the house and had illicit relations with him; but the court, on objection of the county attorney, excluded the testimony. A further effort was made to show the relations between her and the defendant immediately prior to the demand for money and the commencement of the prosecution, but the court would not permit inquiry to be made.

It was competent for the defendant to cross-examine the witness as to her antecedents, character, and past conduct, and thus impair her credibility. This line of inquiry became important because of the contention that the prosecution was prompted by the malice of this wit-

[48] Part of opinion omitted.

ness, resulting from a failure to extort money, and some of the circumstances surrounding the case seem to justify a full cross-examination as to her past conduct and character. There is no better method of sifting the conscience and testing the veracity and credibility of a witness than by cross-examination, and there is abundant authority holding that, for the purpose of impairing the credibility of the witness, he may be cross-examined as to specific acts tending to discredit him, although such acts are irrelevant and collateral to the main issue. State v. Pfefferle, 36 Kan. 90, 12 Pac. 406; State v. Probasco, 46 Kan. 310, 26 Pac. 749; State v. Wells, 54 Kan. 161, 37 Pac. 1005; State v. Park, 57 Kan. 431, 46 Pac. 713; State v. Greenburg, 59 Kan. 404, 53 Pac. 61; Brandon v. People, 42 N. Y. 265; People v. Casey, 72 N. Y. 393; Hanoff v. State, 37 Ohio St. 178, 41 Am. Rep. 496; Tla-koo-yel-lee v. U. S., 17 Sup. Ct. 855, 42 L. Ed. 166; Martin v. State, 125 Ala. 64, 28 South. 92. In the Case of Tla-koo-yel-lee a witness testified against her husband, and on cross-examination questions were asked with a view to showing that since the arrest of her husband she had been living with another person as his wife, under an agreement that if her husband was convicted they should continue to live together as husband and wife. The supreme court of the United States held that the questions were material, as bearing upon the character and credibility of the witness, and that their exclusion was prejudicial error. In Martin v. State, supra, a witness testified that the defendant had purchased certain meat which he was charged with stealing; and, with a view of showing bias and prejudice, it was held to be proper to cross-examine the witness as to her conduct with the defendant, although it involved illicit sexual intercourse, so long as she did not claim immunity from answering on account of subjecting herself to criminal prosecution, or its tendency to degrade her. Following these authorities, it must be held that the refusal of the court to permit a full cross-examination of Mrs. Stutzman was material error. * * *

Reversed.[44]

[44] Graves, J., in People v. Arnold, 40 Mich. 710 (1879): "On the cross-examination of the witness Sabin, he swore that he had formerly been a member of the firm of Granger and Sabin, bankers, at Detroit. Defendant's counsel then asked this question: 'Did you not, while a member of that firm, extract from an envelope securities which were left in your vault for safe keeping, and use their proceeds in stock speculations in New York?' The court on the unexplained objection of the prosecuting attorney refused to allow the question. We think this ruling was not well advised. It was important for the defendant that the jury should be informed as far as practicable, without infringement of the rules of law, in regard to the moral character and antecedents of the witness, and the question was designed to elicit such information. No doubt the witness might have declined to answer under the acknowledged rule, that no one can be compelled to criminate himself. But this is a matter of personal privilege which a witness may waive, and is not a ground of objection by the people, and here the witness did not object, and we cannot assume but that he was not only willing, but desirous to answer."

STATE v. CARSON.

(Supreme Judicial Court of Maine, 1876. 66 Me. 116.)

LIBBEY, J.[45] The prisoner was on trial for the murder of one Brawn. He was a witness in his own behalf. In his defense he had not put in evidence his previous good character. On cross-examination the counsel for the government was permitted, against objection duly taken, to ask him the following questions: "Did you assault Mr. Farrar on the Calais road, while drunk." Similar questions were allowed to be put to the witness, against objection, as to assaults on several other persons, at different times and places, while drunk. These matters had not been gone into, in the examination in chief. Was this line of examination legally permissible? It must have been admitted for one of two purposes: either as affecting the credibility of the witness, or as tending to prove the crime alleged. A party to a suit may be a witness. If a witness, his examination must be conducted under the same rules that are applicable to the examination of any other witness. To impeach his credibility, it is not competent to prove by other witnesses that he has committed other crimes than the one with which he is charged; nor is it competent to do the same thing by cross-examination.[46] The proper line of cross-examination does not extend so far as to authorize, in that way, the introduction of incompetent evidence. The witness must be prepared to vindicate his general character for truth, and to meet the proper evidence of a prior conviction of an infamous crime. These are matters properly in issue. But he cannot be required to be prepared to vindicate himself against any alleged crime that may be insinuated in the form of cross-examination, and of which he has no previous notice. We think these principles well settled by the authorities. The evidence was incompetent for the purpose of impeaching the credibility of the witness. The subject is carefully considered and determined in Holbrook v. Dow, 12 Gray (Mass.) 357.

Nor was the evidence competent as tending to prove the crime for which the prisoner was on trial. The fact that he had made a violent assault on another person, at a different time and under different circumstances, could have no legitimate effect to prove him guilty of the fatal assault upon Brawn. In Commonwealth v. Thrasher, 11 Gray (Mass.) 450, the court states the rule as follows: "As a general rule in criminal trials, it is not competent for the prosecutor to give evidence of facts tending to prove another distinct offense, for the purpose of raising an inference of the prisoner's guilt of the particular act charged. The exceptions are cases where such evidence of other acts has some connection with the fact to be found by the jury,

[45] Statement omitted.

[46] But see Goddard v. Parr, post, p. 396.

where such other fact is essential to the chain of facts necessary to make out the case, or where it tends to establish the identity of the party, or proximity of the person at the time of the alleged act, or the more familiar case, where guilty knowledge is to be shown or some particular criminal intent. Unless it be made material for some such reasons as we have stated, evidence of the substantive offenses of the like kind ought not to go to the jury." The case at bar does not fall within any exception to the general rule. We think the court erred in allowing the questions to be put to the witness.

Exceptions sustained.[47]

DUNGAN v. STATE.

(Supreme Court of Wisconsin, 1908. 135 Wis. 151, 115 N. W. 350.)

On writ of error by the defendant to review a judgment convicting him of a felonious assault on his step-daughter.[48]

DODGE, J. The errors assigned by the plaintiff in error are predicated upon the failure of the court over objection to prevent abuse by the prosecuting attorney of his right of cross-examination of the defendant. The propounded questions specially assigned as error fall into three classes: First, those tending to insinuate that the defendant himself at different times had conducted, or lived in, disreputable places devoted to prostitution either in Milwaukee or Chicago; second, questions tending to the insinuation that defendant's wife, the mother of the prosecuting witness, was a dissolute woman and engaged in prostitution, and at different times an inmate of houses devoted to that end; third, that the place of residence of the defendant and his wife at the time of the offense charged was in a building inhabited by prostitutes.

The first class of these questions presents the often discussed and often much abused field of proving disgraceful, immoral, or criminal conduct of one accused of crime which is in no way connected with the crime itself. The rule is without exception that such evidence is wholly inadmissible upon the issue of guilt, because the jury have no right to draw any inference from such general bad character or specific misconduct that the accused committed the offense charged, and yet, while recognizing that they have no such right, it is well-nigh impossible to avert a prejudicial effect from such evidence. Its admission, or any attempt by the prosecutor by suggestive questions to convey such facts to the jury, is a most serious abuse which, if not promptly suppressed by the court, with explanation to the jury such as to remove so far as possible the ill effects, must usually work reversal. Buel v. State, 104 Wis. 132, 80 N. W. 78; McAllister v.

[47] Semble, accord: People v. King, 276 Ill. 138, 114 N. E. 601 (1916).

[48] Statement condensed and part of opinion omitted.

State, 112 Wis. 496, 88 N. W. 212; Paulson v. State, 118 Wis. 90, 94 N. W. 771; Baker v. State, 120 Wis. 135, 97 N. W. 566; Topolewski v. State, 130 Wis. 244, 249, 109 N. W. 1037, 7 L. R. A. (N. S.) 756, 118 Am. St. Rep. 1019, 10 Ann. Cas. 627. Such being the undoubted rule upon the issue of guilt or innocence, it is nevertheless subject to a certain qualification which has arisen only since one accused of crime is permitted to testify in his own behalf. When he does so he is not only the defendant, but he is also a witness, and in the latter capacity is subject to the same rules as other witnesses as to the asking of questions on cross-examination relative to facts which may impair his credibility. Thus by express provision of the statute he may be asked on cross-examination whether he has been convicted of a specific crime.

Apart from statute the rule is general that some inquiry may be made of every witness as to the morality of his past life on the assumption that immorality in some other respects may have a bearing upon his character for veracity.[49] But such questions, and the information they educe, are solely relevant to that question of veracity. It is at once obvious that this rule opens a very wide field for abuse by counsel of their privilege to make such inquiry. A counsel may, if not restrained by the court, devote the cross-examination of a witness, not alone to proving disgraceful and disreputable acts having but the remotest bearing upon the question of his veracity, but he may also, by persistent questions, suggesting facts which do not exist, commit a great outrage upon the feelings and reputation of the witness, to the great embarrassment of courts from resulting reluctance of witnesses to place themselves in a position where they can be so insulted. When any attorney evinces a tendency toward such unworthy practices, it becomes the duty of the trial court to at once interpose and protect both the witness from such assaults and the forum over which he presides from thus being debased into an arena of mere scandal. Especially is such restraint his duty when the witness

[49] Hunt, J., in Shepard v. Parker, 36 N. Y. 517 (1867): "* * * It is the constant practice at the circuit to inquire of a witness if he has not been guilty of a specific offense, for the purpose of impeaching him. It is usually a satisfactory test. If a man admits himself to have been guilty of heinous offenses, the jury would justly give him less credit than if his life had been pure, and his conduct upright. If a female witness admits herself to have broken down those barriers which the virtue and religion of every civilized country have reared for her improvement and protection, her oath would be of little value before a jury of intelligent men. This practice is uniform and fully sustained by the authorities. President, etc., of Third Great Western Turnpike Road Co. v. Loomis, 32 N. Y. 127 [88 Am. Dec. 311 (1865)]; Le Beau v. People, 34 N. Y. 223 [1866]. The protection against its abuse is twofold: First, in the privilege of the witness to refuse to answer; and, second, in the discretion of the judge."

As to the discretion of the trial judge, see President, etc., of Third Great Western Turnpike Road Co. v. Loomis, 32 N. Y. 127, 88 Am. Dec. 311 (1865); Le Beau v. People, 34 N. Y. 223 (1866); State v. McCartey, 17 Minn. 76 (Gil. 54 [1871]).

is also a defendant in a criminal prosecution, for he may not only suffer in his feelings and reputation, but the jury are extremely likely to translate a suspicion of his general immoral character into a conviction of the particular crime with which he is charged.

The rule has therefore become established that the limits of this kind of cross-examination, namely, for the purpose of fairly ascertaining the character for veracity of witnesses, may safely be left to the discretion of the trial judges, and hence that, unless abuse or neglect to exercise such judicial discretion appear, the mere inquiry of a witness as to some disreputable conduct in his career need not result in reversal. Buel v. State, supra; State v. Nergaard, 124 Wis. 414, 423, 102 N. W. 899; 2 Wigmore Ev. § 981 et seq. To ask a witness whether he has at some time conducted a disreputable place of business ordinarily bears but slightly upon his character for veracity; and we held in Meehan v. State, 119 Wis. 621, 623, 97 N. W. 173, that it was by no means an abuse of discretion for a trial judge to reject such question, and yet we do not feel at liberty to say that in no case might it in the discretion of the court be asked. As to the inquiries in this case as to defendant's past life, we cannot conclude that any error was committed.

The other class of questions, namely, as to the conduct, behavior, and places of habitation of the defendant's wife, present an abuse of the right of cross-examination which is hardly conceivable. What possible relevancy to the guilt or innocence or to the veracity of the accused could the immorality or misconduct of his wife have? Is it conceivable, when a witness goes upon the stand in aid of the ascertainment of the truth, that he so opens the door to assaults on his feelings and the reputation of others as that the opposing attorney may, by asking him the question whether his wife was ever an inmate of a house of ill fame, spread abroad an insinuation of that fact? While an appellate court, in its anxiety to sustain a judgment when it can believe that errors committed upon the trial could not have affected the result, might pass over even such an assault as this upon a witness, we cannot think that in the present case such course is open to us, for the court in ruling upon certain of those questions in effect declared, in the presence of the jury, that he permitted inquiry into the conduct and surroundings of the defendant's wife and of defendant himself "in so far as it touches upon the real consideration of the defendant of those things which are naturally expected and that we naturally expect to find existing between the father and daughter or the father and stepdaughter. That is all the bearing it has in this case." This obviously meant that the fact of immoral surroundings and conduct suggested, as a legitimate inference, probability of the specific offense between the defendant and the prosecuting witness; that such evidence need not be confined to considerations of mere credibility or veracity, but might bear upon the likelihood of the commission of the crime itself.

This brought the cross-examination within all the words of disapproval which were pronounced in the Paulson Case with reference to an attempt to defame a defendant's character before he had become a witness. If the jury heeded this remark, the fact that the defendant, or even his wife, was an immoral person, living among disreputable surroundings, may have been by them considered sufficient to overcome that presumption of his innocence of the specific act of assault upon this child, and to have hurried them to a conclusion of guilt, which they might not have been able to reach from the unaided testimony of the prosecutrix, fully contradicted by the defendant himself, and also persuasively contradicted by the testimony of other witnesses. This was error which we cannot convince ourselves can be passed over as not prejudicial.

Judgment and sentence reversed, and cause remanded for new trial.[50] * * *

IV. Contradiction and Impeachment

ADAMS v. ARNOLD.

(Court of King's Bench, 1701. 12 Mod. 375.)

Trespass for an assault upon the plaintiff's wife, and getting her with child; and what the wife declared in her labour rejected to be evidence.

And here Holt, Chief Justice, would not suffer the plaintiff to discredit a witness of his own calling, he swearing against him.

REX v. OLDROYD.

(Court for Crown Cases Reserved, 1805. Russ. & R. 88.)

The prisoner was tried before Mr. Baron Graham, at the Lent assizes for the county of York, in the year 1805, for the murder of his father at Sandal Magna, on the 12th of July, 1804, by strangling him. He was convicted upon circumstantial evidence, but the learned judge respited his execution upon an objection pressed upon him by the counsel for the prisoner, as to the admissibility in evidence of a deposition read upon the trial under the following circumstances.

The counsel for the prosecution at the close of their case observed

[50] In a number of the states the cross-examination of a witness as to misconduct for the purpose of discrediting, appears to be excluded on the ground of raising collateral issues, thus failing to distinguish between cross-examination and the proof of offenses by other witnesses. For a collection of the cases, see note to 2 Wigmore, § 987.

to the learned judge, that they did not mean to call the mother of the prisoner, Elizabeth Oldroyd, strong suspicions having fallen upon her as having been an accomplice; but the judge thought it right, in compliance with the usual practice (her name being on the back of the indictment, as having been examined before the grand jury), to have her examined, which was accordingly done. The learned judge observing upon this examination, that the evidence given by the woman was in favor of the prisoner, and materially different from her deposition taken before the coroner, thought it proper to have the deposition read, for the purpose of affecting the credit of her testimony so given on the trial: and in summing up the case to the jury he stated, that her testimony was not to be relied upon, and left the matter of the prisoner's guilt entirely upon the other evidence.

The question reserved for the opinion of the judges was whether it was competent to the judge, under the circumstances stated, to order this deposition to be read, in order to impeach the credit of the witness.

The case was taken into consideration at a meeting of all the judges in Easter term, 11th of May, and again on the 18th of May, 1805, when they were all of opinion, that it was competent under the circumstances for the judge to order the deposition to be read, to impeach the credit of the witness. It was then considered whether, laying the evidence of the prisoner's mother entirely out of the case, there was sufficient evidence to go to the jury. Graham, B., read to the judges from his notes the evidence given on the trial; and, upon consideration the judges were of opinion, that there was evidence sufficient to go to the jury; and that the jury having found the prisoner guilty, there were not circumstances sufficient to raise a doubt so as to induce any interposition to prevent the law taking its course.

The case of Margaret Tinckler (East, P. C. 354—This case was before the judges on the 6th November, 1781) was mentioned; where the judges determined, that although evidence had been received which was not strictly admissible, yet the case appearing clear against the prisoner without that evidence, it was not a reason to stay the execution. And the judges, upon the present occasion, seemed all to agree to that doctrine, where the case was otherwise clear; but seemed to think, that this case could hardly have fallen within the rule if the evidence of the mother's deposition, to impeach her credit, had been held inadmissible.

Upon the question, whether a party producing a witness could be permitted to call evidence to impeach the credit of such witness, were cited Rex v. Colledge, Adams v. Arnold (12 Mod. 375), 12 Vin. Abr. 48, tit. Evidence, M, a, pl. 6.

In this case, the determination of the judges was confined to the right of a judge to call for a witness's deposition, in order to impeach

the credit of a witness who on the trial should contradict what she has before deposed; but Lord Ellenborough and Mansfield, C. J., thought the prosecutor [51] had the same right.

BRADLEY v. RICARDO.

(Court of Common Pleas, 1831. 8 Bing. 57.)

This was an action against the sheriff of Gloucestershire for a false return of nulla bona to a writ of fi. fa.

At the trial the plaintiff called the sheriff's officer to prove the receipt of the warrant to levy.

Upon cross-examination, the witness affirmed that no goods could be found belonging to the party against whom the levy was directed.

The plaintiff's counsel was then proceeding to prove his case by other witnesses, and to contradict the sheriff's officer as to his statement that no goods could be found, when the learned Judge who presided thought that, if the plaintiff were permitted to contradict a witness placed in the box by himself, as to a particular fact, the whole evidence of the witness must be struck out; upon which the plaintiff was nonsuited.

Wilde, Serjt., obtained a rule nisi to set aside the nonsuit, contending that though a party is not allowed to throw general discredit on the character of a witness called by himself, he may set him right as to any particular fact which he may have stated incorrectly, and the rest of his evidence may stand.

TINDAL, C. J.[52] This rule must be made absolute. The object of all the laws of evidence is to bring the whole truth of a case before a jury; but if this rule were to be discharged, that would no longer be the just ground on which the principles of evidence would proceed, but we should compel the plaintiff to take singly all the chances of the tables, and to be bound by the statements of a witness whom he might call without knowing he was adverse, who might labour under a defect of memory, or be otherwise unable to make a statement on which complete reliance could be placed. Suppose a case in which, for some

[51] In State v. Slack, 69 Vt. 486, 38 Atl. 311 (1897), it was held that the state's attorney might prove a conviction to discredit a witness called by him.

In Com. v. Hudson, 11 Gray (Mass.) 64 (1858), it was ruled by Shaw, C. J., that the prosecution should not be permitted to prove contradictory statements by its own witness.

It has been held that, where the rule requires a party to call an attesting witness, he is entitled, in case of adverse testimony, to prove the bad reputation of the witness for truth, Williams v. Walker, 2 Rich. Eq. (S. C.) 291, 46 Am. Dec. 53 (1846); or to prove contradictory statements, Thompson v. Owens, 174 Ill. 229, 51 N. E. 1046, 45 L. R. A. 682 (1898); Harden v. Hays, 9 Pa. 151 (1848).

[52] Opinions of Gaselee, Bosanquet, and Alderson, JJ., omitted.

formal proof, the plaintiff is obliged to make a witness of the defendant's attorney, who on cross-examination makes a statement adverse to the plaintiff; is the plaintiff to be precluded from calling the witnesses whom he had prepared before to show the real state of the case? It has been urged as an objection, that this would be giving credit to the witness on one point after he has been discredited on another; but difficulties of the same kind occur in every cause where a jury has to decide on conflicting testimony. The general rule is, that a party shall not be permitted to blast the character of a witness called in support of his case by adducing general evidence to his discredit; but I have never heard it said that when surprised by a statement contrary to fact, he may not call another witness to show how the fact really is. It is a common occurrence that persons called on to give their testimony decline to make any statement before they appear in Court. It would be a great hardship if the party compelled to call such persons should be bound by everything they may choose to say. The alteration in the general rule which the defendant in this case seeks to establish, would lead to great inconvenience and injustice. The rule, therefore, which has been obtained for setting aside the nonsuit must be made absolute.

Rule absolute.

WRIGHT v. BECKETT.

(Court of Common Pleas, 1834. 1 Moody & R. 414.)

LORD DENMAN, C. J.[53] The question which has been argued before us, arose in this manner: Four witnesses, examined on the plaintiff's part, gave evidence which, if believed, established his case; he then called a fifth, whose testimony, if believed, defeated the plaintiff's case, and fully proved that of the defendant. It was then proposed by the plaintiff to shew that this same witness had formerly given a completely different account at another time. The mode of doing this, was by producing the statement taken down shortly before the trial, from his own lips, by the plaintiff's attorney. The object of the evidence tendered, was to shew the untruth of what he swore upon the trial; we are now to consider whether I did right in permitting this contradiction to be proved.

Notwithstanding my respect for the different opinion which is entertained by my learned brother now present, and, as I believe by others of great weight and authority, I retain that on which I acted at Lancaster.

The case was brought by what occurred to this simple point,—to which of the witnesses credit was due. If to the first four, the plain-

[53] Statement and part of opinions of Lord Denman, C. J., and Bolland, B., omitted.

tiff was entitled to the verdict; if to the last, the defendant. On this issue alone the event of the cause depended. The defendant enjoyed the privilege of assailing the credit of those who were opposed to his interest: the plaintiff must have the same right with respect to that witness who unexpectedly turned against him, unless he is debarred by some strict rule of law.

I find no such rule, but many decisions which must have proceeded on the opposite principle. There is a passage, indeed, upon this subject in Buller's Nisi Prius, to which, as I understand it, I most fully subscribe (page 297): "A party never shall be permitted to produce general evidence to discredit his own witness, for that would be to enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him with the means in his hands of destroying his credit if he spoke against him. But if a witness prove facts in a cause which make against the party who called him, yet the party may call other witnesses to prove that those facts were otherwise; for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only."

But I consider the meaning to be, that no party shall produce a witness whom he knows to be infamous, and whom he has, therefore, the means of discrediting by general evidence. No inference arises, that I may not prove my witness to state an untruth, when he surprises me by doing so, in direct opposition to what he had told me before. In this case, the discredit is consequential, and the evidence is not general but extremely particular, and subject to any explanation which the witness may be able to afford. The rule laid down in Buller's Nisi Prius, therefore, appears to me inapplicable.

Two dangerous consequences are, however, apprehended from admitting the former statement of a witness, in contradiction to his testimony on the trial.

Now, I must observe in passing, that the Judge's apprehension of possible danger on admitting certain evidence, cannot create a rule for excluding it. The Legislature may make such a provision, or the rule may have so far prevailed in practice as to be properly considered parcel of the common law. But if, instead of acting on established rules, we were now conferring on what rules it would be best to establish, the inconvenience of precluding the proof tendered strikes my mind as infinitely greater than that of admitting it. For it is impossible to conceive a more frightful iniquity, than the triumph of falsehood and treachery in a witness, who pledges himself to depose to the truth when brought into Court, and, in the meantime, is persuaded to swear, when he appears, to a completely inconsistent story.

The dangers on the other hand, though doubtless very fit subjects of precaution in the progress of a trial, exist at present, in an equal degree, with reference to modes of proceeding which have never yet been questioned.

The most obvious and striking danger is that of collusion. An attorney may induce a man to make a false statement without oath, for the mere purpose of contradicting by that statement the truth, which, when sworn as a witness, he must reveal. The two parties concerned in this imagined collusion must be utterly lost to every sense of shame as well as honesty. But there is another mode by which their wicked conspiracy could be just as easily effected. The statement might be made, and then the witness might tender himself to the opposite [54] party, for whom he might be first set up, and afterwards prostrated by his former statement. This far more effectual stratagem could be prevented by no rule of law.

The other danger is, that the statement, which is admissible only to contradict the witness, may be taken as substantive proof in the cause. But this danger equally arises from the contradiction of an adverse witness; it is met by the Judge pointing out the distinction to the jury, and warning them, not to be misled. It is not so abstruse but that Judges may explain it, and juries perceive its reasonableness; and it is probable that they most commonly discard entirely the evidence of him who has stated falsehoods, whether sworn or unsworn.

I now proceed to observe upon the cases cited.[55] * * *

The result is, that, finding no direct authority compelling the exclusion of such evidence, and some which appear to me on principle to prove it admissible, and thinking that truth and justice may be most materially affected by that exclusion, I am bound to abide by the course I pursued at nisi prius, and must give my judgment against making the rule absolute.

BOLLAND, B. * * * I have most attentively considered all the cases cited in the arguments before us, and I am of opinion that the evidence of Mr. Mallady ought not to have been received, and that the rule for a new trial should be made absolute.

The rule applicable to this question is, as it seems to me, that which has been relied upon by my brother Jones; viz., that a party in a cause is not to be permitted to give evidence of a fact, for the purpose of discrediting his own witness, unless such fact would of itself be evidence in the cause; but that where such fact is relevant to the issue, and so per se evidence in the cause, such proof is to be allowed to be given, although it may collaterally have the effect of discrediting the testimony of his own witness.

The passage cited from Mr. Justice Buller's treatise on the law rela-

[54] In Clancey v. St. Louis Transit Co., 192 Mo. 615, 91 S. W. 509 (1905), it was held that, in case of collusion between the opposite party and the witness, the party calling the witness might contradict him by his former deposition.

[55] In the omitted passages the Chief Justice reviewed Alexander v. Gibson, 2 Campb. 556 (1811); Lowe v. Joliffe, 1 Wm. Blackstone, 365 (1762); Goodtitle v. Clayton, 4 Burr, 2224 (1768); Rex v. Oldroyd, Russ. & Ry. 88 (1803); Ewer v. Ambrose, 3 B. & C. 746 (1825); Friedlander v. London Assurance Co., 4 B. & Adol. 193 (1832).

tive to trials at nisi prius, p. 297, taken altogether, warrants this distinction; for after having laid it down that a party shall not be permitted to give general evidence to discredit his own witness, the learned author goes on to state,—"But if a witness prove facts in a cause which make against the party who called him, yet the party may call other witnesses to prove that those facts were otherwise, for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only." By these words the learned writer points out in what manner and to what extent a party shall be allowed to impeach the credit of his own witness, in contradistinction to that "general evidence," of which he had made mention just before. The cases of Ewer and Another, Assignees v. Ambrose and Another, 3 B. & C. 746, and Friedlander v. The London Assurance Company, 4 B. & Adol. 193, were decided upon the principles laid down in the above rule; and it is worthy of observation, that the general leaning of the late Lord Tenterden's mind was so strong against allowing a party to discredit one of his own witnesses, that when the latter case was before him at nisi prius, he appears to have considered, though mistakenly, as the Court afterwards thought, that all such evidence was inadmissible.

I think that great weight is due to the argument founded on the danger of collusion; it is, indeed, in my mind, the main objection to the reception of the evidence. * * *

With the exception of the opinion of the two learned Judges in Rex v. Oldroyd, the authorities are uniform in establishing, that a party cannot contradict his own witness but by giving evidence of facts bearing upon the issue. It was open to the plaintiff to do so in the present case, but he was not at liberty to prove that his witness, Warrener, had previously made a different statement to the attorney, because that was a matter not relevant to the issue in the cause; nor was the statement entitled to such weight as a contradiction, as to have the power of neutralizing the evidence (one of the reasons urged for its admission), it not having been given upon oath. It furnished a sufficient apology for putting Warrener in the brief, and calling him, but could go no farther. In the case of Ewer v. Ambrose, the evidence by which it was sought to contradict the witness was, his answer in Chancery. In Rex v. Oldroyd, the contradiction was supported by the witness's deposition before the coroner.

For these reasons I am of opinion, the evidence of the witness, Mallady, was improperly received at the trial; but, as the Court is divided, there cannot, of course, be any rule.[56]

[56] Erle, J., in Melhuish v. Collier, 15 Adolphus & Ellis (N. S.) 878, (Court of Queens Bench, 1850): "The first point is an important one. A plaintiff's witness says, in effect, that the plaintiff has no cause of action. Then he is asked whether he has not, formerly, made a different statement. I think that question is proper, and not inconsistent with the rule that a party know-

ATWOOD v. WELTON.

(Supreme Court of Errors of Connecticut, 1828. 7 Conn. 66.)

This was an action qui tam, for taking usury, brought on the statute, to recover the value of the money alleged to have been loaned by the defendant, to one Hezekiah Scott, on a corrupt and usurious agreement.

On the trial, Hezekiah Scott, named in the declaration as the borrower of the money, was offered as a witness by the plaintiff, to prove the alleged usury. Upon his cross-examination, he was asked, by the defendant's counsel, whether he had not been in a controversy with the defendant, and whether he had not threatened that he would be revenged on him for collecting of him the note mentioned in the plaintiff's declaration, to each of which inquiries Scott, the witness, answered in the negative. And thereupon the defendant offered Richard Bryan and others, as witnesses, to prove that Scott had been in controversy with the defendant, and had threatened that he would be revenged on him for collecting said note. These witnesses were objected to, by the plaintiff; and the judge rejected them. The plaintiff obtained a verdict; and the defendant moved for a new trial, on the ground that these decisions of the judge were erroneous.[57]

DAGGETT, J. It is very clear, that a witness, on his cross-examination, may be questioned as to his being in a controversy with the party against whom he testifies, and whether he has not threatened to be revenged on him. If he should answer affirmatively, it would show a bias on his mind, which ought to be weighed by the jury, in considering his testimony. To such a witness as full belief will not be readily yielded as to one who feels no such hostility. If the wit-

ing a witness to be infamous ought not to produce him, and must not be allowed to take the chance of his answers and then bring evidence to contradict him. We do not interfere with that rule. There are treacherous witnesses who will hold out that they can prove facts on one side in a cause, and then for a bribe or from some other motive, make statements in support of the opposite interest. In such cases, the law undoubtedly ought to permit the party calling the witness to question him as to the former statement, and ascertain, if possible, what induces him to change it. It is not now necessary to ask whether a person to whom the former statement was made may be called to contradict the witness; for it was not done here. The point is one upon which judges have differed, and opinions may vary to the end of time. As to the remaining question: Where a witness alleges a fact contrary to the interest of the party calling him, it is clear that the party may bring others to prove opposite facts, relevant to the case."

For further comments on this subject, see opinion of Justice White in Putnam v. U. S., 162 U. S. 687, 16 Sup. Ct. 923, 40 L. Ed. 1118 (1896).

Where the English rule as to the extent of cross-examination prevails, a party does not make a witness his own by cross-examination as to any relevant matter, so as to preclude proof of contradictory statements. Johnson v. Armstrong, 97 Ala. 731, 12 South. 72 (1893). The rule appears to be otherwise where cross-examination is restricted. Lambert v. Armentrout, 65 W. Va. 375, 64 S. E. 260, 22 L. R. A. (N. S.) 556 (1909).

[57] Statement condensed and part of opinion omitted.

ness should answer in the negative, it is equally clear, he may be contradicted by other proof. A witness may always be asked any question relative to the issue, for the purpose of contradicting him, if his answer be one way, by other witnesses, in order to discredit his whole testimony. "Falsus in uno, falsus in omnibus," has become a familiar maxim. Such has been the invariable rule in our country; and such is the rule of the common law. In upwards of forty years practice, I have not known it to be doubted. It is true, a witness may not be interrogated as to any collateral independent fact. This would be to try as many issues as a party might choose to introduce, and which the other party might not be prepared to meet. Spencely qui tam, v. De Willott, 7 East, 108. The question whether the defendant had a controversy with the witness, and had threatened to be revenged, surely was relevant to the issue; for it tended to prove such a state of mind towards the defendant, as might well be submitted to the jury to discredit his testimony as to material facts. There is hardly a point about which there can be less doubt. Swift's Ev. 148; Turner v. Austin, 16 Mass. 185; Tucker v. Welsh, 17 Mass. 160, 9 Am. Dec. 137; 2 Camp. Rep. 630; 1 Stark. Ev. 135. "In such a case, (says the learned commentator,) the inquiry is not collateral, but most important to show the motives and temper of the witness in the particular transaction." * * *

New trial granted.[58]

ATTORNEY GENERAL v. HITCHCOCK.

(Court of Exchequer, 1847. 1 Exch. 91.)

This was an information at the suit of the Attorney-General, which charged the defendant, a malster, with having used a certain cistern for making malt, without having previously entered it, as required by the statute 4 & 5 Will. 4, c. 51, s. 6.

At the trial, before Pollock, C. B., at the sittings after last Easter term, a witness of the name of Spooner, who deposed to the fact of the cistern having been used by the defendant, was asked, on cross-examination by the defendant's counsel, whether he had not said that the officers of the Crown had offered him £20 to say that the cistern had been used. Spooner denied having said so, and thereupon the defendant's counsel proposed to ask another witness of the name of Cook, whether Spooner had not said so. The Attorney-General objected to this question, and the Lord Chief Baron, being of opinion that the question was irrelevant to the issue, and that it also tended to raise a collateral issue, held the objection good, and ruled that it could not be put.

[58] And so in State v. Darling, 202 Mo. 150, 100 S. W. 631 (1906).

Bovill obtained a rule for a new trial, on the ground that this evidence was improperly rejected, and cited Meagoe v. Simmons, 3 C. & P. 75, and Yewin's case, 2 Campb. 638, (n).

POLLOCK, C. B.[59] I am of opinion that this rule should be discharged; and I may also add, that my brother Parke expressed himself to be of that opinion before he left the Court. The question is, whether the witness Spooner, who had been asked if he had not said that the officer had offered him a bribe for the purpose of saying that the cistern had been used, and who stated that he had not said so, could be contradicted by asking the other witness, Cook, if Spooner had not made that statement to him? The circumstance of Spooner being the only witness to prove that fact cannot affect the point, which must stand or fall by this general question, and by the answer to it, namely, on what occasions can evidence be admitted to contradict a witness, as to what he denies having said on cross-examination. I think, whether the answer be given in the terms used by me at the trial, or whether it be in effect as my Brother Alderson has put it in the course of the argument this morning, the result is the same. I have always understood,—and it is a matter on which I am not now expressing an opinion the result merely of the argument and consideration of to-day, and of the other day when the matter was before the Court, but the result of much consideration given to such questions during great experience in these matters, and with questions respecting the law of evidence,—my view, I say, has always been, that the test, whether the matter is collateral or not, is this: if the answer of a witness is a matter which you would be allowed on your part to prove in evidence —if it have such a connection with the issue that you would be allowed to give it in evidence—then it is a matter of which you may contradict him. Or it may be as well put, or perhaps better, in the language of my Brother Alderson this morning, that if you ask a witness whether he has not said so and so, and the matter he is supposed to have said, would, if he had said it, contradict any other part of his testimony, then you may call another witness to prove that he had said so, in order that the jury may believe the account of the transaction which he gave to that other witness to be the truth, and that the statement he makes on oath in the witness-box is not true.

As to the authorities cited by Mr. Bovill, with the greatest respect for the learned writers whose words he has quoted, I must say I think the expression, "as to any matters connected with the subject of inquiry," is far too vague and loose to be the foundation of any judicial decision. And I may say, I am not at all prepared to adopt the proposition in those general terms—that a witness may be contradicted as to any thing he denies having said, provided it be in any way connected with the subject before the jury. It must be connected with the issue as a matter capable of being distinctly given in evidence, or it must

[59] Opinions of Alderson and Rolfe, BB., omitted.

be so far connected with it as to be a matter which, if answered in a particular way, would contradict a part of the witness's testimony; and if it is neither the one nor the other of these, it is collateral to, though in some sense it may be considered as connected with, the subject of inquiry. A distinction should be observed between those matters which may be given in evidence by way of contradiction, as directly affecting the story of the witness touching the issue before the jury, and those matters which affect the motives, temper, and character of the witness, not with respect to his credit, but with reference to his feelings towards one party or the other. In the case cited, of Thomas v. David [7 C. & P. 350] on the witness being asked whether she was not connected in a particular manner with one of the parties, and having denied it, the learned judge permitted evidence to be given to show that the connection which she swore had not existed, did in reality subsist. The object in doing so was, not to prove or disprove any part of her testimony, but the evidence was received on the same ground as it was in the case of Ex parte Yewin [2 Campb. 638], where Mr. Justice Lawrence permitted evidence to be given to contradict a witness as to his having used expressions importing revenge. It is certainly allowable to ask a witness in what manner he stands affected towards the opposite party in the cause, and whether he does not stand in such a relation to that person as is likely to affect him, and prevent him from having an unprejudiced state of mind, and whether he has not used expressions importing that he would be revenged on some one, or that he would give such evidence as might dispose of the cause in one way or the other. If he denies that, you may give evidence as to what he has said, not with the view of having a direct effect on the issue, but to show what is the state of mind of that witness, in order that the jury may exercise their opinion as to how far he is to be believed. But those cases, where you may show the condition of a witness, or his connection with either of the parties, are not to be confounded with other cases, where it is proposed to contradict a witness on some matter unconnected with the question at issue. And as to the latter class of cases, it appears to me that no instance has been cited by Mr. Bovill which amounts to an authority that you may contradict the witness on any matter that is not directly in issue before the Court.

In this case it is admitted, that, with reference to the offering of a bribe, it could not originally have been proved that the offer of the bribe had been made to the witness to make a particular statement, the bribe not having been accepted by him. And the reason is, that it is totally irrelevant to the matter in issue, that some person should have thought fit to offer a bribe to the witness to give an untrue account of a transaction, and it is of no importance whatever, if that bribe was not accepted. It is no disparagement to a man that a bribe is offered to him: it may be a disparagement to the person who makes the offer. If, therefore, the witness is asked the fact, and denies it or if he is asked whether he said so and so, and denies it, he cannot

be contradicted as to what he has said. Lord Stafford's case [7 How. St. T. 1400] was totally different. There the witness himself had been implicated in offering a bribe to some other person. That immediately affected him, as proving that he had acted the part of a suborner for the purpose of perverting the truth. In that case the evidence was to show that the witness had offered a bribe in the particular case, and the object was to show that he was so affected towards the party accused as to be willing to adopt any corrupt course in order to carry out his purpose. It seems to me that, under these circumstances, this evidence was properly excluded, and that, therefore, this rule should be discharged.

Rule discharged.[60]

HARDEN v. HAYS.

(Supreme Court of Pennsylvania, 1848. 9 Pa. 151.)

ROGERS, J.[61] * * * The plaintiff having given evidence of the execution of the will by the subscribing witnesses, viz.: by proving the handwriting of Samuel Cochran, and by the testimony of Charles Chessman, the defendants proposed to prove that Samuel Cochran, the witness to the will, in conversation with the witness said repeatedly that the testator was not in his right mind when the will was drawn and executed; that he regretted he had drawn it or had anything to do with it, and that it ought to be burned or destroyed. The evidence so offered was rejected by the court, and this forms one of the prominent points in the case. This testimony, if true, would be decisive of the plaintiff's case. Its materiality cannot, therefore, be disputed. It is equally clear that, had Cochran lived and been brought to the stand, it would have been evidence of the most overwhelming character. Cowden v. Reynolds, 12 Serg. & R. 281. But it is said that inasmuch as he is dead, and his handwriting only proved, the evidence, from the accident of death, must be excluded. The opinion of the court is not without authority to support it, for the same point has been ruled in Stobart v. Dryden, 1 Meeson & Welsby, 615. The reasons on which the case was ruled are well summed up by Mr. Greenleaf, in his valuable Treatise on Evidence, vol. 1, p. 216, § 126. Such testimony was overruled by the court, "because the evidence of the handwriting in the attestation is not used as a declaration of the witness, but is offered merely to show the fact that he put his name there in the manner in which attestations are usually placed to genuine signatures, and the second chiefly because of the mischiefs which would ensue if the gen-

[60] See Williams v. State, 73 Miss. 820, 19 South. 826 (1896), where a number of the cases are reviewed.

[61] Statement and part of opinion omitted.

eral rule excluding hearsay were thus broken in upon; for the security of solemn instruments would thereby become much impaired, and the rights of parties under them would be liable to be affected at remote periods by loose declarations of the attesting witnesses, which could neither be explained nor contradicted by the testimony of the witnesses themselves. In admitting such declarations, too, there would be no reciprocity; for although the party impeaching the instrument would thereby have an equivalent for the loss of his power of cross-examination of the living witness, the other party would have none for the loss of his power of re-examination."

That there is force in the reasoning of the court, I am not disposed to deny, although I cannot agree to the first reason assigned. It is not true at least in this state, where subscribing witnesses are not required to a will, that the evidence of handwriting in the attestation is offered merely as the declaration of the fact that he put his name there in the manner in which attestations are usually placed to genuine signatures. On the contrary, proof of the handwriting of a deceased subscribing witness is not merely evidence that he attested the will, but it is also proof of the sanity of the testator. It is evidence of that asserted fact, because the principle of law is, that no man would attest the will of any but a sane person of sound, disposing mind, memory, and understanding. On such evidence, without more, a will must be admitted to probate. It is in effect the attestation of the witness that the testator was sane. In Hays v. Harden, 6 Pa. 409, it is ruled that proof of the handwriting of the subscribing witness to a will, when the witness cannot be called, is equivalent to his oath to the signature of the testator. On this point several cases have been ruled, some closely analogous, others directly in point. Indeed, I do not understand it to be denied, that you may give evidence of the general character of the witness for truth and veracity to impeach or lessen the weight due to the attestation. Nor can it be questioned, in this state at least, after the decision of the case of Crouse v. Miller, 10 Serg. & R. 155, in which it was held that where book entries were given in evidence on proof of the handwriting of a deceased or absent witness, his character either for truth or honesty might be impeached for the purpose of destroying their credibility. This, it is true, is not the very point, but it is analogous to the case in hand.

It is admitted by Baron Parke that a contrary doctrine had been ruled in some cases in England, although very limited, as he says, indeed, in point of number. It was so ruled by Lord Mansfield, in Wright v. Littler, 3 Burrows, 1244; by Justice Heath at nisi prius; recognized and approved by Lord Ellenborough; and to this let me add, by Bayley, J., in Doe v. Ridgway, 4 Barn. & Ald. 55. He (the attesting witness to a bond), Justice Bayley says, must have been called if he had been alive, and it would then have been competent to prove, by cross-examination, his declarations as to the forgery of the bond. Now the party ought not, by the death of the witness, to be deprived of

obtaining the advantage of such evidence. The same may be said of 5 Bing. 435. The weight of authority at the time of the decision of Stobert v. Dryden, was all on one side, and opposed to the doctrine of that case, which evidently was ruled on the ground of the dangerous character of the testimony. In Losee v. Losee, Executors, 2 Hill, 609, the Supreme Court of New York held that where an instrument is read in evidence on proof merely of the handwriting of the attesting witness, the adverse party may give evidence of the witness's bad character at the time of attesting, and show his subsequent declarations that the instrument was a forgery. Chief Justice Nelson, who delivered the opinion of the court, cites many cases in which the same doctrine is held. The point came incidentally before the court in Fox v. Evans, 3 Yeates, 506. There the declarations of one of the witnesses to a will, who was out of the state and had not been examined, was properly overruled; but it is evident from the remarks of the court, that if his handwriting had been proved, evidence of his declarations to impeach him would have been received. For when a party rests on his testimony, it is open to attack either by proof of his general character, or by proof of his repeated declarations.

The same point has also been ruled in McElwee v. Sutton, 2 Bailey (S. C.) 128. There a deed was introduced on proof of the death and handwriting of one Vail, the attesting witness, whereupon the opposite party offered to show that Vail had frequently said the deed had been ante-dated to protect the property from creditors. The evidence was rejected, and for this cause, among others, a new trial was awarded. O'Neil, J., who delivered the opinion of the court, after remarking that the presumption arising from the attestation in question might be overcome, added: "To do this nothing can be more satisfactory than to show that the witness himself had said, 'Although I witnessed the deed, yet I know it does not bear its genuine date, but was ante-dated to save the property.' This is in effect a contradiction of the testimony which the law presumes him to give." In North Carolina, where trespass was brought for killing a slave, it was held that the slave's good character was admissible to repel the presumption of his improper conduct. Pierce v. Myrick, 12 N. C. 345. So in Gardenhire v. Parks, 2 Yerg. (Tenn.) 23, and Vandyke v. Thompson, 1 Har. (Del.) 109, the same point was presented for decision in the case of deeds which had been proved by the subscribing witnesses and subsequently recorded; and it was in both instances determined that evidence of their bad character might be given for the purposes of showing the instruments were forgeries. In that class of cases the question becomes of primary importance. Vide notes to 2 Hill, 612, and 1 Meeson & Welsby, 615.

From this array of cases, it must be agreed that on this side of the Atlantic at least, the weight of authority is decidedly in favour of the admission of the testimony. It is said that if any declarations, at any time, from the mouth of subscribing witnesses who are dead, are to be admitted in evidence, the result would be that the security of solemn

instruments would be much impaired. The rights of parties under wills and deeds would be liable to be affected at remote periods by loose declarations of attesting witnesses, which those parties would have no opportunity of contradicting or explaining by the evidence of the witnesses themselves. I admit there is force in this view of the case, and that such testimony calls for vigilance and strict scrutiny, but I cannot agree that this is a reason for the exclusion of the testimony altogether, thereby, in many cases, destroying the possibility of exposing fraud, forgery, and villainy of every description, so apt to be practised on persons of weak understandings, particularly when debilitated by sickness and disease. It is better that we should incur the risk mentioned, than that we should sanction fraud and imposition. The remarks of Baron Parke show a distrust of courts and juries, and if pushed to an excess would be an argument against all testimony whatever, which we all know has and will continue to be abused; but that would be a flimsy reason for excluding it altogether. Human testimony may be uncertain, yet its introduction is a necessity with which we cannot dispense. Courts and juries will make the necessary allowances so as to attain the ends of justice by extracting the truth from the attending circumstances.

The result of this novel doctrine, for it is nothing less, it seems to me will be to produce this result, that a man who has a valid title to-day, by the accident of death will have none to-morrow. To obtain this questionable benefit it is hardly worth while to overturn a current of authorities establishing a different principle. And be it remarked, not a solitary case to the contrary has been cited on this side of the Atlantic. And that the admission of the evidence is better calculated to attain the ends of justice, would also appear from this, that the same principle must be extended to cases where the subscribing witness is out of the jurisdiction of the court. It is not difficult to see how easy it would be to spirit away a subscribing witness on the eve of trial, prove his handwriting, thereby giving full effect to his testimony, and then excluding all testimony of his repeated declarations, that the bond or will was a forgery or a conspiracy to cheat or defraud. Establish this doctrine, and we shall not be without instances of attempts to baffle justice by removing the witness, and thereby prevent the introduction of proof, which the guilty know would destroy their claim. I have, therefore, come to the conclusion we shall better attain the ends of justice by adhering to the law as established, than by adopting fanciful theories, although supported by the authority of some of the members of the Court of Exchequer of acknowledged ability and talents. * * *

Venire de novo.[62]

[62] And so in the case of dying declarations. Carver v. U. S., 164 U. S. 694, 17 Sup. Ct. 228, 41 L. Ed. 602 (1897). But see Stobart v. Dryden, 1 M. & W. 615 (1836).

BEAUBIEN et al. v. CICOTTE et al.

(Supreme Court of Michigan, 1864. 12 Mich. 459.)

CAMPBELL, J.[68] This case arises upon the will of Antoine Beaubien, deceased, probate of which was refused in the Probate Court, and in the Circuit Court for Wayne county to which an appeal was brought.

The will was opposed on the grounds of incapacity, and fraud and undue influence. The proponents now bring error, alleging that the court below received and rejected testimony improperly. * * *

Dr. Smith, who had testified in his direct examination to the valid execution of the will, and the capacity of the testator, was asked whether he had not, on a certain occasion, at Mr. Beaufait's house, had a conversation with George Moran and one Page, referring to Beaubien's death and will, and declaring that if the family should follow it up they would break the will, for it was not worth a snap of his fingers. This he denied. Moran was called upon the stand and asked whether, on that occasion, Smith made the remark mentioned concerning the will. The question being objected to was discussed, and withdrawn to introduce some preliminary inquiries which were objected to, and which related to the preliminary conversation touching Beaubien's death, and whether Moran had any conversation with Smith that night about the will, Smith having denied any conversation with him on any subject. The grounds of the objection were not given, but it is now claimed that the conversation, if had, was immaterial. We think the contradiction comes properly within the rule of impeachment. When a witness testifies on the stand that a paper was duly executed by a competent testator, his statement on another occasion that the instrument was worthless, is a clear contradiction on the very essence of the issue. The case of Patchin v. Astor Mutual Ins. Co., 13 N. Y. 268, where the same objection was made that is made here, that the statement was one of opinion and not of fact, is directly in point. It was in the witness's power, if he saw fit, admitting the conversation, to explain that it was a mere matter of opinion, and based upon the facts sworn to on the trial. Such a statement, however, upon so plain a matter, is usually one which would be understood as intended to cover facts; and even if confined to opinion, it would, upon a question of capacity, and coming from the attending physician and subscribing witness, be as directly material to the issue, because the witness's opinion formed one of the most important parts of his testimony. It is difficult to conceive how a subscribing witness could declare a will worthless, and yet not intend to convey a statement of fact inconsistent with testimony which should show it to have been made by a man of sound mind, and acting without pressure. The preliminary questions

[68] Statement and part of opinion omitted.

were necessary in order to identify time and place, and the fact of a conversation. The subsequent rejection of testimony which should have been received can not affect the admissibility of this.[64] * * *

COMMONWEALTH v. HAWKINS.

(Supreme Judicial Court of Massachusetts, 1855. 3 Gray, 463.)

Trial on an indictment for murder, before Shaw, C. J., and Metcalf and Bigelow, JJ.[65]

Bolles, for the defendant, offered the depositions taken before the coroner, at the inquest on the body of Leet, for the purpose of contradicting the evidence given by the same witnesses at this trial, when called by the Commonwealth. The attorney general objected, on the ground that the witnesses sought to be impeached had not been asked, on their examination, whether they had not previously made different statements, nor had their attention in any way called to their depositions before the coroner.

But the Court were of opinion that, for the purpose of impeaching the witnesses, such parts of their depositions were admissible as were contradictory of the evidence given by them at the trial; that the uniform practice in this commonwealth, differing in this respect from that of England, and some of the other states, had been, as stated in Tucker v. Welsh, 17 Mass. 160, 9 Am. Dec. 137, to allow the introduction of evidence that a witness had previously made different statements, without first calling his attention to such statements;[66] that after such parts had been read, the Commonwealth would have the right to require the whole of the former statement to be read, and might recall the witness afterwards to explain the alleged discrepancy.

Bolles then proposed to point out to the jury that these witnesses had omitted, in their testimony before the coroner, material facts to which they now testified, and which, he argued, were so important that they could not have been omitted then, and remembered now, consistently with the ordinary workings of a good memory and a good conscience.

[64] And so in Com. v. Molnehan, 140 Mass. 463, 5 N. E. 259 (1886); McFadin v. Catron, 120 Mo. 263, 25 S. W. 506 (1894). See Whipple v. Rich, 180 Mass. 477, 63 N. E. 5 (1902), where it was thought that the former statement of a witness to an accident, that the driver was not to blame, might be received to contradict his testimony, which tended to show carelessness on the part of the driver.

[65] Part of case omitted.

[66] And so in Robinson v. Hutchinson, 31 Vt. 443 (1859); Inhabitants of New Portland v. Inhabitants of Kingfield, 55 Me. 172 (1882); Cook v. Brown, 34 N. H. 460 (1857).

For a review of the New England cases, see Hedge v. Clapp, 22 Conn. 262, 58 Am. Dec. 424 (1853), in which it is suggested that the rule is one of practice which may be varied in the discretion of the judge.

But the Court ruled that those parts only of the testimony before the coróner could be read, for the purpose of impeaching the character of the witness, which went to show a discrepancy or contradiction, as by showing that the witness had given different accounts at different times, by alleging a fact at one time which he denied at another, or by stating it in two ways inconsistent with each other; and that the mere omission to state a fact, or stating it less fully before the coroner, was not a subject for comment to the jury, unless the attention of the witness was particularly called to it at the inquest. * * *

Verdict, guilty of manslaughter.

CONRAD v. GRIFFEY.

(Supreme Court of the United States, 1853. 16 How. 38, 14 L. Ed. 835.)

Mr. Justice McLEAN delivered the opinion of the Court.

This is a writ of error to the Circuit Court of the United States, for the Eastern District of Louisiana.

This action was brought to recover the balance of three thousand seven hundred and eighty-one dollars and fifty-eight cents, claimed to be due under a contract to furnish, deliver, and set up, on the plantation of the defendant, in the parish of Baton Rouge, a steam-engine and sugarmill boilers, wheels, can carriers, and all other things necessary for a sugar-mill; all which articles were duly delivered.

The defendant in his answer set up several matters in defense.

The error alleged arises on the rejection of evidence offered by the defendant on the trial before the jury, and which appears in the bill of exceptions. The plaintiff read in evidence the deposition of Leonard N. Nutz, taken under a commission on the 28th of June, 1852, and filed the 9th of July succeeding. The defendant then offered in evidence a letter of the witness dated at New Albany, on the 3d April, 1846, with an affidavit annexed by him of the same date, addressed to the plaintiff Griffey. As preliminary proof to the introduction of said letter, the defendant adduced the bill of exceptions signed upon a former trial of this cause, and filed on the 23d February, 1849, showing that the letter had been produced by the plaintiff in the former trial, and read by his counsel in evidence as the letter of Nutz, in support of a former deposition made by him. And the said letter and affidavit were offered by the defendant to contradict and discredit the deposition of the witness taken the 28th June, 1852; but upon objection of counsel for the plaintiff that the witness had not been cross-examined in reference to the writing of said letter, or allowed an opportunity of explaining the same, it was rejected.

At the former trial the letter was offered in evidence by the plaintiff in the Circuit Court, to corroborate what Nutz, the witness, at that

time had sworn to; and the letter was admitted to be read for that purpose by the court. On a writ of error, this court held that the Circuit Court erred in admitting the letter as evidence, and on that ground reversed the judgment. Conrad v. Griffey, 11 How. 492, 13 L. Ed. 779.

The rule is well settled in England, that a witness cannot be impeached by showing that he had made contradictory statements from those sworn to, unless on his examination he was asked whether he had not made such statements to the individuals by whom the proof was expected to be given, In the Queen's case, 2 Brod. & B., 312; Angus v. Smith, 1 Moo. & M. 473; 3 Stark. Ev. 1740, 1753, 1754; Carpenter v. Wall, 11 Ad. & El. 803.

This rule is founded upon common sense, and is essential to protect the character of a witness. His memory is refreshed by the necessary inquiries, which enables him to explain the statements referred to, and show they were made under a mistake, or that there was no discrepancy between them and his testimony.

This rule is generally established in this country as in England. Doe v. Reagan, 5 Blackf. (Ind.) 217, 33 Am. Dec. 466; Franklin Bank v. Steam Nav. Co., 11 Gill & J. (Md.) 28, 33 Am. Dec. 687; Palmer v. Haight, 2 Barb. (N. Y.) 210, 213; McKinney v. Neil, 1 McLean, 540, Fed. Cas. No. 8,865; United States v. Dickinson, 2 McLean, 325, Fed. Cas. No. 14,958; United States v. Brown, 4 McLean, 378, 381, Fed. Cas. No. 14,668; Jenkins v. Eldredge, 3 Story, 181, 284, Fed. Cas. No. 7,266; Kimball v. Davis, 19 Wend. (N. Y.) 437; Brown v. Kimball, 25 Wend. (N. Y.) 259. "The declaration of witnesses whose testimony has been taken under a commission, made subsequent to the taking of their testimony, contradicting or invalidating their testimony as contained in the depositions, is inadmissible, if objected to. The only way for the party to avail himself of such declarations is to sue out a second commission." "Such evidence is always inadmissible until the witness, whose testimony is thus sought to be impeached, has been examined upon the point, and his attention particularly directed to the circumstances of the transaction, so as to furnish him an opportunity for explanation or exculpation."

This rule equally applies whether the declaration of the witness, supposed to contradict his testimony, be written or verbal. 3 Stark. Ev. 1741.

A written statement or deposition is as susceptible of explanation, as verbal statements. A different rule prevails in Massachusetts and the State of Maine.

The letter appears to have been written six years before the deposition was taken which the letter was offered to discredit. This shows the necessity and propriety of the rule. It is not probable that, after the lapse of so many years, the letter was in the mind of the witness when his deposition was sworn to. But, independently of the lapse of time, the rule of evidence is a salutary one, and cannot be dispensed

within the courts of the United States. There was no error in the rejection of the letter, under the circumstances, by the Circuit Court; its judgment is therefore affirmed, with costs.

Affirmed.[67]

PEOPLE v. BROOKS.

(Court of Appeals of New York, 1892. 131 N. Y. 321, 30 N. E. 189.)

EARL, C. J.[68] The defendant was indicted for setting fire to the store occupied by her in the city of Syracuse on the 27th day of October, 1890. She was brought to trial in the court of sessions of Onondaga county in February, 1891, and was convicted of arson in the first degree, and was sentenced to the Onondaga penitentiary for the term of 15 years. Her conviction having been affirmed by the general term of the Supreme Court, she then appealed to this court.

The learned counsel for the defendant has brought to our attention three grounds upon which he claims the judgment should be reversed. Upon the trial the principal evidence adduced against the defendant to show her guilt was that of Charlotte Brooks, the daughter of her husband by a former wife, who was about 18 years old. She testified that, three or four days before the fire, the defendant required her to take an oath, by kissing the Jewish Bible, that she would not tell to any one what she was about to say to her; and that, after she had tak-

[67] The first clear statement of this rule was made in Angus v. Smith, Moody & Malkin, 473 (1829), by Tindal, C. J.: "As far as the contradiction of the witness of the plaintiff is concerned, I am clearly of opinion that the conversation proposed is not admissible in evidence. I understand the rule to be, that before you can contradict a witness by showing he has at some other time said something inconsistent with his present evidence, you must ask him as to the time, place, and person involved in the supposed contradiction. It is not enough to ask him the general question, whether he has ever said so and so, because it may frequently happen that, upon the general question, he may not remember having so said; whereas, when his attention is challenged to particular circumstances and occasions, he may recollect and explain what he has formerly said. I think, as far as my memory serves, the rule was so laid down to this extent in the Queen's case. I will allow the plaintiff's witness to be recalled and asked the question."

Reporter's footnote to Angus v. Smith, supra: "See 1 Phill. Ev. 292, 5th edition; and The Queen's case, 2 Brod. & Bing. 299 (1820). That decision established the principle that it was necessary to remind the witness of the conversation, but it does not appear from the report to have laid down any rule as to the manner or degree in which it ought to be suggested to him; and the question there put to the judges assumed that the witness had not been at all interrogated with respect to the declaration supposed to have been made by him. The general practice, however, since that decision, has been in conformity with the rule adopted in the principal case."

That the rule is not varied by the fact that the contradictory statement was made after the testimony was given, and that an examination of the witness has become impossible, see Mattox v. U. S., 156 U S. 237, 15 Sup. Ct. 337, 39 L. Ed. 409 (1894), Shiras, J., dissenting. Compare Carver v. U. S., 164 U. S. 694, 17 Sup. Ct. 228, 41 L. Ed. 602 (1897), admitting contradictory statements to discredit a dying declaration.—*Ed.*

[68] Part of opinion omitted.

en the oath and promised that she would not tell, she said to her that she had bills for goods to settle, and that there was a judgment against her, and she was going to make a bonfire of the goods in the store, and burn them up; and that, after she had taken the oath, the defendant told her, if she did tell what she had said to her, she would be sent to prison for 20 years for perjury. There was other evidence pointing to the guilt of the defendant, and corroborating the story related by the witness Charlotte. The defendant was called as a witness on her own behalf, and these questions were put to her by her counsel: "Now, state whether or not Charlotte was friendly to you or unfriendly." "Did you and Charlotte have frequent difficulties during that time?" (Meaning the time previous to the fire.) "Did Charlotte assault you on other occasions previous to the fire?" All these questions were objected to on the part of the prosecution as incompetent, because Charlotte had not been examined as to the particular matters inquired of on behalf of the defendant.

The trial judge sustained the objection, and excluded the evidence, because Charlotte had not been examined as to the same matters, and her attention had not been called to the particular matters inquired of. In making the ruling the trial judge said: "You have the witness here, and can ask anything you wish of her that she has not testified to, and, if you think she has not told the truth, you can ask the witness about it; and I think that is as far as you can go. I think the rule is this: That a witness may be cross-examined as to his or her attitude of mind in regard to the defendant, and his attention must be called to each and all the transactions upon which the counsel for the defendant desires to give evidence. If the witness admits the acts and declarations that the defendant claims were made and done, that is the end of it. If the witness denies, then I think it is competent to call other witnesses to contradict those matters; but to let a witness go off the stand, not having questioned the witness as to the particulars, and then calling third parties to prove independent transactions showing the attitude of the mind of the witness towards the party, I think is not the rule. So I have allowed and do allow this witness to testify as to any transactions bearing upon that point in regard to which the witness Charlotte was examined." And the judge said, further: "I should say that the witness referred to is in court now, so that there is no loss to the defendant by the application of the rule as I understand it." But the counsel insisted upon his right to examine the defendant, for the purpose of proving Charlotte's hostility towards her, without first examining Charlotte in reference to the same matter.

We think the rule of law laid down by the trial judge was erroneous. The hostility of a witness towards a party against whom he is called may be proved by any competent evidence. It may be shown by cross-examination of the witness, or witnesses may be called who can swear to facts showing it. These can be no reason for holding that the witness must first be examined as to his hostility, and that then,

and not till then, witnesses may be called to contradict him, because it is not a case where the party against whom the witness is called is seeking to discredit him by contradicting him. He is simply seeking to discredit him by showing his hostility and malice; and, as that may be proved by any competent evidence, we see no reason for holding that he must first be examined as to his hostility. And such we think is the drift of the decisions in this state and elsewhere. Hotchkiss v. Insurance Co., 5 Hun, 90; Starr v. Cragin, 24 Hun, 177; People v. Moore, 15 Wend. 419; People v. Thompson, 41 N. Y. 6; Schultz v. Railroad Co., 89 N. Y. 242; Ware v. Ware, 8 Greenl. (Me.) 42, 53; Tucker v. Welsh, 17 Mass. 160, 9 Am. Dec. 137; Day v. Stickney, 14 Allen (Mass.) 255; Martin v. Barnes, 7 Wis. 239; Robinson v. Hutchinson, 31 Vt. 443; New Portland v. Kingfield, 55 Me. 172; Hedge v. Clapp, 22 Conn. 262, 58 Am. Dec. 424; Cook v. Brown, 34 N. H. 460. So we think the trial judge laid down an erroneous rule of law.

But we are still of opinion that no harm was done to the defendant. The extent to which an examination may go for the purpose of proving the hostility of a witness must be, to some extent at least, within the discretion of the trial judge. We said about it, in Schultz v. Railroad Co., supra, that "the evidence to show the hostile feeling of a witness, when it is alleged to exist, should be direct and positive, and not very remote and uncertain, for the reason that the trial of the main issue in the case cannot be properly suspended to make out the case of hostile feeling by mere circumstantial evidence from which such hostility or malice may or may not be inferred." Before these questions were excluded, the defendant's counsel, on the examination of Charlotte, proved by her that she and the defendant had had frequent altercations; that the defendant "used to whip her lots of times." * * * We think there was ample evidence to show the state of feeling between the defendant and Charlotte. * * *

Affirmed.

REX v. HODGSON.

(Court of Crown Cases Reserved, 1812. Russ. & R. 211.)

The prisoner was tried and convicted before Mr. Baron Wood, at the Yorkshire summer assizes, in the year 1811, on an indictment for committing rape upon Harriet Halliday, spinster.

After the girl had given her evidence in support of the prosecution she was cross-examined by the prisoner's counsel, who put these questions to her:

Whether she had not before had connections with other persons? and whether she had not before had connection with a particular person? (named).

The counsel for the prosecution objected that she was not obliged to answer these questions; but it was contended by the prisoner's counsel, that in a case of rape she was.

The learned judge allowed the objection, on the ground that the witness was not bound to answer these questions, as they tended to criminate and disgrace herself, and said that he thought there was not any exception to the rule in the case of rape.

The prisoner's counsel called witnesses, and among others, offered a witness to prove that the girl had been caught in bed about a year before this charge with a young man, and offered the young man to prove he had connection with her.

The counsel for the prosecution objected to the admissibility of this sort of evidence of particular facts, not connected with the present charge, as they could not come prepared to answer them.

The learned judge allowed the objection, and the witnesses were not examined.

The prisoner was found guilty; but the judgment was respited and these points saved for the consideration of the judges.

On the 2d of December, 1811, this case was considered by all the judges (except Mansfield, C. J., Macdonald, C. B., Grose, J., and Lawrence, J., who were absent), and was postponed for consideration to Hilary term, 30th January, 1812, when, all the judges being present, they determined that both the objections were properly allowed.[69]

[69] Lord Ellenborough in Rex v. Watson, 2 Starkie, 116 (1817): "This is so clear a point, and so entirely without precedent, that it would be a waste of time to call for a reply. For the purpose of ascertaining the credit due to witnesses, the Court indulge free cross-examination; but when a crime is imputed to a witness, of which he may be convicted by due course of law, the Court know but one medium of proof, the record of conviction. It is the constant practice at nisi prius not to receive such evidence without the record of conviction. You may ask the witness whether he has been guilty of such a crime, this, indeed, would be improperly asked, because he is not bound to criminate himself, but if he does answer promptly, you must be bound by the answer which he gives, for the Court does not sit for the purpose of examining into collateral crimes. It would be unjust to permit it, for it would be impossible that the party should be ready to exculpate himself, by bringing forward evidence in answer to the charge, there would be no possibility of a fair and competent trial upon the subject, and therefore it is never done."

Kindersley, V. C., in Goddard v. Parr, 24 L. J. Eq. (N. S.) 783 (Chancery, 1855): "I cannot conceive that any doubt can arise upon this motion. It is an established rule, that if one party calls a witness, and the other party, in cross-examination, asks a question to elicit the fact that the witness has been guilty of some crime or misdemeanour, the party so cross-examining has a perfect right to put such a question; but then he must be content with the answer he gets, and it is not competent for him to call witnesses to show that the witness under examination has been guilty of any crime which is quite irrelevant to the matter in dispute. It would be very different if the question had any relevancy to the matter at issue between the parties. Here the question relates to some contract, or alleged contract, entered into between certain persons; and the witness Stroud is called to prove the contract. He makes an affidavit, and is then cross-examined by the other side; and he is asked whether he ever told fortunes. Now, telling fortunes is an act which subjects a man to legal punishment. His answer is—'No, I nev-

REG. v. RILEY.

(Court of Crown Cases Reserved, 1887. 16 Cox, 191.)

LORD COLERIDGE, C. J.[70] I am of opinion that this conviction must be quashed, on the ground that evidence material to the issue was rejected by the court. The indictment was for an assault committed by the prisoner upon a woman with intent to commit a rape upon her; and the questions and answers that were rejected were tendered for the following purpose; namely, that the woman having denied that she had had connection with the individual accused of assaulting her, it was sought ab aliunde to prove that at certain specified times and places before the time of the commission of the alleged offence, she had voluntarily had connection with the prisoner. It appears to me clear that such evidence was admissible. Now, it has been held over and over again that where evidence is denied by the prosecutrix with regard to acts of connection committed by her with persons other than the prisoner, she cannot be contradicted. The rejection of such evidence is founded on good common sense, not only because it would put very cruel hardship on a prosecutrix, but also on the ground that the evidence does not go to the point in issue, that point being whether or not a criminal assault has been made upon her by the prisoner. To admit evidence of connection previously with persons other than the

er did, and I never have had any other occupation than that of a land agent and surveyor.' Now, it is not contended but that this fact is entirely irrelevant to the matter at issue. After this, witnesses are examined by the other side for the purpose of proving that the witness Stroud had told their fortunes, and had been paid for it upon several occasions. One thing is obvious, that if it is competent to do that, you may bring a host of witnesses to contradict every fact that is stated, whether relevant or not. Suppose, for instance, that when Fanny Duffin was called as a witness to show that Austin Stroud told fortunes, she had been cross-examined, and had been asked whether she had ever been guilty of brawling in church, or any other crime having nothing to do with the matter in dispute. Then if she had answered no, it would be competent to bring other witnesses to prove that she had been guilty of brawling in church. Then, again, any of these witnesses might be asked the most simple questions, and others brought to contradict them; so the matter might go on to all eternity. Anything more absurd one cannot imagine. It would be contrary to justice in every way; and on this ground the rule has been long since recognized for the purpose of putting some limit to the examination of witnesses, that you can only call witnesses to contradict evidence which is material to the question at issue between the parties. Then it has been said that this question is relevant in this way, that Stroud described himself as a land surveyor; and if it can be proved that he ever told fortunes, ergo he is not a land surveyor, and his evidence cannot be believed as such. If the evidence had gone to prove that he was not a land surveyor, then there might possibly be something in the question; but the object is to prove that he did some act which is not within the vocation of a land surveyor, and that he did some act which is contrary to the law. It appears to me that the matter contained in these affidavits is scandalous, and is utterly irrelevant to the matter in dispute between the parties. The affidavits must, therefore, be taken off the file, and the party who filed them must pay the costs."

[70] Statement and opinion of Pollock, B., omitted.

prisoner would be plainly contrary to the most elementary rules of evidence; but to reject evidence as to the particular person is another matter. Because not only does it render it more likely that she would or would not have consented, but it is evidence which goes to the very point in issue. Take the case of a woman having lived without marriage for two or three years with a man before the assault; could it be contended that, had she denied it, proof of that sort was not material to the issue; and, if material to the issue, that if denied evidence to contradict it could not be given. I see that Hullock, B. is reported to have decided practically the very point upon which our opinion is now sought. That appears from a note to the case of Rex v. Martin, 6 C. & P. 562, where the case of Rex v. Aspinall is cited. If that case can be found it is directly in point, but, like Mr. Addison, I have looked, and I confess I cannot find the case. It is enough for us to say, however, in the absence of that case, that the decision is common sense; and on the ground not only of authority but of good sense, I am of opinion, that this evidence ought not to have been rejected, and that, as it was rejected, the conviction must be quashed.

STEPHEN, J. I am of the same opinion entirely, and have hardly anything to add. I think that the weight of authority was decidedly in the direction in which this decision will place it. Although some of the authorities were rather in the nature of dicta than of absolute judgments, I did not think, when I wrote upon the subject that there could be much room for doubt; but at the same time, in the absence of direct authority, I did not feel that my statement could be made without suggesting that there might be doubt. Now, however, by this decision the doubt, if it existed, is removed. I may add, that our observations with regard to evidence as to connection with other men being inadmissible are not intended to exclude or conflict with the decisions as to the admissibility of evidence as to prostitution.

MATHEW and WILLS, JJ., were of the same opinion.

Conviction quashed.

COMMONWEALTH v. FITZGERALD.

(Supreme Judicial Court of Massachusetts, 1861. 2 Allen, 297.)

Indictment for being a common seller of intoxicating liquor. At the trial in the superior court, William Tanner, a witness for the Commonwealth, testified to a purchase of liquor from the defendant, in his tent upon a camp-field, and that he purchased no other liquor and had no other on that day. The defendant offered evidence to prove that the witness was seen to procure liquor at another tent on the same day, but Lord, J., excluded it, as a mere contradiction of the witness's testimony that he did not buy elsewhere; but ruled that "it was competent and would be admitted if offered to prove that the sale was identical with the one testified to, or if offered with other evidence to show

that the witness bought and drank to such an extent as to become incapable to testify." The defendant was convicted, and alleged exceptions.

BIGELOW, C. J. The evidence offered was clearly incompetent for the purpose of contradicting and discrediting the witness Tanner. The fact that he bought intoxicating liquor at another place on the same day on which the alleged sale was made to him by the defendant was irrelevant and immaterial to the issue, and had no tendency to prove or disprove the guilt of the defendant. It therefore came within the well settled rule that evidence is inadmissible to contradict the testimony of a witness on an immaterial fact, although such fact may have been drawn out by the examination in chief. 1 Greenl. Ev. § 449; Commonwealth v. Buzzell, 16 Pick. 157, 158.

The purposes for which the evidence was competent were correctly stated by the court at the trial, and the defendant had an opportunity to introduce it with a limitation as to its effect which was legitimate and appropriate. It was certainly competent for the defendant to show that the witness had been drinking to such excess as to impair his ability to see and understand what was passing before him at the time, and to recollect it afterwards, so as to testify intelligibly and with accuracy. To this extent, he was permitted by the court to offer evidence. We do not understand that the ruling of the court confined the defendant to proof of total incapacity in the witness to testify to the facts which he was offered to prove; but it was left open to him to show either total or partial intoxication, as tending to prove the witness to be unworthy of credit in stating facts which occurred when he was in such a condition. This ruling imposed no unreasonable burden on the defendant.

Exceptions overruled.[71]

EAST TENNESSEE, V. & G. RY. CO. v. DANIEL.

(Supreme Court of Georgia, 1893. 91 Ga. 768, 18 S. E. 22.)

SIMMONS, J.[72] Daniel sued the railway company for damages on account of the killing of his mule. The defendant denied that the mule was killed by its train. The evidence tending to prove that it was killed by the defendant's train was altogether circumstantial and presumptive, except that of one Lofton, who testified that he saw the mule when it was struck by the train and knocked from the track. Upon his cross-examination he was interrogated as to where he lived, what his business was, and why he happened to be present at the time

[71] That the condition of the witness may be shown to affect the value of his statements, see Mace v. Reed, 89 Wis. 440, 62 N. W. 186 (1895); State v. Collins, 115 N. C. 722, 20 S. E. 452 (1894); People v. Webster, 139 N. Y. 73, 34 N. E. 730 (1893).

[72] Part of opinion omitted.

of the killing of the mule. In answer to these questions he stated, among other things, as corroborative of what he had testified as to his presence at the time of the injury, that he left home, and went to town, for the purpose of purchasing some tobacco; that he went to Mr. Copeland's store, and purchased it on credit, and on his way home he saw the accident. The defendant proposed to prove by Copeland that Lofton did not go to his store and purchase tobacco at the time referred to. This testimony was excluded by the court, and its exclusion was made one of the grounds of the defendant's motion for a new trial.

While the fact which the witness proposed to prove by Copeland was not directly material on the circumstances of the killing, it was indirectly material, because it contradicted the witness as to the train of events which led him to be present, and thus tended to discredit him as to the fact of his presence. If testimony had been offered by the defendant to the effect that this witness was not present at the killing; that he was not in town, or had not left home, that day,—it is clear that no valid objection could have been made to it. And when the witness undertook to corroborate his story, and show his presence at the killing, by stating all his movements during the morning of the killing, and that his going to Mr. Copeland's store to buy tobacco had led him to be present, we think it was proper for the defendant to disprove the statement of the witness on this point. Although it was a collateral issue, it was a matter affecting his credit, and perjury could be assigned on it. Bishop says: "The credit of a witness is always an element adapted to vary the result of the trial of a fact. Therefore, it is a collateral issue therein. And it is perjury to swear corruptly and falsely to anything affecting such credit as that he has not made a specified statement material in the case; that he has not expressed hostility to the defendant; that he has never been in prison." 2 Bish. Crim. Law, (8th Ed.) § 1032. And again: "Where the evidence is simply to explain how the witness knew the thing he states, as where, testifying to an alibi, he mentions the party's residence and habits to show he could not be mistaken on the main point, since this incidental matter may incline the jury more to credit the substantial, it will sustain a conviction for perjury, if false." Id. § 1037. * * *

Judgment reversed.[73]

[73] In Scott v. U. S., 172 U. S. 343, 19 Sup. Ct. 209, 43 L. Ed. 471 (1899), where the defendant undertook to explain the presence of certain marked bills in his pocket, by saying that they must have been put there by his enemies, and on cross-examination named two persons as hostile to him, it was held proper to show that such persons were not in fact unfriendly to him. But see Chicago City Ry. Co. v. Allen, 169 Ill. 287, 48 N. E. 414 (1897), where a witness explained his presence by saying that he had just voted at a certain polling place, and it was held that the adverse party was not entitled to show that his residence was not in that precinct.

STATE v. TAYLOR.

(Supreme Court of Missouri, 1889. 98 Mo. 240, 11 S. W. 570.)

Defendant was convicted on a charge of assault with intent to kill, and appealed, assigning a number of errors.

BRACE, J.[74] * * * 3. After the defendant had testified in his own behalf, the state was permitted, over the objection of the defendant, to introduce in evidence the original record of defendant's conviction of the violation of a city ordinance in frequenting a bawdy-house. On the trial of one for a criminal offense, it is not permissible to show in evidence that the defendant has been guilty of another and independent crime, totally disconnected from the one for which he is on trial. When, however, the defendant goes upon the stand as a witness in his own behalf, his credibility may be impeached to the same extent, and in the same manner, as any other witness, except that he cannot be cross-examined as to any matter not referred to by him in chief. State v. Bulla, 89 Mo. 595, 1 S. W. 764; State v. Palmer, 88 Mo. 568; State v. Clinton, 67 Mo. 381, 29 Am. Rep. 506. Under the statute, prior to the Revision of 1879, persons convicted of arson, burglary, robbery, or larceny in any degree, or any felony, were declared incompetent to be sworn as a witness. Gen. St. 1865, p. 791, § 66. This disqualification was omitted from the Revision of 1879, and since conviction of an infamous crime did not render a witness incompetent; but in two cases that have come to this court it has been held that such conviction (for larceny) might be given in evidence to affect the credibility of the witness. State v. Kelsoe, 76 Mo. 507; State v. Loehr, 93 Mo. 103, 5 S. W. 696.

These cases, however, are not authority for the introduction of evidence of a conviction of a mere misdemeanor, not infamous at common law or ever declared to be so by statute. The general moral character of one who has been convicted of an infamous crime may well be considered so degraded as that but little credit ought to be given to his testimony, but it is not necessarily so of one who has been convicted of a mere misdemeanor, or the violation of a city ordinance. That conviction for such offenses cannot be given in evidence to impeach the credibility of a witness has been held by the courts of other states, in which the disqualification to testify arising from the conviction of an infamous offense has been removed expressly by statute, but provision made that such conviction might be shown in order to affect credibility, (Coble v. State, 31 Ohio St. 100; Glenn v. Clore, 42 Ind. 60;) and it is not perceived why the same conclusion should not be reached here, where the admissibility of such evidence has been reached by construction. By a long line of decisions in this

[74] Part of opinion omitted.

state, it is established that evidence of bad general moral character may be given in impeachment of a witness. This rule is invariably coupled, however, with the qualification that single and particular instances of moral delinquency cannot be shown. State v. Shields, 13 Mo. 236, 53 Am. Dec. 147; Seymour v. Farrell, 51 Mo. 95; State v. Hamilton, 55 Mo. 520; State v. Breeden, 58 Mo. 507; State v. Clinton, supra; State v. Miller, 71 Mo. 590; State v. Grant, 79 Mo. 133, 49 Am. Rep. 218; State v. Bulla, 89 Mo. 595, 1 S. W. 764. Conviction of an infamous crime tends to show a depraved and corrupt nature, a bad general moral character. Conviction of a penal offense, not infamous, may be consistent with a character generally good or bad. The former is admissible in evidence; the latter not, in impeachment of a witness' credit. The court erred in not sustaining the defendant's objection to the introduction of the record of his conviction of a violation of the city ordinance. This conclusion renders it unnecessary to consider the error assigned on the refusal of the court to permit the defendant to introduce the pardon of the mayor for the offense. * * *

Reversed.[75]

MAWSON v. HARTSINK.

(Nisi Prius, 1802. 4 Esp., 102.)

Assumpsit against the defendants, on two bills of exchange by the plaintiff, as indorsee of the defendants, who had been partners in a bank, called the Security Bank.

One of the defendants, Playfair, let judgment go by default; the two others pleaded bankruptcy, having obtained their certificates.

Their certificates were impeached on the grounds of the two defendants having been guilty of concealment; having lost money by gaming in the stocks; and that money had been given to induce creditors to sign their certificates.

The facts, upon the part of the plaintiff in impeaching the certificates, were proved by a witness of the name of Stanley Leathes.

The defendants proposed to impeach the credit of this witness, as a person of infamous character, and not entitled to credit

[75] Holt, C. J., in Rex v. Warden of the Fleet, 12 Mod. 337 (1700): "And in respect to a person who had been burnt in the hand, if it were for manslaughter, and afterwards pardoned, it were no objection to his credit, for it was an accident which did not denote an ill habit of mind; but secus if it were for stealing, for that would be a great objection to his credit, even after pardon: but the record of conviction ought to be produced, which here they had not."

Under the present statute in Missouri, conviction of any offense appears to be admitted for this purpose. State v. Blitz, 171 Mo. 530, 71 S. W. 1027 (1902). But not a conviction for a violation of a municipal ordinance. State v. Mills, 272 Mo. 526, 199 S. W. 131 (1917).

The first witness was a person of the name of F. Reeves, the chief clerk of the office at Bow street.

He was asked as to his knowledge of Leathes; and whether he would believe him on oath.

He said, he had been before the Justices at Bow street; and from what passed there, he thought him a person whom he should be very unwilling to believe.

LORD ELLENBOROUGH interfered, and said: He could not hold this to be evidence. The transaction was ex parte; it was upon a partial adduction of evidence on a charge against him at a public office, from whence he had received an unfavourable opinion of Leathes, from a story told without an oath. If the witness derived his information from any particular source, falling within his own knowledge, it might be otherwise.

Garrow then asked. Whether, in consequence of what passed at the public office, he had made particular enquiries as to the witness's general character?

LORD ELLENBOROUGH. That cannot be evidence. That information must be from persons not on their oaths; perhaps not credible. If this was allowed, when it was known that a witness was likely to be called, it would be possible for the opposite party to send round to persons who had prejudices against him, and from thence to form an opinion, which was afterwards to be told in court, to destroy his credit.

Garrow then put his question in this way: "Have you the means of knowing what the general character of this witness was? and from such knowledge of his general character, would you believe him on his oath?"

LORD ELLENBOROUGH said: The question might be put in that way, as it would then be open for the opposite side to ask, as to the means of knowing the witness's character; so that it could be judged of what degree of credit was due to the assertion, from the means that the witness then called, had of informing himself and forming his judgment.

Verdict for the plaintiff.[76]

[76] On the trial of O'Coigley at bar on a charge of high treason, 27 Howell's State Trials, loc. 32 (1798), the defense called the Earl of Moira, to impeach a witness named Dutton who had testified for the prosecution:

"Mr. Dallas: Does your lordship know a person of the name of Dutton, a quartermaster in the artillery? A. I have heard of him, I do not know him.

"Does your lordship know what is his general character?

"Mr. Garrow: His lordship says that all he knows of Dutton's character is from hearsay.

"Mr. Dallas: I apprehend, that what Mr. Garrow states as a disqualification, upon the part of the noble earl, to give such evidence, is by no means so, when it comes to be accurately stated.

"Mr. Garrow: The constant practice, where character has been inquired into, has been to put the question thus: Are you acquainted with such a person? From your acquaintance with him, what is his general character? But I never heard that when a witness says, I do not know the person, but

KIMMEL v. KIMMEL.

(Supreme Court of Pennsylvania, 1817. 3 Serg. & R. 336, 8 Am. Dec. 655.)

Error to the Court of Common Pleas of Somerset county, in which a bill of exceptions was returned.

To impeach the character of Peter Kimmel, a subscribing witness to the note on which the suit was brought, Jonathan Boyd was called, who testified, "that he had known Peter Kimmel for eighteen or twenty years; that he had lived at one time within four miles of him; that he had bought goods from him, and paid him, and that he had no knowledge of his general character but by report." The defendant then proposed to ask the witness the following question, "What is the general reputation of Peter Kimmel, in the county of Somerset, as a man of truth?" This question was objected to on the ground that the witness was incompetent to speak of Peter Kimmel's general character, because he professed to know nothing on the subject of his own knowledge; all his information having been derived from others; and that a witness must be able, from what he himself knows of a person's

have heard of him, that then it was asked, what have you heard of his reputation.

"Mr. Dallas: I admit that hearsay would not be evidence of any particular fact. But Mr. Garrow seems to have forgotten, that not long since he himself stated that character was not fact, but a conclusion to be drawn from a great number of facts, which might have happened in a very long or a short life. Character, in my estimation of it, is no more than the reputation which a man generally bears among those to whom he is known; when, therefore, a witness is asked with respect to the character of any particular person, the very question shows that it is not confined to the fact; but that it goes beyond it; because he is not asked, from his knowledge of the person, would he believe him, but whether, from his knowledge of the character of that person, he would believe him. If character is therefore no more than the general opinion which is entertained of a person, by those to whom he is well known, nothing can be more clear than that it is the general estimation in which he stands—that general estimation to be collected from the course of his general conversation; I take it to be perfectly clear, that it is no objection in this case to an account of character, to say that it amounts only to hearsay; because, when one man gives the character of another, it must be that which he has heard from others, for it extends beyond his own knowledge, and the question is generally put to an extent beyond his knowledge. Upon these grounds, I submit that I am entitled to ask the noble earl what is the general character which this man bears.

"Mr. Justice Buller: Did you ever hear that asked when the witness said he knew nothing about the person?

"Mr. Justice Heath: It must be founded in personal knowledge.

"Mr. Justice Buller: I must tell the jury that the noble lord says this witness is not to be believed upon his oath, but he knows nothing of him. Then they have a right, on the other side, to ask to particular facts:—then my lord Moira give us an instance. Suppose his lordship mentions his appearance at some court of justice in Ireland; that the evidence he gave there was not believed—the next question then is, were you present, did you hear the trial, my lord? No. Do you know that he swore it? No.

"Mr. Justice Lawrence: The question is always put in this way—Do you know the witness? Yes. Then, what do you know of him?

"Mr. Dallas: It is my duty to acquiesce; I have submitted my reasons."

character, to state what it is, otherwise his evidence will be secondary and inadmissible. And of this opinion was the Court below, who sustained the objection, and the defendant tendered a bill of exceptions.

GIBSON, J. Although the very nice and subtle distinction taken below, cannot in this case be sustained, I admit there may be cases where even evidence of character may be excluded, on account of its being hearsay, and not the best of which the nature of the case is susceptible; as where the witness may have never been in the neighborhood in which the person, whose character is to be affected, resides, and where the former may, in truth, have no other knowledge of the actual state of the reputation or common report of such neighborhood than what he has gleaned from a single individual. The witness shall not be permitted to say he was told that the person had either a good or bad character in his own neighborhood. But that is a very different thing from a knowledge of common report acquired, as in this case, from common report itself. That knowledge of character which is gained from report, cannot be considered as secondary; for report constitutes character, and is, itself, the very thing of which the witness is called to speak. A competent knowledge of the subject can, indeed, be acquired through no other medium, for particular instances of, want of veracity, or private belief of destitution of moral principle, arising from particular instances of misconduct, are always excluded. A personal acquaintance with the individual to be affected, is unnecessary; but it will be enough if the witness be acquainted with his character; which is a term convertible with common report. The witness is to give not his own judgment of the matter, but the aggregate result of at least a majority of the voices he has heard; or in other words, (for after all there is, perhaps, no more plain or practical exposition of the matter), he must state what the common report is among those who have the best opportunity of judging of the habits and integrity of the person whose character is under consideration. There is danger from the proneness, so often observable in witnesses to substitute their own opinion for that of the public, whose judgment cannot be so readily warped by prejudice or feeling as that of an individual; and hence the policy of not requiring any intimate degree of knowledge respecting the person himself, or of bringing the witness too close to the scene. The reputation of the neighborhood is the only thing that is competent; and if the witness has acquired a knowledge of it by the report of the neighborhood, he is exactly qualified to be heard.

DUNCAN, J. The bill of exceptions presents this case for the consideration of the Court. Peter Kimmel has been examined as a witness on behalf of George Kimmel, the defendant in error. In order to affect his credibility, one Jonathan Boyd was on examination, on the part of the plaintiff in error, who swore as follows: "I have known Peter Kimmel for eighteen or twenty years. I lived at one time within four miles of him. I have bought goods from him, and

paid him. I have no knowledge of his general character except from report."

This question was then offered to be put to the witness on the part of the plaintiff in error. "What is the general reputation of Peter Kimmel, in the county of Somerset, as a man of truth?" The Court, on objection to this question by the defendant in error, sustained the exception, and overruled the testimony. This is a question of importance; not from any difficulty in its solution, but because it is one of daily occurrence in the trial of causes. The adherence to rules of evidence is said to be one of the first duties of a Judge. They are fixed and certain, as rules of property, not arbitrary or discretionary. Facts are to be proved by positive testimony, or by circumstances from which a jury may fairly deduce them. Character by reputation. Character and reputation are the same.[77] The reputation which a man has in society is his character. Where, in judicial proceedings, character is made a part of the inquiry, it never can be proved by the proof of particular facts. A man who is called on to give testimony, is always subjected to the investigation of his general character. This the law supposes he is ever prepared to defend. But miserable, indeed, would be the situation of a witness, if every transaction of his life was open to inquiry. No man could be prepared to repel every possible charge, that might be made against him, or refute, the imputation of every crime, that any man might be disposed to make. He is not on his trial. His general character is the test, by which his credit is to be adjudged.

A witness called on to impeach the credit of another, is never permitted to speak of his knowledge of particular facts from which he draws an opinion of the witness examined. All who are conversant in courts of justice must have observed the reluctance with which witnesses testify with regard to the character of other witnesses. Men of the strictest veracity, and acting under the strongest impressions of the sacred obligation of an oath, to testify the whole truth, too frequently endeavor to evade a direct answer. How often do they, in the first instance, state, I know nothing of my own knowledge but from report? How often does the inquiry end in the very question put to this witness,—"What is the general reputation of the witness examined, as to truth, in the county in which he lives?" If a witness was not permitted to state the general reputation, there must be an end of all inquiry into character. Particular facts cannot be given in evidence. Opinion will not be evidence; for if it were, no witness would be safe from the shafts of calumny. No man is to be discredited by the mere opinion of another; few men live whom some do not think ill of. But it is said, the witness must speak of his own knowledge. So he must. But what is this knowledge? Not a personal, individual knowledge of facts. He knows, by reputation, what is the character of the

[77] Compare Com. v. Stewart, 1 Serg. & R. (Pa.) 342 (1815), post, p. 431.

man. Again, it is said, that in this case, the person called to impeach the character of the witness examined, said he had his knowledge of him but from report. General report is general reputation. General reputation is general character. But the witness had known the man from eighteen to twenty years; lived at one time within four miles of him; had dealings; testified his opportunities of having acquired a knowledge of his general character by a long acquaintance with him. None so proper, then, to bear testimony as to his character. No question could be put, the answer to which would so clearly establish his character, his reputation for truth, or otherwise, as the one which the court decided could not be put. This Court would, in a case which they consider so clear, have, without any observations, directed the reversal of the judgment; but as the counsel for the defendant in error, not from any doubts in his own mind, but from a desire that the opinion of the Court, and the reasons of the opinion, should be given, to prevent misapprehension on a subject which so frequently must occur, has requested the Court to give not only the opinion, but the reasons of it, according to the provisions of the law. This is now done.[78]

The judgment must be reversed, and a venire facias de novo awarded.

COMMONWEALTH v. LAWLER.

(Supreme Judicial Court of Massachusetts, 1866. 12 Allen, 585.)

Indictment for being a common seller, and for single sales, of intoxicating liquor.

At the trial in the superior court, before Morton, J., the Commonwealth relied on the testimony of Patrick Connell. In order to impeach him, the defendant called a witness and asked him, "What is the general reputation of Connell for truth and veracity?" The witness replied, "I have not heard it talked of a great deal." The defendant then asked the several questions following; but all were excluded by the judge. "Have you heard his character for truth and veracity called in question? If you have heard his character for truth and veracity called in question; state what the common speech of people is as to his character for truth and veracity. What is the general reputation of Connell for truth and veracity, among those who speak of it at all?" The judge ruled that the defendant might ask the witness what was the common speech of people as to Connell's character for truth and veracity, but that the questions in the form put by the defendant were inadmissible.

[78] See Wetherbee v. Norris, 103 Mass. 565 (1870), approving the following course at the trial: "The judge required of the defendant that each of the witnesses should be first asked this question, 'Do you know the reputation of the plaintiff for truth and veracity?' If the witness said he did, he was then to be asked, 'What was that reputation?' "

The jury returned a verdict of guilty, and the defendant alleged exceptions.

BIGELOW, C. J. The defendant has no valid ground of exception to the ruling of the court. He was permitted to put to the witness the proper inquiry as to the general reputation for truth of the person whose character for veracity he sought to impeach. The questions which were ruled out were calculated to elicit testimony to the prejudice of the witness offered by the government, from a person who had no actual knowledge of his general reputation for truth. If answered, they might have led to the introduction of evidence of particular instances of prevarication by the government witness, or of doubt as to his truthfulness on some special occasion, without touching his general character for veracity. The rule is perfectly well settled that the evidence must be confined to the general reputation of the witness, and the court did nothing more than hold the party to a strict observance of it, by requiring his questions to be restricted to that form of inquiry solely.

Exceptions overruled.[79]

BAKEMAN v. ROSE et ux.

(Court of Errors of New York, 1837. 18 Wend. 146.)

Error from the supreme court. The wife of Rose, previous to her marriage, brought an action of assault, battery, and false imprisonment against Bakeman, in the Oswego common pleas, and established her case by the testimony of a female of the name of Sally Holton. The defendant proved, by a number of witnesses, that the character of Sally Holton for truth and veracity was bad, and the plaintiff, by a number of witnesses, proved her character for truth and veracity to be good. The defendant also offered to prove that the reputation of Sally Holton was that of a public prostitute. The plaintiff objected to the evidence, and the court sustained the objection.[80]

[79] Baker, J., in Gifford v. People, 148 Ill. 173, 35 N. E. 754 (1893): "It is not necessary, as seems to have been supposed by counsel on both sides in this case, that witness should have heard any considerable number of the neighbors of the witness sought to be impeached or sustained, speak of his reputation for truth and veracity. It may very well be that the reputation for truth and veracity, or chastity, or common honesty of a person may be known among his neighbors and acquaintances without having heard it generally discussed. Indeed, one whose word passes current among his associates and neighbors, or who is received and accepted by society as a virtuous man or woman, or whose honesty is not questioned in a community in which he lives will ordinarily excite no discussion or comment, and yet every person in the community knows that he or she is accepted, recognized and reputed to be a truthful, virtuous or honest person."

See, also, opinion of Cockburn, C. J., in Reg. v. Rowton, 10 Cox, 25 (1865).

[80] Statement condensed and concurring opinions omitted.

BY THE CHANCELLOR.[81] The first and most important question in this case is, whether the plaintiff in error should have been permitted, in addition to the usual inquiries as to the general character of the principal witness against him for truth and veracity, to prove also that she had the general character of a prostitute. As it is not the business of this court to make laws, but merely to declare what the existing law is, it is only necessary to say that it is perfectly well settled, both in this state and in England, that the general character of the witness alone can be inquired into for the purpose of impeaching credibility; that is, what is his general character for truth and veracity; or whether his general moral character is such that he is not entitled to credit. But you cannot prove that he has been guilty of any particular crime, or species of crimes, or immoralities, or that he has the reputation of being guilty of any particular class of crimes. You cannot therefore inquire whether the witness has the general reputation of being a thief, prostitute, murderer, forger, adulterer, gambler, swindler, or the like; although each and every of such offences, to a greater or less degree, impairs the moral character of the witness, and tends to impeach his or her veracity. And if a party is not permitted to impeach the witness by proving that he has the general character of a thief or a swindler, there can be no good reason why he should be permitted to impeach the witness by showing a general reputation of being unchaste. Indeed, it would be much safer for a female witness to permit the adverse party to prove the fact that she was a common prostitute, than to attempt to impeach her credit by showing it by general reputation; as there would be some chance of refuting the charge, if it was false, in the one case, when there would not be any in the other. Instead, also, of allowing the chastity of female witnesses to be drawn in question in that manner, it would be much better to resort at once to the principles of the Persian, Gentoo and Mussulman laws, to which we were referred on the argument; which do not allow the testimony of any female except in special cases, where, from the nature of the facts to be proved, it is presumed no male witness could have been present.

The question as to the admissibility of such evidence to impeach the character of a witness, was distinctly passed upon by the supreme court of this state, more than twenty years since, in the case of Jackson v. Lewis, 13 Johns. 504, and I believe the correctness of that decision has never been doubted by the profession here. The only case I have been able to find, in the courts of any of our sister states, in which a different rule has been attempted to be adopted, is that of Commonwealth v. Murphy, 14 Mass. 387, before the supreme court of Massachusetts. A very loose note of this decision is stated by Mr. Tyng on the relation of some other person; and which, if ever made, was virtually overruled by the same court in the subsequent case of Commonwealth v. Moore,

[81] Walworth.

3 Pick. (Mass.) 194. But even in Murphy's Case, if the report be correct, the party was not permitted to give evidence of general reputation of unchastity. He was allowed to prove the actual fact that the witness was a prostitute, and had been the mother of several bastard children. The decision, in any view of it, was wrong, and ought not to be followed as a precedent here. * * *

Affirmed.[82]

HOOPER v. MOORE.

(Supreme Court of North Carolina, 1856. 48 N. C. 428.)

Detinue for slaves, tried before Dick, J., at the last Caswell Superior Court.

The plaintiff read in evidence the deposition of one Martha Bailey as to the title of the slaves in question.

Another witness was offered, as to the general character of Martha Bailey; and having testified as to that, he was asked by the defendant's counsel whether, if he was a juror, from what he knew of her general character, he would believe her on oath. The question was objected to, but allowed by the Court. Plaintiff again excepted.

Verdict for defendant. Judgment and appeal.[83]

BATTLE, J. * * * The third and last objection raises a question of practice, in relation to the examination of witnesses called to impeach the characters of other witnesses, which we are not sorry to have an opportunity of attempting to settle.

The question is, whether an impeaching witness, after he has stated that the character of another witness is bad, can be asked whether, from his knowledge of that character, he would, if he were a juror, believe the witness upon his oath. We are decidedly of opinion that such an enquiry, if permitted, gives occasion, either to improper replies, or makes the witness usurp the province of the jury, and is, therefore, wrong in principle, as well as embarrassing in practice. We are aware that the rule to which we object has the sanction of the English Courts, and has been referred to without disapprobation by this Court. See State v. Boswell, 13 N. C. 209, and the authorities there cited. By reference to the case just referred to, it will be seen that what the Court said upon this subject was not necessary to the decision, and that it was a mere statement of what was the English practice, without much reflection whether the rule was well or ill founded in principle. Those who have seen its application, must have observed that the replies of the impeaching witnesses were often-

[82] See opinion of Senator Tracy, p. 150, for a good statement of the contrary view.

In several states bad reputation for chastity or honesty may be shown. State v. Sibley, 131 Mo. 531, 33 S. W. 167 (1895). For a collection of the cases, see note to 2 Wigmore, § 923.

[83] Statement condensed and part of opinion omitted.

er prompted by their own opinion of the witness, than by their knowledge of his general character, that is, the estimation in which he was held by others. The replies, too, are very apt to be evasive and hypocritical. "The witness would believe him if he were disinterested, or had no feeling in the matter, but otherwise, he would not believe him." These and such like replies are improper, because they do not fairly meet the inquiry, whether the character of the impeached witness is so bad that he ought not be believed, though testifying under the sanction of an oath.

But the great objection to the rule is, that the impeaching witness is called upon to do that which belongs exclusively to the jury. It is, or ought to be, their province to pronounce whether a witness is to be believed, and, consequently, whether a fact to which he testifies, supposing him not to be mistaken, is proved. The character, whether good or bad, of a witness, is a fact, and, of course, as to that, another witness may testify. Whether that character, if bad, is so bad that he ought not to be believed, is an opinion or conclusion which the law, as a general rule, forbids a witness to give, except in certain cases where he testifies as an expert. Our Legislature has been careful in guarding and preserving the exclusive province of the jury to decide upon questions of fact, by prohibiting the judge from giving an "opinion whether a fact is fully or sufficiently proved;" Rev. Stat. ch. 31, § 136; Rev. Code, ch. 31, § 130. We ought to be equally careful in settling rules of practice, to protect the jury from an improper invasion of their province by the witnesses. The evil arising from such an invasion, is thus ably and forcibly set forth by Shepley, J., in the case of Phillips v. Kingfield, 19 Me. 375, 36 Am. Dec. 760: "To permit the opinion of a witness that other witnesses should not be believed, to be received and acted upon by a jury, is to allow the prejudices, passions and feelings of that witness to form, in part at least, the elements of their judgment. To authorize the question to be put, whether the witness would believe another witness on oath, although sustained by no inconsiderable weight of authority, is to depart from sound principles and establish rules of law respecting the kind of testimony to be admitted for the consideration of the jury, and their duties in deciding upon it. It would, moreover, permit the introduction and indulgence, in courts of justice, of personal and party hostilities, and of every unworthy motive by which man can be actuated to form the basis of an opinion to be expressed to a jury to influence their decision." See, also, Greenleaf on Ev. § 461. Our conclusion is, that the Judge erred in permitting the question to be put, after it was objected to by the plaintiff.

Reversed.[84]

[84] Accord: Eastman v. Boston Elevated R. Co., 200 Mass. 412, 86 N. E. 793 (1908).

The Supreme Court of Michigan apparently follows the English practice Hamilton v. People, 29 Mich. 184 [1874]), which is indicated by the follow-

V. Corroboration and Support

BISHOP OF DURHAM v. BEAUMONT.

(At Nisi Prius, 1808. 1 Camp. 207.)

This was an issue out of Chancery to try whether previous to an agreement being entered into in the year 1792, between the present Bishop of Durham and the late Sir Thomas Blackett, Baronet, lessee of certain lead mines, the 9th part of the ore dug from which belongs to the Bishop, the agent of Sir Thomas Blackett, had represented to his lordship, that the sum of £925. was the full annual value of this 9th part, or what other representation he had made on the occasion.

A suit in equity being instituted to set aside the agreement, this issue was directed, to ascertain whether the plaintiff had been misled as to the value of his portion of the ore by the agent of the person under whom the defendant now enjoys the mines, in right of his wife. The conversation, the import of which was questioned, took place on the 17th or 18th of August, 1791, between the Bishop and one Erasmus Blackett, acting on the behalf of Sir Thomas, in the presence of a Mr. Emme, the Bishop's secretary. The only two witnesses called, therefore, were Mr. Emme on the one side, and Mr. E. Blackett on the other.

The former swore that in answer to a question from the Bishop, Mr. E. Blackett said, that the sum of £925. was the full annual value of the 9th part of the ore raised from the mines in question; while this gentleman himself swore, that in answer to the same question he said, the sum of £925. was a full equivalent for the Bishop's 9th part, meaning that this was as much as the lessee, who was at the expense of working the mines, could afford to pay, and more than the Bishop could make, by taking the ore in kind. The cause thus hanging upon the testimony of these two persons,

The Attorney General, for the defendant, proposed to call witnesses to the character of Mr. E. Blackett. He contended that where fraud and falsehood were imputed to a witness, there his credit might be supported by evidence to his general character. And he cited as in point the case of Doe ex dem. Stephenson v. Walker, 4 Esp. Cas. 50, where the question being upon the validity of a will, and one of the attesting witnesses having sworn that when the will was executed, the

ing statement by Martin, B., in Reg. v. Brown, 10 Cox, c. c. 453 (1867): "In Taylor on Evidence, § 1324, it is said evidence may be adduced impeaching a witness's character for veracity. But here the evidence will be confined to general reputation, and will not be permitted as to particular facts. The regular mode of examining into the character of the person in question is to ask the witness whether he knows his general reputation among his neighbors, what that reputation is, and whether from such knowledge he would believe him on his oath.' That practice has always prevailed within my recollection."

pen was put into the testatrix's hand, she being then in a state of stupid insensibility, and that in signing her name her hand was guided without her knowing what she did, Lord Kenyon admitted evidence to the character of the two other subscribing witnesses; and it being sworn that they were persons of great respectability, who were deemed incapable of the misconduct imputed to them, the jury found a verdict establishing the validity of the will. Here a direct fraud was imputed to the witness, in having stated the 9th part of the ore to be greatly under its value, and in addition to that, he was charged with perjury in denying the false representation he had formerly made. Therefore he came within the rule laid down by Lord Kenyon, and to enable the jury properly to appreciate his testimony, an opportunity should be given to shew the character for veracity and integrity which he had always borne. For this purpose he offered to call Mr. Baron Wood, who then sate on the bench beside his lordship.

The counsel on the other side said, they admitted Mr. E. Blackett to be a man of respectable character; they did not impute perjury to him, but only imperfection of memory; and as they were prepared with similar evidence in support of their own witness, Mr. Emme, in case it had been admissible, they declined arguing the point of law.

LORD ELLENBOROUGH. There is here no case laid for admitting evidence to character. I fully accede to the doctrine laid down in Doe on the demise of Stephenson v. Walker.[85] There the attesting witnesses whose character was disputed were dead, and it was properly held that the party claiming under the will should have the same advantage as if they had been alive. In that case they must have been personally adduced as witnesses, when their character would have appeared on their cross-examination, and being dead, justice required that an opportunity should be given to shew what credit was to be attached to their attestation of the will. In like manner, the Court of King's Bench held in the time of Lord Mansfield, that evidence of the conduct of deceased witnesses might be received, to attract credit to their testimony, or to destroy its effect. So in a case upon the northern circuit, in which I was myself counsel for the defendant, and which turned upon the validity of a false instrument, (whether a deed or a will I forget,) Mr. Justice Heath admitted as evidence, a confession of the forgery which compunction had drawn from one of the attesting witnesses in extremis. This confession only supplied the place of what might have been obtained from cross-examination, had the witness survived; and the propriety of admitting it was never questioned. But here neither is the witness dead, nor is there any shade cast over his character. Therefore in analogy to the case of Doe v. Walker, or of any other case ever determined in Westminster-Hall, there is no colour or pretence for admitting evidence to

[85] Accord: Provis v. Reed, 5 Bingham, 435 (1829).

the character of the witness who has just been examined on the part of the defendant.

The jury found a verdict for the plaintiff, establishing the fact, that £925. had been represented as the full annual value of the Bishop's part of the lead ore.

Verdict for plaintiff.[86]

REX v. CLARKE.

(Nisi Prius, 1817. 2 Starkie, 241.)

This was an indictment against the defendant for an assault upon Mrs. Webb, with intent to commit a rape.

Upon the cross-examination of the prosecutrix, she was asked, whether she had not been sent twice to the House of Correction, upon charges of having stolen money from her master several years ago. She admitted that she had, and stated, that she had since been admitted into the Refuge for the Destitute, and had remained there nearly two years; and that she had, on going away, received a box of clothes and a guinea, as a reward for her good behaviour.

On the part of the prosecution, the superintendent of the establishment, called the Refuge for the Destitute, was called and examined as to the conduct of the prosecutrix while she remained in that asylum, and as to the practice of conferring rewards for good conduct.

Gurney, for the defendant, objected, that evidence of the witness's good character could not be adduced, until her character had been impeached by evidence aliunde, and that the cross-examination of the prosecutrix as to her character, did not warrant the admission of such evidence.

Scarlett for the prosecution, contended, that since the witness had been examined as to particular facts, for the purpose of impeaching her character, he had a right to call witnesses to confirm her, in the account which she had given upon her cross-examination.

HOLROYD, J.[87] The object of the cross-examination was to impeach the character of the witness, and to show that she was not credible. It is shown by this cross-examination that she has committed crimes. A witness is then examined as to her situation and conduct since, in order to repel the inference which might be drawn from her former misconduct. I do not see why such evidence may not be let in for the purpose of removing the impeachment of her character upon cross-examination, as well as if it had arisen aliunde. The circumstances which are offered, are offered with a view to show that the witness is

[86] Accord: Tedens v. Schumers, 112 Ill. 263 (1884); First Nat. Bank of Bartlesville v. Blakeman, 19 Okl. 106, 91 Pac. 868, 12 L. R. A. (N. S.) 364 (1907), annotated.

[87] Opinion on other points omitted.

not so unworthy of credit as she might have been considered to be, if these circumstances had not intervened. It appears to me, that the evidence is admissible.[88]

, The husband of the prosecutrix being examined, as to the complaint made by the prosecutrix to him soon after the assault had taken place.

HOLROYD, J., held, that the fact of her having made the complaint was evidence, as also was the description of her state and appearance at the time; but that the particulars of the complaint were not evidence, as to the truth of her statement.[89]

LOUISVILLE & N. R. CO. v. McCLISH

(Circuit Court of Appeals of the United States, 1902. 115 Fed. 268, 53 C. C. A. 60.)

Action for damages for the death of George McClish, alleged to have been negligently run over and killed by a train operated by defendant.[90]

DAY, Circuit Judge. * * * The witness Henry Wright, called by the plaintiff, gave testimony tending to show that he was at work on a telephone pole some distance south of the place of the injury; that he saw McClish, with whom he was well acquainted, pass up along the track northwardly shortly before the passenger train went in the same direction. Further, that shortly after the passenger train passed he saw parties bringing the body of McClish from the scene of the injury. The company offered the testimony of three witnesses, tending, with more or less certainty, to show that Wright was not at this pole that day, but was at a certain opera house until the body was brought into town. Over the objection of the defendant company the plaintiff was permitted to introduce the testimony of witnesses to establish the general good character of the witness Wright for truth and veracity. The question of the admissibility of this kind of testimony has led to no little contrariety of decision in the courts of this country. The practice is not regulated by any statute of Tennessee, so far as we are advised, and is a question of general law, not controlled by state decisions. Garrett v. Railroad Co., 41 C. C. A. 237, 101 Fed. 102, 49 L. R. A. 645. The question was presented to this court under facts differing from those now before us in Spurr v. U. S., 31 C. C. A. 202, 87 Fed. 713. * * *

In the present case we perceive in the character of Wright's cross-examination nothing which tends to impeach his general character

[88] Accord: People v. Gay, 7 N. Y. 378 (1852).

[89] See Com. v. Cleary, post, p. 422.

[90] Statement condensed and part of opinion omitted.

for truth. It is true it is searching and exhaustive, but it relates entirely to details of his alleged conduct and observation of McClish to which he had testified in chief, and we think the doctrine of the Spurr Case entirely applicable to the case in hand so far as that feature is concerned.

Did the contradiction of Wright by the witnesses who claim that he was not where he says he was, and consequently could not have seen what he attempted to describe, put in issue the general character of the witness for truth, and thereby justify the introduction of witnesses to sustain it? Greenleaf, who goes farther upon this subject than many of the authorities are willing to follow in admitting this class of testimony, supports the doctrine that the contradiction of a witness by other testimony does not lay the foundation for the introduction of other testimony supporting his general reputation for truth. Greenl. Ev. § 469, and notes. What more is there in this case than the contradiction of Wright by other testimony? It is true that the contradiction is of that character that admits of no reconciliation of the testimony upon any theory of honest mistake or failure of memory. This is often true of witnesses whose general character for truth is unassailable. If, in every case where the witnesses are in direct and irreconcilable conflict, general character proof can be introduced, the disputed issues of fact will be lost sight of in a mass of testimony sustaining or impeaching the various witnesses in the case. The present case affords a striking illustration of the effect of the introduction of this class of testimony, for we find no less than six other witnesses at the trial whom it was deemed necessary to sustain by proof of general reputation. If this practice is to be followed, as is said in Russell v. Coffin, 8 Pick. 142, "great delay and confusion would rise; and, as almost all cases are tried upon controverted testimony, each witness must bring his compurgators to support him when he is contradicted, and, indeed, it would be a trial of the witnesses, and not of the action."

An attentive consideration of the cases and of the reasons upon which they are founded leads us to the conclusion that the introduction of this class of testimony should be confined to cases where an attack has been made upon the character of the witness by some method which tends to impeach his general character for truth. It is true that contradicting testimony may have an effect indirectly to impeach in the mind of the trior the character of the witness contradicted, but that is not the purpose of the testimony. It does not matter how much a witness may be contradicted, his general character is presumed good until it is assailed by some recognized method of impeachment. This may be undertaken by showing that the general reputation of the witness for truth is bad, by showing by direct proof or upon cross-examination that he has been convicted of an infamous crime. In these instances the attack is made upon his char-

acter, and is not so much upon his testimony in the particular case as upon his unreliability as a witness. When his character is thus assailed, the attack may be repelled by proof of general good reputation for truth. Until it is impeached it is not in issue, and we think the ends of justice will be subserved by confining the testimony to the issues of fact essential to the determination of the controversy before the court. While, as we have said, the cases are by no means uniform upon this subject, the conclusion reached is sustained by many well considered cases; among others: Wertz v. May, 21 Pa. 274; Brann v. Campbell, 86 Ind. 516; State v. Ward, 49 Conn. 429; Webb v. State, 29 Ohio St. 351; State v. Archer, 73 Iowa, 320, 35 N. W. 241; Russell v. Coffin, 8 Pick. (Mass.) 142; Brown v. Mooers, 6 Gray (Mass.) 451; Gertz v. Railroad, 137 Mass. 77, 50 Am. Rep. 285; Stevenson v. Gunning's Estate, 64 Vt. 609, 25 Atl. 697; People v. Gay, 7 N. Y. 378; Tedens v. Schumers, 112 Ill. 263. * * *

Judgment reversed.

RUSSELL et al. v. COFFIN.

(Supreme Judicial Court of Massachusetts, 1829. 8 Pick. 143.)

This was a writ of entry, dated the 19th of April, 1825, wherein the demandant counted on his own seisin and a disseisin by James Bigelow, who aliened to the tenant. The plea was, that Bigelow never disseised.

And the demandant was permitted to cross-examine Hedge as to the testimony he had given in a certain deposition then in the counsel's hands, which had not been read to the witness, nor in evidence, and the witness having given testimony in some particulars different from such deposition, and having testified to some things material in the cause, not stated in his deposition, the counsel were permitted to give the deposition in evidence to impeach his testimony. Whereupon the tenant proposed to call witnesses to prove the general character of the witness for truth. But this evidence was ruled out, and the counsel for the defendant were permitted, in argument to the jury, to treat the testimony of this witness as having been given falsely, with a view to benefit the tenant; and the jury were instructed, that this was a subject proper for their consideration; to all which the tenant excepted.

The jury found a verdict for the demandant.[91]

PARKER, C. J. * * * In regard to the objection, that the tenant was not allowed to give evidence of the general character of Hedge, one of the witnesses, we think it cannot prevail. Hedge was a subscribing witness to the deed from Winslow to William Coffin, but was not examined by the demandants, from an apprehension that his testimony

[91] Statement condensed and part of opinion omitted.

would be adverse. He was then introduced by the tenant, and was cross-examined by the demandants, who afterwards read Hedge's deposition, to contradict his testimony on the stand. There was nothing irregular in this course; nor was there a right to go into evidence of his general character, notwithstanding the attempt to impeach him by contrasting his testimony given at a different time.

The position, as laid down by Starkie, cannot be carried to the extent contended for. He probably meant only, that where the questions put in the cross-examination and the answers did impeach his general character, the other party might rebut by proving a good general character. And so far we do not object to the principle. As in the case stated by Starkie, the witness was asked, whether she had not been twice committed to Bridewell, and answered that she had. This went to affect her general reputation; and the party who called her, was allowed to prove, that since those commitments her character had been fair and good.

But it never was decided, that if a witness was contradicted as to any fact of his testimony, either by his own declarations at other times, or by other witnesses, evidence might be admitted to prove his general good character. If this were the practice, great delay and confusion would arise, and as almost all cases are tried upon controverted testimony, each witness must bring his compurgators to support him when he is contradicted; and indeed it would be a trial of the witnesses and not of the action.

None of the objections prevailing, the judgment must be upon the verdict.[92]

DERRICK v. WALLACE.

(Court of Appeals of New York, 1916. 217 N. Y. 520, 112 N. E. 440.)

POUND, J.[93] The plaintiff, called as a witness in his own behalf, on his cross-examination testified that on the 31st day of October, 1896, he had been convicted of the crime of forgery in the second degree and sentenced to Auburn State Prison for a term of 5 years and 8 months. He thereafter offered evidence of witnesses of his general reputation in the community in which he lived. This was objected to as incompetent, on the ground that his reputation had not been impeached, except by cross-examination, and was excluded, subject to his exception.

Although opposite views have been taken of this question, we think that evidence of general good reputation should have been admitted. The authorities on both sides are collected by Professor Wigmore in his work on Evidence (section 1106), and the cases and text-books sup-

[92] See elaborate opinion to same effect in Chapman v. Cooley, 12 Rich. (S. C.) 654 (1860).

[93] Part of opinion omitted.

porting the rule are cited by Burford, C. J., in First National Bank of Bartlesville v. Blakeman (1907) 19 Okl. 106, 91 Pac. 868, 12 L. R. A. (N. S.) 364. It would be an affectation of research to appropriate the result of their labors by extended citations. Enough to say that such evidence has been admitted almost invariably in the jurisdictions where the question has arisen. It seems, however, to have been assumed that the courts in this state are against its admissibility, and a brief review of the cases may prove helpful. * * *

The main question, therefore, remains an open one in this state. Against the admissibility of the evidence it is urged that as a practical proposition the calling of witnesses to general good reputation must be limited to cases where witnesses are first called to impeach the general character of the witness; otherwise, the trial of the main issue would be obscured and delayed for the trial of collateral issues of character, which would distract the attention of the jury. Tedens v. Schumers, 112 Ill. 263, 267. But the instances when conviction of crime is followed by reform and re-established good character are not so numerous that the convenience of the courts will not permit the former convict to show his good reputation. Here the witness was called in the year 1913 and discredited by a conviction in the year 1896. Is he to be discredited for life rather than permitted to call witnesses to his present good character? Certainly not, unless for a better reason than the application of a rule of mere expediency.

It is further urged that "records of convictions of crime exhibit the bad character directly, and cannot be explained away by testimony as to good repute." Wigmore, § 1106. In other words, the proof of conviction is proof of a particular circumstance and not of general bad character, and, therefore, it does not logically open the door to rebutting proof of general good character. But Holmes, J., in Gertz v. Fitchburg R. R. Co., 137 Mass. 77, 50 Am. Rep. 285, holding that an impeaching conviction may be rebutted by evidence of good character says: "When it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil, which the conviction may be disposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case." He is speaking of proof by the record of conviction, but it is not apparent that any different rule should apply when the fact of conviction is proved on cross-examination.

In general the credibility of a witness is not to be impeached by proof of a particular offense, such as the commission of a crime, except from the mouth of the witness himself on cross-examination (Jackson v. Osborn, 2 Wend. 555, 558, 20 Am. Dec. 649; Sims v. Sims, 75 N. Y. 466, 472); but conviction of a crime may be proved by the record for the purpose of affecting the weight of testimony. By the Code of Civil Procedure (section 832) it may also be proved by cross-examination, but, if proved at all, it must be proved either by the record or by cross-

examination. Newcomb v. Griswold, 24 N. Y. 298; People v. Cardillo, 207 N. Y. 70, 100 N. E. 715, Ann. Cas. 1914C, 255. Anciently an outlawed felon was said to have a wolf's head (caput lupinum), so that any one might kill him as he would a wolf. 1 P. & M. Hist. Eng. Law, 459. Later and until recently the convicted felon was disqualified as a witness. Persons convicted of crime are now competent witnesses, and the only purpose for which conviction can be shown is to affect credibility by suggesting general bad reputation. Evidence of conviction thus impeaches the general character for truth and veracity, and may be met by evidence of general good character. Mere self-incrimination on cross-examination never disqualified the witness, and misconduct thus confessed cannot be said to discredit character generally in the community, in the sense that proof of conviction discredits it.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

WILLARD BARTLETT, C. J., and CHASE, COLLIN, CUDDEBACK, CARDOZO, and SEABURY, JJ., concur.

Judgment reversed, etc.

ELLICOTT et al. v. PEARL.

(Supreme Court of the United States, 1836. 10 Pet. 412, 9 L. Ed. 475.)

Mr. Justice STORY [94] delivered the opinion of the court.

This is a writ of error to the judgment of the circuit court for the district of Kentucky, upon a writ of right, sued forth on the 17th of January 1831; in which the plaintiffs in error were the demandants. * * *

The next exception is founded upon the refusal of the court to permit testimony to be given of the declarations of one Kincaid (the surveyor of Remey's survey) under the following circumstances: Kincaid had been examined as a witness for the demandants, (by way of deposition), and the tenants, thereupon, gave in evidence the conversations and declarations of Kincaid, to certain witnesses, in order to discredit his (Kincaid's) testimony, and to show that he had stated that the survey was made by him, at the mouth of Raccoon Creek, for Remey, when it was his interest to place it at Pond Creek. The demandants then, with a view to sustain Kincaid, and to support the statements going to his interest, offered witnesses to prove the statements and conversations of Kincaid at other times, corresponding with the statements made in his deposition, relative to his making the surveys of Thompson and Remey; and it being suggested by the demandants, upon an inquiry from the court, that these statements and conversations were subsequent to those testified to by the tenants' wit-

[94] Part of opinion omitted.

nesses; the court, upon an objection taken by the tenants, excluded the evidence. In our opinion, the evidence was rightly excluded.

Where witness proof has been offered against the testimony of a witness under oath, in order to impeach his veracity, establishing that he has given a different account at another time, we are of opinion that, in general, evidence is not admissible, in order to confirm his testimony, to prove that at other times he has given the same account as he has under oath; for it is but his mere declaration of the fact; and that is not evidence. His testimony under oath is better evidence than his confirmatory declarations not under oath; and the repetition of his assertions does not carry his credibility further, if so far as his oath. We say in general, because there are exceptions; but they are of a peculiar nature, not applicable to the circumstances of the present case; as where the testimony is assailed as a fabrication of a recent date, or a complaint recently made; for there, in order to repel such imputation, proof of the antecedent declaration of the party may be admitted.

It is true that in Lutterel v. Reynell, 1 Mod. Rep. 282,[95] it was held, that though hearsay be not allowed as direct evidence, yet it may be admitted in corroboration of a witness's testimony to show that he affirmed the same thing upon other occasions, and that he is still constant to himself. Lord Chief Baron Gilbert has asserted the same opinion in his Treatise on Evidence, p. 135. But Mr. Justice Buller, in his Nisi Prius Treatise, p. 294, says: "But clearly it is not evidence in chief; and it seems doubtful whether it is so in reply or not." The same question came before the house of lords, in the Berkeley Peerage Case, 4 Camp. 401; and it was there said by Lord Redesdale, that he had always understood that for the purpose of impugning the testimony of a witness, his declarations at another time might be inquired into; but not for the purpose of confirming his evidence. Lord Eldon expressed his decided opinion, that this was the true rule to be observed by the counsel in the cause. Lord Chief Justice Eyre is also represented to have rejected such evidence, when offered on behalf of the defendant in a prosecution for forgery. We

[95] In this case, where a cotrespasser, who had not been joined as a defendant, testified for the plaintiff, the Lord Chief Baron "also declared it was agreed, that whereas William Maynard, one of the witnesses for the plaintiff, was guilty, as appeared by his own evidence, together with the defendants, but was left out of the declaration, that he might be a witness for the plaintiff, that he was a good and legal witness; but his credit was lessened by it, for that he swore in his own discharge; for that when these defendants should be convicted, and have satisfied the condemnation, he might plead the same in bar of an action brought against himself. But those in the simul cum were no witnesses. Several witnesses were received, and allowed, to prove, That William Maynard did at several times discourse and declare the same things, and to the like purpose, that he testified now. And the Lord Chief Baron said, though a hearsay was not to be allowed as a direct evidence, yet it might be made use of to this purpose, viz., to prove that William Maynard was constant to himself, whereby his testimony was corroborated."

See opinion of Buller, J., in Rex v. Parker, 3 Douglas, 242 (1780), disapproving the broad rule for which Lutterel v. Reynell was supposed to stand.

think this is not only the better, but the true opinion; and well founded on the general principles of evidence. There is this additional objection to the admission of the confirmatory evidence in the present case, that it is of subsequent declarations; which would enable the witness at any time to control the effect of the former declarations, which he was conscious that he had made, and which he might now have a motive to qualify or weaken or destroy. * * *

Judgment affirmed.[96]

COMMONWEALTH v. CLEARY.

SAME v. GUIHEEN.

(Supreme Judicial Court of Massachusetts, 1898. 172 Mass. 175, 51 N. E. 746.)

HOLMES, J. These are indictments for unlawfully abusing a female child under the age of 16 years. St. 1893, c. 466, § 2. They come here on exceptions to evidence that the child "made complaint to her [mother] the next morning after the occurrence as to what had been done to her by the defendants the night before." It does not appear that more was admitted than the fact that the child made complaint, with sufficient to identify the subject-matter, and therefore it is not necessary to consider whether the whole statement would have been admissible if offered, as the district attorney asks us to decide. The only question argued for the defendants is whether the statement appears, as matter of law, to have been too remote in point of time to be admissible. It is not argued that the common law in cases of rape does not apply. See Com. v. Roosnell, 143 Mass. 32, 8 N. E. 747; Com. v. Hackett, 170 Mass. 194, 196, 48 N. E. 1087.

The rule that, in trials for rape, the government may or must prove that the woman concerned made complaint soon after the commission of the offense, is a perverted survival of the ancient requirement that she should make hue and cry as a preliminary to bringing her appeal. Glanville, 14, 6; Bract. 147a; Fleta, 1, c. 25, § 14; St. 4 Edw. I. Stat. 2. Appeals became obsolete, and left rape to be dealt with by indictment before the development of the modern law of evidence. Lord Hale, after stating the old law as to appeals, quoting Bracton, went on to deal with the evidence upon an indictment for rape. Having stated that the party ravished might give evidence upon oath, the value of which would be affected by corroborative facts, he recurred to the matter of fresh complaint, and said that, if she "presently discovered the offense, made pursuit after the offender," etc., "these and the like are concurring evidences, to give greater probability to her testimony." 1 Hale, P. C. 632, 633.

[96] And so in Com. v. Jenkins, 10 Gray (Mass.) 487 (1858). But see opinion by Cooley, J., in Stewart v. People, 23 Mich. 63, 9 Am. Rep. 78 (1862).

Obviously, this was suggested by, and merely echoed, the requirement in appeals, but it gave that requirement a more or less new turn. If it means, what it has been taken to mean, that the government can prove fresh complaint as part of its original case, it cannot be justified by the general principles of evidence which now prevail. In general, you cannot corroborate the testimony of a witness by proof that he has said the same thing before, when not under oath. But Lord Hale's statement of the law has survived as an arbitrary rule in the particular case, notwithstanding the later-developed principles of evidence; and, although nowadays recognized as an exception attempted to be fortified by exceptional reasons, still it is put upon the ground upon which it was placed by his words. The evidence is not admitted as part of the res gestæ, or as evidence of the truth of the things alleged, or solely for the purpose of disproving consent, but for the more general purpose of confirming the testimony of the ravished woman. Reg. v. Lillyman [1896] 2 Q. B. 167, 170, 177; 3 Russ. Crimes (6th Ed.) 387, see Grave's note (m); State v. Kinney, 44 Conn. 153, 155, 26 Am. Rep. 436; Haynes v. Com., 28 Grat. (Va.) 942, 947, 948; Hornbeck v. State, 35 Ohio St. 277, 280, 35 Am. Rep. 608; People v. O'Sullivan, 104 N. Y. 481, 486, 10 N. E. 880, 58 Am. Rep. 530; Bedingfield's Case, 14 Am. Law Rev. 830, 838; 3 Greenl. Ev. § 213; 1 McClain, Cr. Law, §§ 455, 456.

It follows that the complaint could not be rejected because it was no part of the res gestæ, or because, under our statute, the child was too young to consent. The former point was argued by both sides, seemingly under the mistaken notion that the complaint is substantive evidence of the facts charged. The test is whether, according to the principles of the exception, her having made the complaint tends to corroborate testimony given by the child at the trial. It does not appear whether the child testified or not, but it would seem that she did, and, on the bill of exceptions, it must be assumed that she did. The only question open, therefore, is whether it can be said, as matter of law, that the complaint was made too late. This depends upon a preliminary finding by the judge. Com. v. Bond, 170 Mass. 41, 43, 48 N. E. 756. We cannot say that the admission of the evidence was not justified. The alleged rape was between 9 and 10 o'clock in the evening. The girl was not out of the alleged ravisher's company until half past 10, when she entered a friend's house, crying, excited, and frightened. The friend took her to her home at 12. She was still frightened and trembling, and her mother put her to bed. She made the complaint the next morning. It might have been found on this evidence that she was not in a condition to speak until she had rested, and that she was dealt with accordingly. Hill v. State, 5 Lea (Tenn.) 725, 732; State v. Knapp, 45 N. H. 148, 155.

Some cases have cut free from the original ground, and intimate that lapse of time before making complaint goes only to its weight, not to its competency. State v. Mulkern, 85 Me. 106, 26 Atl. 1017;

State v. Niles, 47 Vt. 82, 86. But it is not necessary to lay down so broad a rule. In extreme cases the evidence has been ruled out. People v. O'Sullivan, 104 N. Y. 481, 490, 10 N. E. 880, 58 Am. Rep. 530.

Exceptions overruled.[97]

MERCER et al. v. STATE.

(Supreme Court of Florida, 1898. 40 Fla. 216, 24 South. 154, 74 Am. St. Rep. 135.)

TAYLOR, C. J.[98] * * * Several witnesses were introduced in rebuttal by the state for the purpose of sustaining the general reputation and character for truth and veracity of several other state witnesses. This evidence was objected to by the defendants on the ground that the witnesses for the state, whose characters were sought by it to be sustained, had not been impeached by the defendants, and because their reputation for truth and veracity had not been attacked, and was not at issue. These objections were overruled, and the testimony admitted, and this ruling is assigned as the tenth and twelfth errors. There was no error here. The general characters of the state's witnesses whose reputation for truth and veracity in the communities in which they lived was sought to be established and sustained by the challenged evidence had not been attempted to be impeached by any direct general assault thereon, it is true; but the defendants, as to each of said witnesses, had not only, on cross-examination, and by their own witnesses, undertaken to cast discredit upon them for truth and veracity, but introduced various witnesses who testified to contradictory statements alleged to have been made by them on other occasions respecting the subject-matter of their testimony conflicting with the evidence at the trial.

The rule governing the admissibility of evidence to sustain the general character of a party's witness for truth and veracity is very well settled, and is accurately stated by Judge Redfield in Paine v. Tilden, 20 Vt. 554, as follows: "It is now well settled that, whenever the character of a witness for truth is attacked in any way, it is competent for the party calling him to give general evidence in support of the good character of the witness. And we do not think it important whether the character of the witness is attacked by showing that he has given contradictory accounts of the matter out of court, and different from

[97] Apparently the earlier practice limited the evidence to the bare fact that a complaint had been made, excluding what was said in making such complaint. State v. Jones, 61 Mo. 232 (1875); People v. Hamilton, 268 Ill. 390, 109 N. E. 329 (1915).

In Reg. v. Lillyman, 2 Q. B. 167 (1896), the question was elaborately considered, and the conclusion reached that the details of the complaint should be admitted. See same result in State v. De Wolf, 8 Conn. 93, 20 Am. Dec. 90 (1830). For a discussion of the time element, see State v. Patrick, 107 Mo. 147, 17 S. W. 666 (1891).

[98] Part of opinion omitted.

that sworn to, or by cross-examination, or by general evidence of want of character for truth." In Stevenson v. Gunning's Estate, 64 Vt. 601, 25 Atl. 697, it is said: "It is observable that a distinction is taken between an attack upon the character of the witness, as such, for credibility, and the character of the testimony given, for belief. It is only when the character of the witness for credibility is directly attacked by general evidence regarding his standing and character for truth and veracity, or by showing that he has made contradictory or inconsistent statements either out of court or in court, or that he has been convicted of some crime, or engaged in some act affecting his credibility, like suborning or attempting to suborn a witness or suppress testimony in the case on trial, that sustaining evidence can be used." Phillips v. State, 19 Tex. App. 158; Glaze v. Whitley, 5 Or. 164; Clark v. Bond, 29 Ind. 555; Harris v. State, 30 Ind. 131; State v. Cooper, 71 Mo. 436; Burrell v. State, 18 Tex. 713; George v. Pilcher, 28 Grat. (Va.) 299, 26 Am. Rep. 350; Isler v. Dewey, 71 N. C. 14; Holley v. State, 105 Ala. 100, 17 South. 102; 1 Greenl. Ev. § 462.

In addition to the proof by the state to sustain the general character of its witnesses for truth and veracity, the state attorney was allowed, over the objection of the defendants, to go further in its sustaining proof, and to interrogate the supporting witnesses by independent questions as to the character for honesty of its sustained witnesses; and this ruling is assigned as the eleventh error. The majority of the court are of the opinion that this ruling is reversible error. The general, well-settled rule of law is that, when the character of a witness is gone into, the only proper object of inquiry is as to his reputation for truth and veracity. 1 Tayl. Ev. p. 257 et seq., and cases cited. Neither his general character, nor particular phases or traits of character, can be gone into, but the inquiry must be confined to his reputation or character for truth and veracity. The writer of this opinion, while concurring in the correctness of the rule announced, cannot agree with the majority of the court that the inquiry into the honesty of the state's witnesses permitted in this case is sufficient cause for reversal. * * *

Judgment reversed.

COMMONWEALTH v. RETKOVITZ.

(Supreme Judicial Court of Massachusetts, 1915. 222 Mass. 245, 110 N. E. 293.)

RUGG, C. J.[99] * * * Two witnesses called by the commonwealth testified that they saw the defendant near the house of Domka Peremebida a short time before her death. The counsel for the defendant stated, after cross-examination, in substance that he intended to show, if he could, that these witnesses had concealed the facts, or that they

[99] Statement and part of opinion omitted.

were unduly influenced to testify as they did, or that their testimony was a recent contrivance. Thereupon, the commonwealth was permitted, without objection, to call a witness, Violette, to show that these two witnesses had made statements soon after the homicide similar to those given by them in testimony. Upon this posture of the case such testimony was competent.

The mere fact that a witness has made statements on other occasions at variance with testimony given in court does not warrant the introducing of confirmatory evidence to the effect that he has given an account of the transaction at still other times in harmony with his sworn testimony. A party may, for the purpose of discrediting an opponent's witness, show that he has given two inconsistent narrations of the same affair, one of which was necessarily untrue. As is pointed out with clearness by Bigelow, J., in Commonwealth v. Jenkins, 10 Gray, 485, 488, when this is the state of the evidence it by no means relieves the witness of the distrust thus cast upon him to prove that the story last told was similar to an earlier version given by the witness. The two inconsistent statements still remain. Hence, under these circumstances, such corroborating evidence is inadmissible.

This is the general rule. But there is an exception where the contention is made that the testimony of a witness is given under a bias or undue influence, arising from some late occurrence subsequent to the main event, is a recent contrivance, or that the facts described in testimony previously have been concealed under conditions which warrant the belief that, if they were true, the witness would have been likely to have revealed them. In such a situation, evidence that the witness at earlier times before the intervention of these pernicious impulses had made statements like those given in court has a legitimate tendency to impugn the existence of these factors as operating causes to produce the testimony and thus to fortify his testimony, and therefore should be admitted. The exception to the general rule is a narrow one and is not to be extended; but when the contentions of the parties give rise to its application, it is well established. Griffin v. Boston, 188 Mass. 475, 74 N. E. 687; Brown v. Brown, 208 Mass. 290, 94 N. E. 465. See, for a full discussion of all the principles, Com. v. Tucker, 189 Mass. 457, 479–485, 76 N. E. 127, 7 L. R. A. (N. S.) 1056.
* * *[100]

[100] And so in Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406, Ann. Cas. 1916D, 1161 (1915).

CHAPTER III

HEARSAY

SECTION 1.—THE GENERAL RULE [1]

"The Attestation of the Witness must be to what he knows, and not to that only which he hath heard, for mere Hearsay is no Evidence; for it is his Knowledge that must direct the Court and Jury in the Judgment of the Fact, and not his mere Credulity, which is very uncertain and various in several Persons; for Testimony being but an Appeal to the Knowledge of another, if indeed he doth not know, he can be no Evidence. Besides though a Person testify to what he hath heard upon Oath, yet the Person who spake it was not upon Oath; and if a Man had been in Court and said the same Thing and had not Sworn [2] it, he had not been believed in a Court of Justice; for all Credit being derived from Attestation and Evidence, it can rise no higher than the Fountain from whence it flows, and if the first Speech was without Oath, an Oath that there was such a Speech makes it no more than a bare Speaking, and so of no value in a Court

[1] Mansfield, C. J., in the Berkeley Peerage Case, 4 Campbell 401 (1811): "By the general rule of law, nothing that is said by any person can be used as evidence between contending parties, unless it is delivered upon oath in the presence of those parties. With two exceptions, this rule is adhered to in all civil cases. Some inconvenience no doubt arises from such rigor. If material witnesses happen to die before the trial, the person whose case they would have established, may fail in the suit. But although all the Bishops on the bench should be ready to swear to what they heard these witnesses declare, and add their own implicit belief of the truth of the declarations, the evidence could not be received. Upon this subject, the laws of other countries are quite different; they admit evidence of hearsay without scruple. There is not an appeal from the neighboring kingdom of Scotland in which you will not find a great deal of hearsay evidence upon every fact brought into dispute. This has struck many persons as a great absurdity and defect in the law of that country. But the different rules which prevail there and with us seem to me to have a reasonable foundation in the different manner in which justice is administered in the two countries. In Scotland, and most of the continental states, the judges determine upon the facts in dispute as well as upon the law; and they think there is no danger in their listening to evidence of hearsay, because when they come to consider of their judgment on the merits of the case, they can trust themselves entirely to disregard the hearsay evidence, or to give it any little weight which it may seem to deserve. But in England, where the jury are the sole judges of the fact, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds."

[2] See Brazier's Case, ante, p. 130, where a child was examined without having been sworn.

of Justice, where all Things were determined under the Solemnities of an Oath; Besides, nothing can be more uncertain than the loose and wandering witnesses that are taken upon the uncertain Reports of the Talk and Discourse of others." Chief Baron Gilbert, Law of Evidence (4th Ed. 1777) p. 149.

THE KING v. PAINE.

(Court of King's Bench, 1696. 5 Mod. 163.)

Information[3] tried at the bar by a Bristol jury, against one Samuel Paine, a minister there, setting forth, that the defendant was the composer, author, and publisher, of a most malicious and wicked libel against the late Queen Mary, which was styled "Her Epitaph."

Upon not guilty pleaded, the case, upon the evidence, appeared to be thus:

Paine wrote the libel, it being dictated to him by another. He afterwards put it into his study, and, by mistake, delivered it to one Brereton instead of another paper, who transmitted a copy thereof, through several hands to the Mayor of Bristol, which occasioned the mayor to send for Brereton to examine him, which he did upon oath, but not in the presence of Paine. The defendant Paine was afterwards examined by the mayor, and confessed, that he wrote the libel, but that he did neither compose or publish it, but only delivered it, instead of another paper, to Brereton; but it was proved, by his servant, that he sent him to his study for a writing, and that he not bringing the paper sent for, the said Paine fetched it himself, and being in a room only with Dr. Hoyle the libel was repeated, but he could not tell by whom; but he remembered the first verse. Brereton was now dead.

The question was, whether his depositions taken before the mayor should be given in evidence at this trial?

The counsel for the defendant insisted, that it could not be done by law, because Brereton being dead the defendant had lost all opportunity of cross-examining him; that this case was not like an information before a coroner,[4] or an examination by justices of peace

[3] Part of case omitted.

[4] Bromwich's Case, 1 Levinz, 180 (1667): "The Lord Morly and Bromwich being indicted for the murther of Hastings, the Lord Morly was tried by his peers before the Lord High Steward, and found guilty of Manslaughter, and was dismissed without being put to his Book, or burnt in the Hand, according to the Statute of 1 E. 6, c. 12. And now Bromwich being brought to his trial at the Bar of the King's Bench, the Indictment was against the Lord Morly for the killing of Hastings, and against Bromwich for being present, aiding and assisting; and 'twas proved by one Witness, That the Lord Morly killed Hastings, but that at the same time they were fighting, Bromwich made a Thrust at Hastings, and thereupon the Lord Morly closed with him and killed him; and the Depositions of two other Witnesses taken before the

of persons accused, and afterwards committed for felony, because they have power by a particular statute [5] to take such examination both of the fact and circumstances, and to put it in writing and certify it at the next general gaol delivery. But depositions of this nature are never allowed to be read as evidence in a civil cause, and much less in a criminal case.[6] * * *

The Court thereupon sent the Puisne Judge to confer with the Justices of the Common Pleas; who returning, the Chief Justice declared, that it was the opinion of both Courts that these depositions should not be given in evidence, the defendant not being present when they were taken before the mayor, and so had lost the benefit of a cross-examination.[7]

BREEDON v. GILL.

(Court of King's Bench, 1697. 5 Mod. 272.)

The plaintiff Breedon suggests, for a prohibition, that by the laws of England, when an issue is joined between the parties it ought to be tried by the evidence of witnesses viva voce, and not by notes or minutes of their testimony; that an information was exhibited against him, before the Commissioners of Excise, setting forth, that he was a common brewer, and did keep a private storehouse without acquainting the said commissioners therewith; that he was found guilty; and that he appealed from their sentence to the Commissioners of Appeals, before whom the informer produced as evidence the minutes taken before the Commissioners of Excise, and that the witnesses who gave evidence there were still alive; which minutes were allowed as evidence by the Commissioners of Appeals, etc.

The question now was, Whether a prohibition should be granted, directed to them, not to admit such evidence? [8]

CURIA. The common law does not require, that witnesses shall be examined viva voce, except where the trial is by jury. These depositions were taken in Court, where the evidence is entered; and when that is done, the party has nothing to do but to appeal from an injury supposed to be done by an Inferior Court; and it is very fair to transmit that evidence which was given before them, and upon which they gave their judgment. It is true, they would have the Commissioners

Coroner, which were now dead, were read to the same Effect, as they were read before the Lords on the Trial of the Lord Morly, by the Opinion of all the Judges of England."

[5] 1 & 2 P. & M. c. 13; 2 & 3 P. & M. c. 10.

[6] For the general use of hearsay in criminal trials at an earlier period, see 2 Wigmore, § 1364.

[7] Ex parte affidavits have always been used in support of motions and similar applications. Rex v. Joliffe, 4 Term R. 292 (1791).

[8] Statement condensed.

of Appeals try the cause de novo, which is contrary to the very nature of an appeal. This statute directs, "that the commissioners shall proceed by the oath of witnesses, or the confession of the party." And the last resort is in the Commissioners of Appeals, if they do not meddle with what is out of their jurisdiction; which is not the complaint now, but only of the course and method of the proceedings. The case of Shotter v. Friend, 1 Show. 172, which was lately adjudged in the Court of King's Bench, comes near this case; for there a prohibition was granted to the Consistory Court of the Bishop of Winton after sentence, because they refused to allow the proof of a payment of a legacy by one witness. But a prohibition was never yet granted to any Ecclesiastical Court for proceeding according to such evidence as is allowed by the common law.

For which reasons nothing was done at this time.

But after, in Easter Term, in the ninth year of William the Third, upon further consideration, a prohibition was granted quoad the admitting of the depositions taken in writing before the Commissioners of Excise, for the Commissioners of Appeal ought to examine the witnesses de novo on the appeal.[9]

THE QUEEN v. INHABITANTS OF LYDEARD ST. LAWRENCE.

(Court of Queen's Bench, 1841. 1 Gale & D. 191.)

On appeal to the Somersetshire sessions against an order for the removal of Elizabeth Winter and Emma her child, from the parish of Spaxton in the county of Somerset, to the parish of Lydeard St. Lawrence in the same county, as the place of the last legal settlement of William Winter, the husband of the said Elizabeth, the sessions confirmed the order subject to the opinion of this Court upon the following case:

The examination of William Winter the younger, the husband of the pauper, and William Winter, the father of the pauper's husband, upon which the order of removal was made, were as follows:

"The examination of William Winter, now confined in Wilton gaol in the said county for felony, taken on oath before me, one of her Majesty's justices of the peace acting in and for the said county, this 15th day of July, 1840, who saith, that I am now about twenty-five years old; I was born in the parish of Lydeard St. Lawrence, as I have heard and believe; I have done no act whereby to gain a legal settlement on my own account; about January last I was removed by an order of removal from the parish of North Cadbury in the said county to the parish of Lydeard St. Lawrence in the said county, the

[9] For the use of such evidence, where the witness is unavailable in person, see cases in the next section.

last legal place of settlement of my father William Winter, as I have heard and believe; I have a wife named Elizabeth, and one child named Emma, aged about three years and a half.

"Sworn before me, F. Warre. William Winter." [10]

LORD DENMAN, C. J. * * * The second question is to the sufficiency of the examination in setting forth the place of the pauper's birth-place. It is said that the only objection made, and intended to be made, to the examination in this respect, is that, with reference to the pauper, who speaks as to his birth-place, being a felon convict, and so incompetent from infamy, the fact in question is not proved on credible testimony, and that the objection, therefore, to the evidence, as being in itself hearsay, comes by surprise upon the respondents. I think the word "credible" by no means confines the notice of objection to the competency of the pauper, and that the appellants were entitled to go into the objection, that the evidence as to the birth settlement is entirely hearsay. That objection also must prevail, and the nature of the fact to be proved does not make this an excepted case. Early recollection may be evidence of the place of birth, but early recollection is not the evidence set forth, but merely hearsay and belief. * * *

Order quashed.

COMMONWEALTH v. STEWART.

(Supreme Court of Pennsylvania, 1815. 1 Serg. & R. 342.)

The questions involved in this case arose from an indictment against the defendant, for keeping a disorderly house. It charged him with "keeping a disorderly and ill-governed house, and unlawfully causing and procuring for his own lucre and gain, certain persons, as well men as women, of evil name and fame, and of dishonest conversation, to frequent and come together in his said house, at unlawful times, as well in the night as in the day, permitting them there to be and remain, drinking, tippling, and misbehaving themselves to the great damage and common nuisance of all the leige citizens of the commonwealth there inhabiting, residing, and passing, to the evil example, &c."

On the trial at Nisi Prius before Judge Yeates, in January last, Sarah Bond, a witness produced on the part of the prosecution, after having stated several matters tending to show that the defendant kept a disorderly house, was asked by the counsel for the commonwealth, "whether the house was not a matter of general complaint by the neighbours, as disturbing them?" The counsel for the defendant objected to the question, but the court permitted it to be put, and reserved the point.[11]

[10] Statement condensed and part of opinion of Lord Denman, C. J., and concurring opinions of Patteson, Williams, and Coleridge, JJ., omitted.

[11] Statement condensed, part of opinion of Tilghman, C. J., and part of dissenting opinion of Yeates, J., omitted.

TILGHMAN, C. J. * * * There is another exception to be considered, relating to certain evidence admitted on the trial. Sarah Bond, a witness for the commonwealth, having proved several facts, tending to show, that Stewart kept a disorderly house, was permitted to testify, "that the house was a matter of general complaint by the neighbours, as disturbing them." It seems that the gentlemen who prosecute for the commonwealth have been in the habit of asking questions of this kind. But the practice has not been acquiesced in, and is now brought before this court for decision. It is agreed on all hands, that this is not one of those cases in which hearsay evidence can be admitted. But it is contended, that the complaint of the neighbourhood is a matter of fact, and therefore, when the witness proves the complaint, she only proves a fact within her own knowledge. I am not satisfied with this ingenious distinction, which gets round and avoids an important rule of evidence. In the same way all hearsay evidence may be introduced, for it is always a fact, that the witness hears the other person speak, and it is a fact that the words spoken by that person were heard by the witness. But what is the consequence of receiving testimony of this kind? The jury are influenced by declarations not made upon oath, and the adverse party is deprived of the benefit of cross-examining the person making those declarations. Let us analyze Mrs. Bond's testimony. "The house was a matter of general complaint;" that is, the neighbours said, that they heard noises in that house which disturbed them. But we have only their words for that, and perhaps they would have spoken differently upon oath. It was important to the defendant to be permitted to ask what those noises were, and when they were heard, that he might have an opportunity of contradicting the evidence, or explaining the nature of the noise. It was important too, to know who those neighbours were, that their character might be inquired into. And why should they not be produced and examined on oath? They were close at hand. It appears to me, that the evidence amounted to no more than the general reputation of a disorderly house, and certainly that is not one of the cases in which general reputation is evidence. I am of opinion, therefore, that a new trial should be granted.

YEATES, J. (dissenting). The principle on which the keeping of a disorderly tippling house is punishable by a criminal prosecution, is, that it disturbs the peace and quiet of the neighbourhood, and thereby becomes a common nuisance. In the course of this trial, Sarah Bond, who lived across the street, opposite to the defendant's house, swore to specific disorderly acts committed therein, and that persons of bad repute, old and young, male and female, black and white, frequented it both by night and day. She heard fighting no less than nine or ten times within the period of four or five months, the cry of murder issued from the house, and many persons were collected there. She herself was often disturbed by these noises. On the part of the prosecution, she was asked, whether the neighbours did not generally complain

of these disturbances, and the defendant's counsel objected thereto. I had no hesitation in permitting the question to be asked, considering these complaints as independent facts, the effects springing from the causes specially detailed by the witness. No hearsay evidence, of any particular disorders committed in the house, was admitted, but the effects and consequences of these disorders on the feelings of others, according with the feelings of the witness, were deemed by me to be proper and legal testimony. Expressions of general uneasiness at the moment, are distinct from hearsay evidence, for "out of the abundance of the heart the mouth speaketh." I do not view these general complaints in the light of reputation of the gross irregularities permitted by the defendant in his house. These disorders were established by the oaths of eight several witnesses. * * *

New trial granted.

BOYDEN v. MOORE.

(Supreme Judicial Court of Massachusetts, 1831. 11 Pick. 362.)

Trespass against a deputy sheriff for taking and carrying away four horses, a wagon, &c. The defendant pleaded the general issue, and filed a brief statement.

At the trial before Putnam, J., it appeared, that the chattels were once the property of Charles Boyden, the plaintiff's son. Both parties claimed under Charles,—the plaintiff, by virtue of a transfer from him in January, 1831, and the defendant, by virtue of an attachment on mesne process in favor of John D. Miles against Charles, made about a week after the transfer.

To prove the transfer and delivery of the chattels, the plaintiff introduced two witnesses, who testified that they were called to witness the sale and delivery, and that Charles said to the plaintiff, "take the property, do the best you can with it, pay yourself and pay the rest to my creditors."

The defendant proved, that after the transfer, and on the same evening and the morning following, Charles was at Brooks's inn in Templeton, in possession of the property.

The plaintiff then offered to prove, that within one hour after the transfer, he directed Charles to take the property to Brooks's and get Brooks to keep it at the plaintiff's expense, and that the next morning the plaintiff went to Brooks and told him that he owned the property by virtue of a bill of sale, and that he would pay him for keeping it. To these declarations of the plaintiff the defendant objected, but the judge admitted them as part of the res gestæ.

[A verdict was found for the plaintiff. If these declarations ought to have been rejected a new trial was to be granted.] [12]

[12] Statement condensed and part of opinion omitted.

SHAW, C. J., delivered the opinion of the Court.

The horses, the property in controversy, having been attached as the property of Charles Boyden, son of the plaintiff, by a process, valid as against the son, by the defendant, and being claimed by the plaintiff under an assignment prior in point of time, the question is upon the validity of this assignment. The fact that the vendor was in the possession of the property, after the assignment, was proper evidence to the jury, of fraud in the sale. To repel the conclusion arising from this fact, the plaintiff offered evidence to show, that after the sale he directed his son to take the horses to Brooks's inn, in Templeton, and get the horses kept at his expense, and that he himself went to Brooks's the next day, and told him that he owned the horses, by virtue of a bill of sale, and would pay for the keeping of them. This was objected to as being the plaintiff's own declarations; but we are of opinion, that it was rightly admitted, not as proof of the facts alleged, but as part of the res gestæ.[18] It showed that he was incurring expense, and charging himself with a debt, and that as owner and principal, in which character a mere parol promise was binding, not as a surety or guarantor for his son, which would have required a promise in writing. It tended to show that the possession and acts of the son, were those of an agent. That part of the declarations, in which he said that he owned the horses under a bill of sale, was made immediately after the sale, before any attachment or other adverse claim intervened, to a person having the custody of the horses, and who might be called upon for information, and was we think competent, as proof of notoriety, and to repel the suggestion of secrecy, arising from the fact relied upon, that notwithstanding the supposed sale, the property remained in the custody of the vendor. In all in these respects, those declarations were acts done, and were competent evidence to repel the charge of fraud. * * *

Judgment on the verdict.

[18] Bradley, J., in Bank v. Kennedy, 17 Wall. 19, 21 L. Ed. 554 (1872): "* * * Like the loan, the purchase of the stock was a fact accomplished by conversations and acts. In proving this fact these conversations and acts were competent evidence. Conversations, in such cases, are not adduced so much to prove ulterior facts stated therein as to prove the conversations themselves as facts constituting part of the transaction. Hence they are not hearsay, but original evidence."

The above quotation illustrates one of the many meanings or uses of the unfortunate phrase, "res gestæ." It is frequently applied to hearsay statements receivable under some exception to the hearsay rule.—*Ed.*

WRIGHT v. DOE dem. TATHAM.

(Court of Exchequer Chamber, 1837. 7 Adol. & E. 313.)

Error from the Court of King's Bench.

Ejectment for the manors of Hornby and Tatham, (containing respectively certain lands, which were described), for the rectory, &c., of Hornby, and for other lands and premises, all in the county of Lancaster. The lessor of the plaintiff below claimed as heir at law, the defendant below as devisee, of John Marsden. The material questions were, whether the will had in fact been executed, and whether, assuming the execution to be proved, John Marsden was, at the time, competent, in point of understanding, to make the will.

[The objections taken on behalf of the defendant relate to the admissibility in evidence of three letters [14] addressed to the testator by persons now deceased, well acquainted with him during their lives.]

PARKE, B.[15] * * * First, then, were all or any of these letters admissible on the issue in the cause as acts done by the writers, assuming, for the sake of argument, that there was no proof of any act done by the testator upon or relating to these letters or any of them,—that is, would such letters or any of them be evidence of the testator's competence at the time of writing them, if sent to the testator's house and not opened or read by him?

Indeed this question is just the same as if the letters had been intercepted before their arrival at his house; for, in so far as the writing and sending the letters by their respective writers were acts done by them towards the testator, those acts would in the two supposed cases be actually complete. It is argued that the letters would be admissible because they are evidence of the treatment of the testator as a competent person by individuals acquainted with his habits and personal character, not using the word treatment in a sense involving any conduct of the testator himself; that they are more than mere statements to a third person indicating an opinion of his competence by those persons; they are acts done towards the testator by them, which would not have been done if he had been incompetent, and from which, therefore, a legitimate inference may, it is argued, be derived that he was so.

Each of the three letters, no doubt, indicates that in the opinion of the writer the testator was a rational person. He is spoken of in respectful terms in all. Mr. Ellershaw describes him as possessing hospitality and benevolent politeness; and Mr. Marton addresses him as competent to do business to the limited extent to which his letter calls upon him to act; and there is no question but that, if any one of those writers had been living, his evidence, founded on personal observation, that the testator possessed the qualities which justified the opinion expressed or implied in his letters, would be admissible on this issue. But

[14] These letters were excluded at the trial.

[15] Part of opinion omitted.

the point to be determined is, whether these letters are admissible as proof that he did possess these qualities?

I am of opinion that, according to the established principles of the law of evidence, the letters are all inadmissible for such a purpose. One great principle in this law is, that all facts which are relevant to the issue may be proved; another is, that all such facts as have not been admitted by the party against whom they are offered, or some one under whom he claims, ought to be proved under the sanction of an oath, (or its equivalent introduced by statute, a solemn affirmation,) either on the trial of the issue or some other issue involving the same question between the same parties or those to whom they are privy. To this rule certain exceptions have been recognized; some from very early times, on the ground of necessity or convenience; such as the proof of the quality and intention of acts by declarations accompanying them; of pedigrees, and of public rights by the statement of deceased persons presumably well acquainted with the subject, as inhabitants of the district in the one case, or relations within certain limits in the other. Such also is the proof of possession by entries of deceased stewards or receivers charging themselves, or of facts of a public nature by public documents; within none of which exceptions is it contended that the present case can be classed.

That the three letters were each of them written by the persons whose names they bear, and sent, at some time before they were found, to the testator's house, no doubt are facts, and those facts are proved on oath; and the letters are without doubt admissible on an issue in which the fact of sending such letters by those persons, and within that limit of time, is relevant to the matter in dispute; as, for instance, on a feigned issue to try the question whether such letters were sent to the testator's house, or on any issue in which it is the material question whether such letters or any of them had been sent. Verbal declarations of the same parties are also facts, and in like manner admissible under the same circumstances; and so would letters or declarations to third persons upon the like supposition.

But the question is, whether the contents of these letters are evidence of the fact to be proved upon this issue,—that is, the actual existence of the qualities which the testator is, in those letters, by implication, stated to possess: and those letters may be considered in this respect to be on the same footing as if they had contained a direct and positive statement that he was competent. For this purpose they are mere hearsay evidence, statements of the writers, not on oath,[16] of the truth of

[16] Coltman, J., in same case: "Now, admitting that this is a question of opinion and judgment, we may ask, how is matter of opinion required by the law of England to be proved? The general rule is, that it is to be proved by the examination of witnesses upon oath. The administering of an oath furnishes some guarantee for the sincerity of the opinion; and the power of cross-examination gives an opportunity of testing the foundation and the value of it. Such being the general rule, it is necessary for the party who brings forward evidence not on oath to show some recognized exception to the general rule, within which it falls."

the matter in question, with this addition, that they have acted upon the statements on the faith of their being true, by their sending the letters to the testator. That the so acting cannot give a sufficient sanction for the truth of the statement, is perfectly plain; for it is clear that, if the same statements had been made by parol or in writing to a third person, that would have been insufficient; and this is conceded by the learned counsel for the plaintiff in error. Yet in both cases there has been an acting on the belief of the truth, by making the statement, or writing and sending a letter to a third person; and what difference can it possibly make that this is an acting of the same nature by writing and sending the letter to the testator? It is admitted, and most properly, that you have no right to use in evidence the fact of writing and sending a letter to a third person containing a statement of competence, on the ground that it affords an inference that such an act would not have been done unless the statement was true, or believed to be true, although such an inference no doubt would be raised in the conduct of the ordinary affairs of life, if the statement were made by a man of veracity. But it cannot be raised in a judicial inquiry; and, if such an argument were admissible, it would lead to the indiscriminate admission of hearsay evidence of all manner of facts.

Further, it is clear that an acting to a much greater extent and degree upon such statements to a third person would not make the statements admissible. For example, if a wager to a large amount had been made as to the matter in issue by two third persons, the payment of that wager, however large the sum, would not be admissible to prove the truth of the matter in issue. You would not have had any right to present it to the jury as raising an inference of the truth of the fact, on the ground that otherwise the debt would not have been paid. It is, after all, nothing but the mere statement of that fact, with strong evidence of the belief of it by the party making it. Could it make any difference that the wager was between the third person and one of the parties to the suit? Certainly not. The payment by other underwriters on the same policy to the plaintiff could not be given in evidence to prove that the subject insured had been lost. Yet there is an act done, a payment strongly attesting the truth of the statement, which it implies, that there had been a loss. To illustrate this point still further, let us suppose a third person had betted a wager with Mr. Marsden that he could not solve some mathematical problem, the solution of which required a high degree of capacity; would payment of that wager to Mr. Marsden's banker be admissible evidence that he possessed that capacity? The answer is certain; it would not. It would be evidence of the fact of competence given by a third party not upon oath.

Let us suppose the parties who wrote these letters to have stated the matter therein contained, that is, their knowledge of his personal qualities and capacity for business, on oath before a magistrate, or in some judicial proceeding to which the plaintiff and defendant were not par-

ties. No one could contend that such statement would be admissible on this issue; and yet there would have been an act done on the faith of the statement being true, and a very solemn one, which would raise in the ordinary conduct of affairs a strong belief in the truth of the statement, if the writers were faith-worthy. The acting in this case is of much less importance, and certainly is not equal to the sanction of an extra judicial oath.

Many other instances of a similar nature, by way of illustration, were suggested by the learned counsel for the defendant in error, which, on the most cursory consideration, any one would at once declare to be inadmissible in evidence. Others were supposed on the part of the plaintiff in error, which, at first sight, have the appearance of being mere facts, and therefore admissible, though on further consideration they are open to precisely the same objection. Of the first description are the supposed cases of a letter by a third person to any one demanding a debt, which may be said to be a treatment of him as a debtor, being offered as proof that the debt was really due; a note congratulating him on his high state of bodily vigour, being proposed as evidence of his being in good health; both of which are manifestly at first sight objectionable. To the latter class belong the supposed conduct of the family or relations of a testator, taking the same precautions in his absence as if he were a lunatic; his election, in his absence, to some high and responsible office; the conduct of a physician who permitted a will to be executed by a sick testator; the conduct of a deceased captain on a question of seaworthiness, who after examining every part of the vessel, embarked in it with his family; all these, when deliberately considered, are, with reference to the matter in issue in each case, mere instances of hearsay evidence, mere statements, not on oath, but implied in or vouched by the actual conduct of persons by whose acts the litigant parties are not to be bound.

The conclusion at which I have arrived, is, that proof of a particular fact, which is not of itself a matter in issue, but which is relevant only as implying a statement or opinion of a third person on the matter in issue, is inadmissible in all cases where such a statement or opinion, not on oath, would be of itself inadmissible; and, therefore, in this case the letters which are offered only to prove the competence of the testator, that is, the truth of the implied statements therein contained, were properly rejected, as the mere statement or opinion of the writer would certainly have been inadmissible. It is true that evidence of this description has been received in the Ecclesiastical Courts. But their rules of evidence are not the same in all respects as ours. Some greater laxity may be permitted in a Court which adjudicates both on the law and on the fact, and may be more safely trusted with the consideration of such evidence than a jury; and I would observe, also, that in no instance has the propriety of the reception of it even in the spiritual Courts been confirmed by the Court of Delegates. 1

do not think, therefore, that we are bound by the authority of the cases referred to in the Ecclesiastical Courts.

The next question is, whether there is any evidence of an act done with reference to these three letters, or any of them, to render their contents admissible by way of explaining that act. I am clearly of opinion that none of them were admissible on this ground. * * *.

Affirmed.

PARRIS v. JENKINS.

(Court of Appeals of South Carolina, 1845. 2 Rich. 106.)

This was an action of trover for a negro woman, Emily, and her three children. The question was as to the title.

The negroes originally belonged to the plaintiff. In 1837 the defendant married the plaintiff's daughter, and in 1838 Emily and her children went, in some way unexplained, into his possession. The plaintiff and defendant lived fourteen miles apart. In March, 1841, Emily, with her children, was brought by a servant of the plaintiff in a wagon from the defendant's to the plaintiff's. They remained at the plaintiff's about two months, and then returned to the defendant's. A witness for the defendant testified that, in the spring of 1841, when the wagon of the plaintiff was brought to the defendant's for Emily, the driver, a negro of the plaintiff, told the defendant that his master had sent for Emily to help a little while about his crop, as he was backward. This statement of the negro was objected to, but his Honor held that it was admissible, as a part of the res gestæ, explanatory of the defendant's act in sending Emily when she was sent for.

A good deal of other testimony was introduced on both sides, which left it very doubtful whether the negroes went into the defendant's possession as a gift, or as a loan. The case was submitted to the jury, who found for the defendant.

The plaintiff appealed, on the ground, inter alia, that the declarations of the negro who went for Emily were incompetent as evidence of the message actually sent by the plaintiff.

Curia, per WARDLAW, J. Evidence of the message delivered by the negro driver was received, not to shew that such message was sent, but to explain the defendant's act in sending the woman, and rebut the presumption unfavorable to his rights that might have arisen from that act unexplained. Parris may have not put those words into the negro's mouth, but the negro used them; and were they not calculated to produce an effect upon Jenkins? It is just as if Jenkins, adopting the words of the negro, had said, when he sent the woman—"I send her to help a little while, because my father-in-law is backward;" and so these words are part of the res gestæ—an explanation by contemporaneous acts or declarations of the motives or objects of the principal act, which would otherwise be of ambiguous or contrary import. The

words of a negro are at least as significant as the cry of a brute animal, or any sound proceeding from inanimate substances; and if any sound whatever, cotemporaneous with an act, or nearly connected with it, might serve to give meaning to the act, it would be admissible, not only to shew that there was such sound, but, if important, as nearly as possible to describe it. We all daily begin and quit and change occupation, command and countermand, resolve and act, according to information received from negroes; it would be impossible for us to explain our conduct without reference to the fact that such information was given; and it would be often unjust, if an act should be proved against us, and we should not be permitted to shew, by the same or some other witness, what was said which would explain the act. The jury were distinctly told that the words of the negro were not to be taken as evidence of the truth of what he said, but only as a circumstance to be considered in weighing the effect to be given to the act immediately following them. If the jury have given to the evidence an influence it should not have had, that is but an ordinary misfortune necessarily incident to jury trials. We cannot know the process by which the jury have attained their conclusion, but must suppose that, being properly instructed, they have done their duty. Motion dismissed.

O'NEALL, EVANS, BUTLER and FROST, JJ., concurred.[17]

[17] See, also, People v. Wood, 126 N. Y. 249, 27 N. E. 362 (1891), to the effect that it was competent for the defendant to prove that his wife told him that an outrage had been perpetrated upon her, upon the theory of a shock producing mental derangement.

In Hurst v. State, 101 Miss. 402, 58 South. 206 (1912), it was held that a defendant, charged with carrying concealed weapons, might prove that it had been reported to him that a third person had threatened his life, though the party communicating the information had no personal knowledge that the threat had actually been made. See also dissenting opinion in same case.

Quite a distinct problem may arise as to whether one may reasonably act upon information which does not come to him at first hand. Lord Chancellor Hatherly in Lister v. Perryman, (L. R.) 4 Eng. & Ir. App. Cases 521 (1870): "I think he was justified in acting upon that information so given; for unless that was so there would arise this inconvenience, that you could not trust to the information you derived from your own attorney, when, for example, you employ him to go down into the country and inquire into a matter; and unless your own attorney had brought to you the witnesses whom he went down to see, in order to ascertain and examine into the state of the case, you could hardly justify yourself as having acted upon reasonable and probable cause. In this particular case the information was given by the coachman, who appears to have had charge of the gun to a certain extent, for it was kept in the part of the premises that he had to deal with; it was given after inquiry by him into the subject matter, and after a deliberate interview in order to justify him in judging how far Robinson was a trustworthy person. I think, after that, if we were to say that the master was not justified in acting upon such information because he might have gone farther, it would be very difficult to draw the line so that it would not apply to a case where a person was endeavoring to act simply upon such information as others, whether his attorney or a friend, could collect for him, probably better than he was able to collect it himself."

STATE v. WENTWORTH et al.

(Supreme Judicial Court of New Hampshire, 1858. 37 N. H. 196.)

Indictment for placing obstructions upon the track of a railroad. * * *

The State introduced evidence of the declarations of (the defendant) Wentworth, as to where he was and how he was employed on said evening, and then introduced evidence tending to show the falsity of said declarations; among which was the statement of Wentworth, that he went to Salmon Falls on that evening, in company with a man named William Hasty, who, as he, Wentworth, stated, lived at Salmon Falls, and that he did business with him there on that evening. The State then proved by William Drury, that he, Drury, went to Salmon Falls after Wentworth had so stated, and made inquiries in various places, and of many persons there, for a man of that name, and could obtain no information of such person. To this the defendants objected, but it was admitted.[18]

EASTMAN, J. * * * The next question raised was as to the admissibility of the testimony of the witness Drury.

There is no rule of evidence better established than that hearsay is not competent testimony. But it does not follow that, because the words in question are those of a third person, they are necessarily hearsay. On the contrary, it happens, in many cases, that the very fact in controversy is, whether such things were spoken, and not whether they are true. Thus, replies given to inquiries made at the residence of an absent witness, or at the dwelling-house of a bankrupt, denying that he was at home, are original evidence. So to establish the death of a party, inquiries at the place of his last residence or among his relatives, and the answers are competent. 2 Greenl. on Ev. § 278; Emerson v. White, 29 N. H. (9 Fost.) 482. In these and the like cases it is not necessary to call the persons to whom the inquiries were addressed, since their testimony could add nothing to the credibility of the fact of the denial. Wherever the fact that such communications were made is the point in controversy, the evidence is admissible. 1 Greenl. on Ev. §§ 100, 101.

Drury did not pretend to testify what the persons of whom he made inquiries said to him, but simply stated the fact of his ineffectual effort to obtain information. That was all that was attempted to be proved by him; and had the persons of whom he sought to obtain the information been called as witnesses, they could, upon this point—the point of his seeking information—only have testified that Drury made the inquiries and failed to obtain information, which is all he has testified to. They might have gone further, and testified that they never knew or heard of such a man as Hasty. The evidence in both in-

[18] Statement condensed and part of opinion omitted.

stances would be similar, and negative in its character, and entitled to more or less weight according to the means of observation and knowledge that the witnesses might have. In both instances it would be the evidence of a fact, the result of more or less of knowledge, but not the rehearsal of what others had said. And upon this view, which was the one taken by the court at the trial, we think the evidence was admissible. * * *

Judgment on the verdict.[19]

HAYES v. PITTS-KIMBALL CO.

(Supreme Judicial Court of Massachusetts, 1903. 183 Mass. 262, 67 N. E. 249.)

KNOWLTON, C. J.[20] This is an action to recover for an injury to the plaintiff's intestate, a boy five years of age, which caused his death a few hours afterwards. The declaration is in two counts—one, to recover the damages of the deceased from conscious suffering before his death; and the other, to recover, under St. 1898, p. 724, c. 565 (Rev. Laws, c. 171, § 2), for his death.

The first exception relates to the admission of evidence. The plaintiff was allowed to introduce the statements of the deceased in conversation at different times after the accident, for the purpose of showing that he was conscious. We have no doubt that this testimony was competent. His remarks were verbal acts which tended to show his condition. The evidence was limited by the judge strictly to this purpose, and it was not of a kind that bore upon other issues in the case. The principle on which its admission rests is well established. Hatch v. Fuller, 131 Mass. 574; Com. v. Jardine, 143 Mass. 567, 10 N. E. 250; Lane v. Moore, 151 Mass. 87, 23 N. E. 828, 21 Am. St. Rep. 430; Shailer v. Bumstead, 99 Mass. 112; Earle v. Earle, 11 Allen, 1. * * *

Exceptions overruled.

[19] See, also, Atty. Gen. v. Good, McCleland & Younge 286 (1825).

[20] Statement and part of opinion omitted.

SECTION 2.—RECOGNIZED EXCEPTIONS [21]

I. REPORTED TESTIMONY [22]

FRAUNCES v. SHOTBOLT.

(Court of King's Bench, 1631. 2 Rolle, 211.)

Fraunces brought an action of debt for tithes, upon which they were at issue, and the case was this:

The tithes were let to one Fraunces for life, with remainder for life to the plaintiff; upon a trial for tithes by the first lessee for life, divers witnesses were examined, who had since died.

And now upon this trial, Sir Lawrence Hyde prayed that those witnesses, who were examined on the trial of the first tenant for life, might be witnesses for him in remainder.

It was agreed by all the judges, except Dodridge, that the witnesses who had been examined by the tenant for life were not witnesses for him in remainder, because he should have been made a party to it, otherwise his interest should not be prejudiced, not being a party. And Chamberlain, J., said that Chancellor Egerton held this as a constant rule, Dodridge, J., agreeing, that the tenant for life and the remainderman have all one estate, and therefore it seemed that these witnesses who were examined for the first lessee for life, as it was the same title, might be witnesses for the remainderman.

MAYOR OF DONCASTER v. DAY.

(Court of Common Pleas, 1810. 3 Taunt. 262.)

This was an action of trespass, brought by the mayor and corporation of Doncaster, to try whether the public had a right to pass with goods from ships lying in their river, over a bank at a place called Docking-Hill, which the plaintiffs claimed to be their soil and freehold, in order

[21] For certain statutory exceptions to the hearsay rule in proceedings under Workmen's Compensation Acts, see Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507, Ann. Cas. 1918B, 540 (1916).

[22] Whether the admission of former testimony or of depositions is to be regarded as a true exception to the hearsay rule seems to depend on whether the normal requirement that testimony be given viva voce in open court is an essential part of the rule, a matter impossible to settle. At any rate, there is no controversy about the fact that in common-law courts the personal presence of the witness was required, but if that could not be had because of death or insanity, his former testimony might be received under certain conditions.

to cart the goods upon a highway lying beyond the bank, and parallel to the river: the same plaintiffs had commenced other actions for the like cause, against other defendants. They had proceeded to trial in this cause; and the verdict being adverse to the corporation, and repugnant to the weight of the evidence, upon an application for a new trial, the court had directed that this cause should abide the event of the verdict in another of the causes, which was in progress for trial.

Clayton, Serjt., on this day prayed, on behalf of the plaintiffs, that if any of the witnesses, many of whom were very aged, should die, or become unable to attend in the mean time, their evidences given upon the former occasion might be read at the next trial.

MANSFIELD, C. J. You do not want a rule of court for that purpose: what a witness, since dead, has sworn upon a trial between the same parties, may, without any order of the court, be given in evidence, either from the judge's notes, or from notes that have been taken by any other person, who will swear to their accuracy; or the former evidence may be proved by any person who will swear from his memory to its having been given.

HEATH, J., concurred in refusing the application.[28]

[28] Prentice, C. J., in Atwood v. Atwood, 86 Conn. 579, 86 Atl. 29, Ann. Cas. 1914B, 281 (1913): "The plaintiffs assign as error the admission upon the offer of the defendant of a deposition used upon the former trial of the defendant Mary J. Atwood, who, it appeared, was living and within the jurisdiction of the court, but mentally incompetent. There is no distinction between a deposition, and former testimony given in court, as to the principles to be applied. 2 Wigmore on Evidence, § 1408. In each case the controlling test is: Can the witness' knowledge be utilized by other means? If not, the use of the former testimony, other conditions in respect to it being met, is justified in the interest of justice by the necessity of the situation. It is the best evidence of which the case admits. The death or absence from the jurisdiction of the witness has frequently furnished the occasion for the introduction of his former testimony. Situations where the knowledge of the witness has become unavailable by reason of his mental incompetency have been less frequent; but the authorities are in general accord in taking the only logical and just position that they come under the same rule. 2 Wigmore on Evidence, §§ 1402, 1408; 1 Greenleaf on Evidence, § 163; Regina v. Marshall, Carr. & M. 147, 148 [1841]; Whitaker v. Marsh, 62 N. H. 477, 478 [1883]; Howard v. Patrick, 38 Mich. 795, 799 [1878]; Rothrock v. Gallaher, 91 Pa. 108, 112 [1879]. 'There is no real or practical difference between the death of the mind and the death of the body.' Marler v. State, 67 Ala. 55, 65 [42 Am. Rep. 95 (1880)]."

The statement of Justice Prentice that there is no difference in principle between a deposition and testimony on a former trial must be understood with this qualification: That modern statutes frequently authorize the reading of a deposition under conditions which would not have admitted former testimony at common law.

The courts have refused to extend the analogy of death or insanity to the case of a witness who has simply forgotten the facts to which he formerly testified. Robinson v. Gilman, 43 N. H. 295 (1861); Drayton v. Wells, 1 Nott & McC. (S. C.) 409, 9 Am. Dec. 718 (1819).

There is some difference of opinion as to other situations rendering the witness unavailable, such as the sickness or absence of the witness from the jurisdiction, or the inability of the party to find the witness.

Marston, J., in Howard v. Patrick, 38 Mich. 795 (1878):

"A large number of questions have been raised in this case. We do not,

JUNEAU BANK v. McSPEDON.

(Supreme Court of Wisconsin, 1862. 15 Wis. 629.)

By the Court, PAINE, J.[24] We think the defendant should have been allowed to use the deposition of Mrs. Bartlett on the trial. There is nothing on the face of the papers showing that it was taken on the part of the plaintiff. But even if there was, our conclusion would be the same. It is true the plaintiff had not offered to use it; and there are cases which have held that a party could not use a deposition taken on the part of the other, unless it was first used by the party taking it. But the opposite rule seems to us to be sustained by the weight of authority and argument. The only objection urged against it is, that if either party is allowed first to use a deposition taken by the other, the party taking it is deprived of the right of cross-examination. But the general presumption is, that the testimony of a witness will be in favor of the party calling him, and therefore the right of cross-examination ordinarily belongs to the opposite party. But if a witness should unexpectedly state facts against the party calling him, it would undoubtedly be within the discretion of the court to allow him, by questions in the nature of a cross-examination, to call out whatever he might be able in explanation or avoidance of such facts, just as a party is allowed to put leading questions to his own witness, where the latter appears evidently hostile to the party calling him. At all events, it would seem much more convenient that this practice should prevail in respect to depositions, than that a party who has called out from a witness, in a deposition taken by the other, all the facts material for him to prove, should be obliged to retake the deposition on his own behalf, or be prohibited from using the evidence in case his adversary was able to dispense with it. And this rule being established, the objection for want of cross-examination would fail. For either party would then be allowed to examine the witness fully, both to prove

however, consider it necessary to refer to all, but only such of them as are likely to become important upon a new trial of the case.

"I. The evidence of James Evans should have been admitted. The authorities are all agreed that where a witness has been sworn upon a former trial between the same parties and upon the same issue, and since the trial, has deceased, his testimony as given upon the former trial is admissible. And while there is a conflict as to whether this rule may be extended to cases where the witness is sick or insane, or beyond the jurisdiction of the court, yet we are of opinion that upon principle the evidence should be admitted, and that there is no good ground for any such distinction. In a case like the present the witness is, to all intents and purposes, so far as these parties are concerned, legally dead. They can no more avail themselves of his personal presence in court than though he were in fact dead. The reason of the rule admitting his testimony in the one case is equally strong in the other, and we can see no good reason for recognizing any such distinction."

In this case the witness was absent, but the report does not state whether it was due to sickness or absence from the jurisdiction.

[24] Statement omitted.

facts in his own favor, and in explanation of facts stated in favor of the opposite party. And the statute evidently contemplates this. It provides that the party producing the deponent may first "examine him on all points which he shall deem material, and then the adverse party may examine the deponent in like manner, after which either party may propose such further interrogatories as the case may require." Chapter 137, § 15, R. S. This was clearly designed to enable the whole testimony of a witness to be secured for the benefit of both parties in one deposition, and must be construed as giving both the corresponding rights of examination and cross-examination at the taking. Though perhaps it ought not to be held to allow the party producing the witness to cross-examine with a direct view of impeaching his credibility. There are obvious considerations against this which would not apply to cross-examination for any other purpose.

The whole deposition should therefore have been admitted. For it is impracticable and inconvenient to divide a deposition, so as to admit that which was given only in answer to one party. The answers on cross-examination are frequently intelligible only in connection with the examination in chief. And it seems useless to require either party to have repeated in answer to his own questions, what the witness has clearly stated in answer to the other, as a condition precedent to his right to use it.

As this makes the reversal of the judgment necessary, we shall not express any opinion upon the other questions argued, as a retrial may present the case in a different aspect.

The judgment is reversed, with costs, and a new trial ordered.[25]

PITTSBURGH, C. & ST. L. RY. CO. v. McGRATH.

(Supreme Court of Illinois, 1885. 115 Ill. 172, 3 N. E. 439.)

SHELDON, J.[26] This was an action against the railway company to recover damages for the killing of plaintiff's intestate through the alleged negligence of the defendant, wherein the plaintiff recovered; the judgment was affirmed by the appellate court for the First district, and defendant took this appeal. Error is assigned in the excluding of the deposition of a witness taken before the coroner's inquest upon the body of the deceased, the witness being dead. English cases are cited where such depositions have been held admissible in evidence. Starkie, in remarking upon this subject, observes: "It has been said that depositions taken by a coroner are evidence although the prisoner was not present, because the coroner is a public officer appointed to inquire of such matters, and therefore it is to be presumed that such depositions

[25] But see Dana v. Underwood, 19 Pick. (Mass.) 99 (1837).

[26] Part of opinion omitted.

were fairly and impartially taken; yet it seems the admissibility of these depositions stands altogether upon the statutes," etc. 2 Starkie, Ev. 490, marg.

As quoted from 2 Phil. Ev. 224, marg., Cow. & H. notes (5th Amer. Ed.): "The fourth section of the 7 Geo. IV, c. 64, enacts that every coroner, upon any inquisition before him taken, whereby any person shall be indicted for manslaughter or murder, * * * and shall certify and subscribe the same evidence, and all such recognizances, and also the inquisition before him taken, and deliver the same to the proper officer of the court in which the trial is to be, before or at the opening of the court. * * * It has been held in the construction of the statute of Philip and Mary, under which depositions before coroners used to be taken, (and the same decisions seem to apply equally to cases under the new statute above cited), that in case of any of the witnesses * * * are dead, * * * their depositions may be read on the trial of the prisoner."

The provision of our statute simply is, "which testimony (before coroner) shall be filed with said coroner in his office and carefully preserved." There being no implication, as in the English statute, that the deposition is for use in court, there is such difference between the statutes as to afford room for question whether the English decisions fully apply. The cases in which such depositions have been received are mostly criminal cases, but they have been received in a civil case. Sills v. Brown, 9 Car. & P. 601. The plaintiff was not a party to the proceeding before the coroner, was not present, had no opportunity for the cross-examination of the witness, and any question of negligence, the vital question in this case, was not the very matter of inquiry before the coroner. The legitimate object of the inquest would have been fulfilled in finding simply that the death of deceased was caused by his being run over by a railroad train, without inquiry whether it was through any one's, or whose, negligence. We are of opinion the deposition was rightly excluded. In the case of Cook v. New York Cent. R. Co., 5 Lans. (N. Y.) 401, it was so ruled, and see State v. Turner, Wright (Ohio) 21, and note to above citation from Phillips. * * *

Affirmed.[27]

[27] In Clement v. Blunt, 2 Rolle, 460 (1625), in a trial at bar of an appeal of felony, a deposition taken at the coroner's inquest was rejected; the case is badly reported and the reasons are not clear; one or more of the judges put it on the ground that this action was between private parties, but suggested that it might be allowed in the case of the king.

Samson v. Yardley, 2 Keble, 223 (1668): "In an appeal of murther, * * * Wild, the King's Sergeant pro defendant offered evidence of what a witness, sworn on the trial in the indictment, then said, being now dead; also what the now appellant then confest, which Keeling and Moreton denied, because at common law the appeal preceded the indictment; therefore since the statute that ordains the indictment first, the appeal remains as res integra, wherein on neither side the former proceedings cannot avail either party; but Twisden and Windham conceived it should be admitted, but all admitted proof of what the appellant had said at any time before generally, but not what she swore at the trial; (but what the witnesses dead had said general-

METROPOLITAN ST. RY. CO. v. GUMBY.

(Circuit Court of Appeals of the United States, Second Circuit, 1900. 99 Fed. 192, 39 C. C. A. 455.)

This is a writ of error to review a judgment of the circuit court, Southern district of New York, in favor of Anne Gumby, defendant in error, who was plaintiff below. The judgment was based upon a verdict against defendant below awarding damages for loss of services of plaintiff's son George Gumby, a child 5 years of age at the time of the accident, who was injured by one of defendant's cars May 22, 1897. The facts sufficiently appear in the opinion.

LACOMBE, Circuit Judge.[28] All assignments of error, save one, were abandoned by plaintiff in error upon the argument, and that one only need be discussed. One of the eyewitnesses of the accident was Macon Lyons. He was dead at the time of the trial of the cause at bar, but had testified with great fullness to what he saw of the accident, upon the trial of an action brought by Elizabeth Clayton, grandmother of George Gumby, as guardian ad litem, against the same defendant, to recover for pain and suffering, and for any permanent loss of ability to work, caused by the accident. After introducing some testimony which is not especially persuasive, plaintiff's counsel offered to read the testimony of Lyons taken in the son's action. It would appear from the record that the attention of the trial judge was not at the time called to the circumstance that the guardian ad litem who prosecuted the former action was not the infant's mother (the present plaintiff), but his grandmother. Defendant objected that he knew of no rule of law that made it competent testimony. The objection was overruled, and the testimony read, defendant reserving an exception. The objection is not formulated in specific terms, to the effect that what was offered was hearsay, and not within any of the exceptions which are recognized to the rule that hearsay is incompetent. Nevertheless, since the objection urged here is of such sort that nothing could have been done by the party offering the evidence to overcome such objection, we may with entire propriety dispose of the question raised here.

The statutes of New York (section 830, Code Civ. Proc.) provide that: "Where a party or a witness has died or become insane since the trial of an action * * * the testimony of the deceased or insane person * * * taken or read in evidence at the former trial * * * may be given or read in evidence at a new trial * * *

ly, being but hearsay of a stranger, and not of party interest they would not admit, which might be true or false)."

In Rex v. Thatcher, T. Jones, 53 (1677), the deposition of a witness taken by the coroner was read on the trial of an indictment for murder, the court laying great stress on the authority of the coroner. And so in Bromwich's Case, ante, p. 428.

[28] Part of opinion omitted.

subject to any other legal objections to the competency of the witness, or to any legal objection to testimony or any question put to him."

It is manifest that this does not touch the point at issue. It provides only for new trials of the same action in which the deceased witness testified. We find no other section of the Code authorizing the admission of such testimony, and the question raised here will have to be disposed of under the principles of the common law.

The entire reliance of the plaintiff seems to be upon a paragraph in the sixteenth edition of Greenleaf on Evidence, enlarged and annotated by Prof. Wigmore, published in 1899. The paragraph (which is the annotator's) is section 163a, and reads as follows:

"As to the parties, all that is essential is that the present opponent should have had a fair opportunity of cross-examination. Consequently a change of parties which does not effect such a loss does not prevent the use of the testimony,—as, for example, a change by which one of the opponents is omitted, or by which a merely nominal party is added. And the principle also admits the testimony where the parties, though not the same, are so privy in interest—as where one was an executor, or perhaps a grantor—that the same motive and need for cross-examination existed."

A very large number of cases are cited by the annotator, all of which have been examined by the court. If the propositions above quoted are read with the qualifications which are indicated by the illustrative examples given in the paragraph, they are sound, and abundantly supported by authority. If they are to be read, however, as plaintiff reads them, namely, as asserting that evidence of a deceased witness may be read in any subsequent suit when it appears that the same issue is involved, that the witness testified under the sanction of an oath, that he was confronted with the person against whom the testimony is offered, and that the latter had the opportunity of cross-examination, then it is not supported by the authorities to which our attention has been called, or which we have been able to discover. Stated thus baldly, the proposition imports that when, for example, the derailment of a train because of a misplaced switch has caused injury to a score of passengers, and a witness has testified to the circumstances of the accident in an action brought by A. to recover for his injuries, and has since died, the evidence of such witness may be read by any other injured passenger upon the subsequent trial of his action for damages. No case has been found which lends the slightest support to any such proposition. In all of them it is postulated that the parties must be substantially the same, or, if they are not, that the newcomer must be a privy with the former party in blood, in estate, or in law. * * *

Morgan v. Nicholl, L. R. 2 C. P. 117, was an action of ejectment. Morgan offered the testimony of a deceased witness on the trial of

a former action in ejectment against Nicholl's father brought by Morgan's son, claiming as his heir at law, under the supposition that he was dead, to recover the same premises. It was held that there was no privity of estate between Morgan and his son, and that the evidence, not being admissible against Morgan, was not admissible for him. * * *

This case is on all fours with the one at bar. Anne Gumby could have successfully objected to the reading in evidence against her of the testimony of the witness who testified in the suit of Clayton, guardian ad litem of George Gumby against defendant, and therefore she cannot read the same testimony in evidence against defendant.

The judgment of the circuit court is reversed, and a new trial ordered.[29]

SHAW et al. v. NEW YORK ELEVATED R. CO. et al.

(Court of Appeals of New York, 1907. 187 N. Y. 186, 79 N. E. 984.)

HISCOCK, J.[30] * * * This action was commenced and once tried before the Interborough Rapid Transit Company had become a lessee, and therefore an appropriate party. Upon the second trial such company was by stipulation brought in as a defendant, and appeared by the same attorney who had already appeared in the action for the other defendants. One of plaintiffs' witnesses upon the first trial (Flock) died pending the second trial, and when plaintiffs' counsel attempted to read his evidence the same was objected to by the Interborough Company as inadmissible under the Code; the objection, however, being overruled. Section 830 of the Code, as amended by chapter 595 of the Laws of 1893 (Laws 1893, p. 1375), provided that "the testimony of any witness who has died or become insane after a former trial or hearing of * * * an action, may be read upon a subsequent trial or hearing, by any party to such action or proceeding, subject to legal objections." There is no doubt that the term "party," in this connection, included a privy such as would be a lessee in respect to his lessor. Jackson v. Crissey, 3 Wend. 251, 252; O'Donnell v. McIntyre, 118 N. Y. 156, 162, 23 N. E. 455; Bennett v. Couchman, 48 Barb. 73, 81. By chapter 352, p. 762, Laws 1899, said section 830 was again amended so as to provide that the testimony upon a former

[29] In the omitted part of the opinion a large number of the cases are collected and reviewed.

See, also, Hooper v. Southern Ry. Co., 112 Ga. 96, 37 S. E. 165 (1900), excluding testimony given in another action, where the plaintiff in the last action had appeared as the next friend of the plaintiff in the first action.

In Wisconsin the rule appears to have been extended by statute to include any case where there was fair cross-examination. Illinois Steel Co. v. Muza, 164 Wis. 247, 159 N. W. 908 (1916).

[30] Part of opinion of Hiscock, J., and dissenting opinion of Gray, J., are omitted.

trial of such a deceased witness might be read upon a subsequent trial of the same action "between the same parties who were parties to such former trial or hearing, or their legal representatives."

It is urged that the employment of the words "legal representatives" has modified the application of this provision as it formerly existed, and that such words do not include a privy such as a lessee. It is unnecessary to spend time in considering how well founded may be appellants' contention in this regard, for a complete answer to the exception here urged is found elsewhere than in the construction of this section. Independent of statute the common law permitted the evidence of a deceased witness to be read as between the original parties or their privies. Jackson v. Bailey, 2 Johns. 17, 19; Bradley v. Mirick, 91 N. Y. 293, 295. And there is no such conflict between the Code and this rule as works the abrogation of the latter in the absence of express repeal. Am. & Eng. Ency. of Law, vol. 26, p. 662, and cases there cited. Therefore the evidence was competent under the common law, even if not so under the statute. * * *

Affirmed.[81]

REX v. SMITH.

(Court for Crown Cases Reserved, 1817. Russ. & R. 339.)

The prisoner was tried and convicted before Lord Chief Baron Richards, at the summer assizes for the town of Newcastle-upon-Tyne, in the year 1817, of the murder of Charles Stewart on the night of 3d of September, 1816.

The only question which the learned Chief Baron thought it necessary to submit for the consideration of the judges was, whether the deposition after mentioned ought to have been admitted in evidence. If it was properly admitted, it was conclusive as to the guilt of the prisoner.

The prisoner it appeared had been brought before two magistrates on the 4th of September, 1816, upon a charge of an assault upon the deceased, and also upon a charge of robbing a manufactory, which the deceased had been employed to guard.

The clerk of the magistrates produced the deposition of the deceased taken before the magistrates at the time the above mentioned complaints were preferred, and then reduced into writing by the witness who produced it. It appeared the oath was administered to the deceased before any part of his evidence was reduced into writing.

The prisoner was not present when the examination commenced, but was brought into the room before it was finished, and before the three last lines of the deposition were taken down. The prisoner was inform-

[81] And so in Stephens v. Hoffman, 263 Ill. 197, 104 N. E. 1090 (1914); Yale v. Comstock, 112 Mass. 267 (1873); Adams v. Raigner, 69 Mo. 363 (1879).

ed, that the magistrates were taking the examination of the deceased, and he was desired to attend. The oath was again administered to the deceased in the prisoner's presence, and the whole of what had been written down from the mouth of the deceased was, in the presence and hearing of the deceased, read over to the prisoner very distinctly and slowly. After this was done the deceased was asked in the presence and hearing of the prisoner, whether what had been written was true, and what he meant to say; and the deceased answered that it was perfectly correct. The magistrates then proceeded to examine the deceased further, in the presence and hearing of the prisoner, when the deceased stated what was contained in the three last lines of the deposition. During the whole of the examination the deceased appeared perfectly collected.

After this, the prisoner was asked whether he chose to put any questions to the deceased; he did not ask any question, but only said "God forgive you, Charles." The deceased then signed the deposition in the presence of the magistrates and the prisoner, and after he had signed, the magistrates signed it in the presence of the deceased and the prisoner.

Alderson, on behalf of the prisoner, objected to the admissibility of this deposition in evidence:

First, because the prisoner did not hear the questions put, or the answers given, except as to the last three lines; and therefore he contended, the case was not brought within the statutes 1 & 2 P. & M. c. 13, and 2 & 3 P. & M. c. 10, which made depositions evidence in any case.

Secondly, because under these statutes, the examination is confined to the offence with which the defendant is charged at the time. Here the defendant was charged with an assault and robbery; the deposition, if properly taken, might have been applied to an indictment for the assault or robbery; but could not apply to murder, the offence here inquired into; for no murder had taken place when the deposition was taken.

The learned judge overruled these objections, and admitted the deposition to be read in evidence; and the jury found the prisoner guilty, but the learned judge reserved the case for the consideration of the judges.

In Michaelmas term, 1817, eleven of the judges met, and considered this case (Gibbs, C. J., being absent). Ten of the learned judges thought the conviction right; and that the deposition had been properly received in evidence. Abbott, J., thought the evidence ought not to have been received. Dallas, J., Graham, B., Richards, C. B., and Lord Ellenborough, stated that they should have doubted the admissibility of the evidence, but for the case of Rex v. Radbourne, 1 Leach, C. C. 457.

STATE v. McO'BLENIS.

(Supreme Court of Missouri, 1857. 24 Mo. 402, 69 Am. Dec. 435.)

On appeal from a conviction of murder.

LEONARD, J.,[32] delivered the opinion of the court.

The main question that has been discussed before us in this case is the competency of Nievergelder's deposition, which was regularly taken before the committing magistrate upon the preliminary examination in the presence of the accused, and read on the trial upon proof of the deponent's death. Before we dispose of it, however, we will remark that on a careful examination of the record and consideration of other points presented, we have not found any ground for reversing the judgment, in the impaneling of the jury, in the admission or exclusion of evidence, in the instructions under which the cause was tried, or in the verdict, either as to form or substance, and, dismissing with these remarks the minor points, we proceed at once to the question that was mainly relied upon in argument before us.

The proud answer of the Roman governor to the Jews, when they demanded of him the condemnation of Paul, was: "It is not the manner of the Romans to deliver any man to die before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him." * * * Our own bill of rights secures to the accused, among other things, the right "to be heard by himself and his counsel," "to demand the nature and cause of accusation," "to have compulsory process to compel the attendance of witnesses in his favor," "to meet the witnesses against him face to face," and "to a speedy trial by an impartial jury of the vicinage," and to an exemption from "being compelled to give evidence against himself," and the admission upon the present trial of Nievergelder's deposition is supposed to have violated the clause which secures to the accused "in all criminal prosecutions the right to meet witnesses against him face to face." The great security of the accused, however, after all, is in the fundamental principle of the common law, that legal evidence consists in facts testified to by some person who has personal knowledge of them; thus excluding all suspicions, public rumors, second-hand statements, and generally all mere hearsay testimony, whether oral or written, from the consideration of the jury—the usual test of this hearsay evidence being that it does not derive its value solely from the credit to be given to the witness who is before them, but partly from the veracity of some other individual.

This great principle, however, like all others, has its exceptions and limitations, which are as well settled as a rule itself, and among these exceptions, in its application to the administration of criminal justice,

[32] Statement and part of opinion omitted.

are dying declarations in reference to the same homicide, and the deposition of a witness regularly taken in a judicial proceeding against the accused in respect to the same transaction and in his presence, when the subsequent death of the witness has rendered his production in court impossible; and the question now to be passed upon comes to this; whether the provision in our Constitution is to be construed so as to abolish both or either of these exceptions, so that hereafter this species of evidence, which has heretofore, it is believed, always been received both in England and all over the United States, must be excluded. The Constitution, it is to be observed, has not undertaken to define, by any direct provision, what constitutes competent evidence in criminal cases, except in the single case of treason, but requires it to come from witnesses standing in the presence of the accused, and it may be in the tribunal where his guilt or innocence is to be finally passed upon. If the clause be understood literally, it provides for the production of the witness, but does not prescribe what he may communicate as evidence. It compels his presence in court, but leaves the evidence he may give to be regulated by law. The dying statement of the slain, and the deposition of the deceased witness, are both mere hearsay in the legal sense of the term. The truth of the facts they relate do not depend upon the veracity of the witness who heard the oral statement in one case, or of the officer who heard the testimony of the deponent and wrote it down and read it over to him in the other, but mainly upon the credit due to statements made under such circumstances. Even in the civil law mode of procedure the witnesses, it seems, are ultimately confronted with the accused, and, therefore, it may be said literally even there that they "meet the accused face to face."

But all such constructions would be quite too narrow, and altogether unworthy both of the instrument and of this tribunal. The people have incorporated into their frame of government a great living principle of the common law under which they and their ancestors had lived, and it is the duty of the court so to construe it as to make it effectual to answer the great purpose they had in view. And this principle, we think, is no other than the principle of the common law in reference to criminal evidence that it consists in facts within the personal knowledge of the witness, to be testified to in open court in the presence of the accused. This principle, however, was nowhere written down on parchment. It is not to be found in Magna Charta, or in the English bill of rights, but it existed in the living memory of men, and was always a part of the common law, although in bad times it was trodden under foot by bad men in high places. It is not, however, a stiff, unbending rule, extending to every case, without exception, falling within its letter, but is limited and controlled by subordinate rules, which render it safe and useful in the administration of public justice, and are as well established as the great principle itself, which,

with all its exceptions and limitations, was taken from the existing law of the land and incorporated into the Constitution. The purpose of the people was not, we think, to introduce any new principle into the law of criminal procedure, but to secure those that already existed as part of the law of the land from future change by elevating them into constitutional law. It may as well be the boast of an Englishman living under the common law, as of a citizen of this state living under our Constitution, that in a criminal prosecution he has a right to meet the witnesses against him face to face; and yet it was never supposed in England, at any time that this privilege was violated by the admission of a dying declaration, or of the deposition of a deceased witness, under proper circumstances; nor, indeed, by the reception of any other hearsay evidence established and recognized by law as an exception to the general rule. It is said by Lord Aukland, in reference to the conduct of the British courts in the sixteenth and part of the seventeenth centuries—"Depositions of witnesses forthcoming, if called, but not permitted to be confronted with the prisoner—written examinations of accomplices living and amenable—confessions of convicts lately hanged for the same offense—hearsay of these convicts repeated at second-hand from others—all formed so many classes of competent evidence, and were received as such in the most solemn trials by learned judges." Principles of Penal Law (2d Ed.) 197. But no complaint of the character of the one now made was ever heard. This was not an evil to be provided for by any law, much less by a constitutional provision; these exceptions to the general rule were never considered violations of the rule itself; they grew out of the necessity of the case, and are founded in practical wisdom. The facts thus communicated go to the jury, not as entitled to the full faith of the facts sworn to by a witness from his own personal knowledge, but yet as competent to be considered by the jury in forming their verdict. But whether these exceptions be wise or unwise, is not submitted to our judgment. They were well established at the time, and, we think, went into the Constitution as part of the great principle of criminal evidence adopted by the clause now under consideration.

We refer, in conclusion, in confirmation of our views upon the subject, to the decisions of the other states; but as they are cited in the briefs, we shall do so in a general manner, without calling attention to the particular cases. The privilege now under consideration exists in every state where the common law prevails, either as part of that law, or by a constitutional provision similar to our own, and yet evidence of this character, it appears, has never been excluded but in a single case, decided in early times in Tennessee, and which has since been expressly overruled. In some of the states it has been expressly recognized as competent by direct decisions to that effect, and in all of them the uniform current of judicial dicta, whenever the question has been a subject of discussion, is in favor of its competency. We are

constrained, therefore, both on the score of reason and authority, to pronounce in favor of the legality of the evidence. The judgment must, therefore, be affirmed; Judge SCOTT concurring.

Affirmed.[33]

REYNOLDS v. UNITED STATES.

(Supreme Court of the United States, 1878. 98 U. S. 145, 25 L. Ed. 244.)

On writ of error to review a conviction on a charge of bigamy under the United States statute.[34]

Mr. Chief Justice WAITE. * * * 4. As to the admission of evidence to prove what was sworn to by Amelia Jane Schofield on a former trial of the accused for the same offence but under a different indictment.

The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

[33] And so in Mattox v. United States, 156 U. S. 237, 15 Sup. Ct. 337, 39 L. Ed. 409 (1895).

Winslow, J., in Spencer v. State, 132 Wis. 509, 112 N. W. 462, 122 Am. St. Rep. 989, 13 Ann. Cas. 969 (1907): "* * * In the case of illness or insanity or other physical or mental disability there has been considerable contrariety of opinion. Our examination of the authorities brings us to the conclusion that the English rule in criminal cases was that mere temporary illness or disability of the witness, where there was prospect of recovery, was not sufficient to justify the reception of the former testimony, but that it must appear that the witness was in such a state, either mentally or physically, or both, that in all reasonable probability he would never be able to attend the trial. When this fact satisfactorily appeared it was considered that the situation was practically the same as if the witness were dead. 1 Rosco, Crim. Ev. (8th Am. Ed.) 104, 105; Rex. v. Hogg (1833) 6 Carr. & P. 176; Reg. v. Wilshaw (1841) Carr. & M. 145; Reg. v. Marshall (1841) Carr. § M. 147; Marler v. State, 67 Ala. 55 [42 Am. Rep. 95 (1880)]; McLain v. Com., 99 Pa. St. 86 [1882]."

That a temporary illness of the witness is not sufficient in a criminal case, see State v. Staples, 47 N. H. 113, 90 Am. Dec. 565 (1866); Com. v. McKenna, 158 Mass. 207, 33 N. E. 389 (1893). Contra: People v. Droste, 160 Mich. 66, 125 N. W. 87 (1910).

[34] Statement condensed, part of opinion of Waite, C. J., and concurring opinion of Field, J., omitted.

In Lord Morley's Case, 6 State Trials, 770,[35] as long ago as the year 1666, it was resolved in the House of Lords "that in case oath should be made that any witness, who had been examined by the coroner and was then absent, was detained by the means or procurement of the prisoner, and the opinion of the judges asked whether such examination might be read, we should answer, that if their lordships were satisfied by the evidence they had heard that the witness was detained by means or procurement of the prisoner, then the examination might be read; but whether he was detained by means or procurement of the prisoner was matter of fact, of which we were not the judges, but their lordships." This resolution was followed in Harrison's Case, 12 State Trials, 851, and seems to have been recognized as the law in England ever since. In Regina v. Scaife, 17 Ad. & El. (N. S.) 242, all the judges agreed that if the prisoner had resorted to a contrivance to keep a witness out of the way, the deposition of the witness, taken before a magistrate and in the presence of the prisoner, might be read. Other cases to the same effect are to be found, and in this country the ruling has been in the same way. Drayton v. Wells, 1 Nott & McC. (S. C.) 409, 9 Am. Dec. 718; Williams v. State, 19 Ga. 403. So that now, in the leading text-books, it is laid down that if a witness is kept away by the adverse party, his testimony, taken on a former trial between the same parties upon the same issues, may be given in evidence. 1 Greenl. Evid. § 163; 1 Taylor, Evid. § 446. Mr. Wharton (1 Whart. Evid. § 178) seemingly limits the rule somewhat, and confines it to cases where the witness has been corruptly kept away by the party against whom he is to be called, but in reality his statement is the same as that of the others; for in all it is implied that the witness must have been wrongfully kept away. The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and, consequently, if there has not been, in legal contemplation, a wrong committed, the way has not been

[35] The resolutions of the judges on these questions, as reported in Kelynge, 55, are as follows:

"4. It was resolved by us all, that in case any of the witnesses which were examined before the coroner, were dead or unable to travel, and oath made thereof, that then the examinations of such witnesses, so dead or unable to travel might be read, the coroner first making oath that such examinations are the same which he took upon oath, without any addition or alteration whatsoever.

"5. That in case oath should be made that any witness who had been examined by the coroner, and was then absent, was detained by the means or procurement of the prisoner, and the opinion of the judges asked whether such examination might be read, we should answer, that if their Lordships were satisfied by the evidence they had heard, that the witness was detained by means or procurement of the prisoner then the examination might be read, but whether he was detained by the means or procurement of the prisoner, was matter of fact, of which we were not judges, but their lordships.

"6. Agreed, that if a witness who was examined by the coroner be absent, and oath is made that they have used all their endeavours to find him and cannot find him, that is not sufficient to authorize the reading of such examination."

opened for the introduction of the testimony. We are content with this long-established usage, which, so far as we have been able to discover, has rarely been departed from. It is the outgrowth of a maxim based on the principles of common honesty, and, if properly administered, can harm no one.

Such being the rule, the question becomes practically one of fact, to be settled as a preliminary to the admission of secondary evidence. In this respect it is like the preliminary question of the proof of loss of a written instrument, before secondary evidence of the contents of the instrument can be admitted. In Lord Morley's Case, supra, it would seem to have been considered a question for the trial court alone, and not subject to review on error or appeal; but without deeming it necessary in this case to go so far as that, we have no hesitation in saying that the finding of the court below is, at least, to have the effect of a verdict of a jury upon a question of fact, and should not be disturbed unless the error is manifest. * * *

Judgment affirmed.[36]

WARREN et al. v. NICHOLS.

(Supreme Judicial Court of Massachusetts, 1843. 6 Metc. 261.)

The plaintiffs, for the purpose of showing the trespass alleged, and the circumstances under which it occurred, offered Oliver Luce as a a witness, by whom they proposed to prove the testimony given, on a former trial of this cause in the court of common pleas, by Jonathan W. Brown, since deceased. Upon inquiry whether the witness could state the testimony given by said Brown on said trial, the witness replied, that he could give the substance of it, but not the precise language of Brown; and the court ruled, that the witness was incompetent to testify upon this point, unless he could state the words used by the deceased witness, in giving his testimony, and not what he supposed to be the substance of his testimony. The witness said he could not give the words, or the precise language, used by Brown; and he was thereupon rejected.[37]

SHAW, C. J. The jury in this action, which is trespass quare clausum fregit, having returned a verdict, that the alleged trespass was casual and involuntary, and assessed the damages at $12, and it appearing that $12 had been tendered as damages, before the action was brought, the defendant moves for judgment. This is opposed by

[36] In civil cases, mere absence of the witness from the jurisdiction is generally regarded as sufficient to let in his former testimony, Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co., 51 Minn. 304, 53 N. W. 639 (1892); and the same rule has been applied in a number of criminal cases, Pruitt v. State, 92 Ala. 41, 9 South. 406 (1890). But see State v. Houser, 26 Mo. 431 (1858), contra. A number of the cases are collected in the note to State v. Heffernan, 25 L. R. A. (N. S.) 868 (1908).

[37] Statement condensed and part of opinion omitted.

the plaintiffs, who move for a new trial on the ground stated in the report. The principal one is, that the testimony of Oliver Luce, as to what a deceased witness, Brown, had formerly testified, in this cause, in the court of common pleas, and which was tendered by the plaintiffs, ought to have been received.

The rule upon which evidence may be given of what a deceased witness testified on a former trial between the same parties, in a case where the same question was in issue, seems now well established in this Commonwealth by authorities. It was fully considered in the case of Commonwealth v. Richards, 18 Pick. 434, 29 Am. Dec. 608. The principle on which this rule rests was accurately stated, the cases in support of it were referred to, and with the decision of which we see no cause to be dissatisfied. The general rule is, that one person cannot be heard to testify as to what another person had declared, in relation to a fact within his knowledge, and bearing upon the issue. It is the familiar rule which excludes hearsay. The reasons are obvious, and they are two. First, because the averment of fact does not come to the jury sanctioned by the oath of the party on whose knowledge it is supposed to rest; and secondly, because the party, upon whose interests it is brought to bear, has no opportunity to cross-examine him on whose supposed knowledge and veracity the truth of the fact depends.

Now, the rule, which admits evidence of what another said on a former trial, must effectually exclude both of these reasons. It must have been testimony, that is, the affirmation of some matter of fact, under oath, it must have been in a suit between the same parties in interest, so as to make it sure that the party, against whom it is now offered, had an opportunity to cross-examine; and it must have been upon the same subject-matter, to show that his attention was drawn to points now deemed important. It must be the same testimony which the former witness gave, because it comes to the jury under the sanction of his oath, and the jury are to weigh the testimony, and judge of it, as he gave it. The witness, therefore, must be able to state the language in which the testimony was given, substantially and in all material particulars, because that is the vehicle, by which the testimony of the witness is transmitted, of which the jury are to judge. If it were otherwise, the statement of the witness, which is offered, would not be of the testimony of the former witness; that is, of the ideas conveyed by the former witness in the language in which he embodied them; but it would be a statement of the present witness's understanding and comprehension of those ideas, expressed in language of his own. Those ideas may have been misunderstood, modified, perverted or colored, by passing through the mind of the witness, by his knowledge or ignorance of the subject, or the language in which the testimony was given, or by his own prejudices, predilections or habits of thought and reasoning. To illustrate this distinction, as we

understand it to be fixed by the cases: If a witness, remarkable for his knowledge of law and his intelligence on all other subjects, of great quickness of apprehension and power of discrimination, should declare that he could give the substance and effect of a former witness's testimony, but could not recollect his language, we suppose he would be excluded by the rule. But if one of those remarkable men should happen to have been present, of great stolidity of mind, upon most subjects, but of extraordinary tenacity of memory for language, and who could say that he recollected and could repeat all the words uttered by the witness; although it should be very manifest that he himself did not understand them, yet his testimony would be admissible.

The witness called to prove former testimony must be able to satisfy one other condition, namely, that he is able to state all that the witness testified on the former trial, as well upon the direct as the cross examination. The reason is obvious. One part of his statement may be qualified, softened or colored by another. And it would be of no avail to the party against whom the witness is called to state the testimony of the former witness, that he has had the right and opportunity to cross-examine that former witness, with a view of diminishing the weight or impairing the force of that testimony against him, if the whole and entire result of that cross-examination does not accompany the testimony. It may perhaps be said, that, with these restrictions, the rule is of little value. It is no doubt true, that in most cases of complicated and extended testimony, the loss of evidence by the decease of a witness cannot be avoided. But the same result follows, in most cases, from the decease of a witness, whose testimony has not been preserved in some of the modes provided by law. But there are some cases, in which the rule can be usefully applied, as in case of testimony embraced in a few words—such as proof of demand or notice or notes or bills—cases in which large amounts are often involved. If it can be used in a few cases, consistently with the true and sound principles of the law of evidence, there is no reason for rejecting it altogether. At the same time, care should be taken so to apply and restrain it, that it may not, under a plea of necessity, and in order to avoid hard cases, be so used as to violate those principles. It is to be recollected that it is an exception to a general rule of evidence supposed to be extremely important and necessary; and unless a case is brought fully within the reasons of such exception, the general rule must prevail.

I am aware that Mr. Greenleaf, in his learned and very excellent treatise on Evidence, § 165, has intimated a doubt whether it is wise to hold the rule in question with this strictness; and the cases from the Pennsylvania Reports justify the suggestion, and warrant a more liberal construction of the rule, so far as it is practised on in that State. But Mr. Greenleaf does not cite the case of Commonwealth v.

Richards, 18 Pick. 434, 29 Am. Dec. 608, and probably he had not adverted to it, when his treatise was written. That is a recent case, and one which we are bound to regard as of high authority in this Commonwealth.

The rule in regard to proving what a witness formerly testified, on a prosecution for perjury, does not seem to be strictly analogous. There, if it is proved by a witness, that the party now on trial formerly testified positively to a fact, and did not afterwards, in the course of his testimony, retract or modify that statement; on proof that the matter, thus testified as a fact, was not true, and the witness knew it, the perjury assigned may be considered well proved, although the accused testified to many other things, on the same trial, which the witness now called does not recollect, and which perhaps would be irrelevant, if he could. But the cases, we think, stand on different grounds. Rex v. Rowley, 1 Mood. Cr. Cas. 111.

All that the witness could state, in the present case, was, that he could give the substance of the witness's testimony, but not his precise language. We lay no stress upon the epithet "precise." It might properly lead to a further preliminary examination of the extent of his knowledge, and probably did so. As he could only give the substance and effect of the testimony, but not the language in which it was given, we think the judge did right in excluding him. * * *

Judgment for defendants.[38]

STATE v. ABLE.

(Supreme Court of Missouri, 1877. 65 Mo. 357.)

NORTON, J.[39] * * * It having thus been definitely settled, that the evidence of a witness given on a former trial, under the above circumstances, may be used on a subsequent trial, when the witness has died in the mean time, the question arises how may it be proved? In the case of United States v. Macomb, 5 McLean, 286, Fed. Cas. No. 15,702, Judge Drummond held that when a witness, since deceased, had testified at the preliminary examination in relation to the offense in

[38] Where a statute authorized the admission of certain hearsay statements by persons since deceased, the same court has ruled that it is not necessary for the witness to be able to repeat the exact words, but that it is sufficient to give the substance of what was said, observing that: "In no case has it been held that the testimony is to be received only when the witness can give the exact words of the deceased person whose declaration is material. Such a construction of the statute would often exclude important evidence which the Legislature intended to make admissible. Indeed, it seldom happens after the lapse of any considerable time that a witness can give the exact words of another, unless they were very few. The ruling was in accordance with the usual practice when a conversation is put in evidence, and we are of opinion that it was right." Hayes v. Pitts-Kimball Co., 183 Mass. 262, 67 N. E. 249 (1903).

[39] Part of opinion omitted.

the presence of the accused, witnesses would be permitted to prove what the deceased witness had testified to at such examination, and that so far as it related to such proof, the rules of evidence were the same in criminal as in civil cases. The conclusion was reached in that case after an examination of the authorities, that the evidence of a deceased witness might be proved in a criminal case in the same manner that it could be in a civil case, and that in making such proof it was not necessary to use the precise and exact words of the witness, but only to give the substance. On this last branch of the proposition there is some conflict of authority. While the courts of New York, Massachusetts and Indiana hold that the precise words of the witness must be given, the courts of Pennsylvania, Maryland, Virginia, Ohio, Illinois, Alabama and Vermont hold that the substance of what the deceased witness testified to may be received. Cornell v. Green, 10 Serg. & R. (Pa.) 14; Chess v. Chess, 17 Serg. & R. (Pa.) 409; Gildersleeve v. Caraway, 10 Ala. 260, 44 Am. Dec. 485; Wagers v. Dickey, 17 Ohio, 439, 49 Am. Dec. 467; Marshall v. Adams, 11 Ill. 37; Caton v. Lenox, 5 Rand. (Va.) 36; State v. Hooker, 17 Vt. 659; Kendrick v. State, 10 Humph. (Tenn.) 479; Sloan v. Somers, 20 N. J. Law, 66; Ballenger v. Barnes, 14 N. C. 460; Young v. Dearborn, 22 N. H. 372. In the case of Cornell v. Green, supra, Justice Gibson, in speaking of effects of a rule requiring the evidence of the deceased witness to be given in the exact words of the witness, observed: "The rule applied with that degree of strictness would be altogether useless in practice, for there is no man, be his powers of recollection what they may, who could be qualified to give such evidence; and if he should undertake to swear positively to the very words, the jury ought to disbelieve him on that account alone."

In applying the rule that the substance of what the deceased witness testified to may be given in evidence the distinction between narrating the statement made by the witness and giving the effect of his testimony should be observed. This distinction may be illustrated thus: If a witness state that A., as a witness on a former trial, proved the execution of a written instrument by B., that would be giving the effect of his testimony, which is nothing else than the result or conclusion. But if the witness states that A. testified that he had often seen B. write, that he was acquainted with his hand writing, and that the name subscribed to the instrument of writing exhibited was B.'s signature, that would be giving the substance of A.'s testimony, though it might not be in the exact words. The authorities above cited, we think, establish the following propositions: That in a criminal case the evidence of a deceased witness, who was testified on a former trial may be proved and received on a subsequent trial of the same case between the same parties, the death of the witness first being shown; that the witness called to prove what was testified to by the deceased witness, is not required to use the exact words of the witness, but may give the substance of all that he testified to; that in

proving what was sworn to by the deceased witness, the same rules apply both in civil and criminal cases. It has been held by this court in the case of Jaccard et al. v. Anderson, 37 Mo. 95, that the testimony of a witness since deceased, preserved in a bill of exceptions, filed on the former trial of the cause, could be received in evidence, when proved to be the substance of the testimony which the deceased witness gave on the former trial. In disposing of this question, it is remarked: "that it is to be presumed that the bill of exceptions contained all the testimony of the witness in chief and on cross-examination, which the parties and their counsel deemed material to the issue, or necessary to be saved in a bill of exceptions. On the face of the testimony offered, it appears to have been all that was given or deemed important on the former trial. One of defendant's counsel testified that he assisted in preparing the former bill of exceptions, and that he thought it contained in substance the testimony of King at the trial, though 'not all he may have said.' We think it sufficiently appears that the substance of the whole testimony was contained in the bill of exceptions that was offered in evidence."

Applying the principle of the decision to the case before us, it will manifestly appear that the court, in admitting the evidence of the deceased witness, Holliday, as preserved in the bill of exceptions, committed no error. Haughawout, one of the defendant's counsel, swears that he kept minutes of the testimony of the former trial, and prepared the bill of exceptions from his own minutes; and, Robinson, another attorney of defendant, that it was agreed on in the presence of the judge and attorneys for the State and defendant, but that he could not state that it contained all of the testimony of the witness. The evidence of this witness alone, under the views expressed in Jaccard v. Anderson, supra, might have authorized the court to receive the evidence. The testimony of Haughawout is more than supplemented by that of Judge Cravens before whom the first trial was had, and who signed the bill of exceptions. He stated as certified to by the special judge, that he remembered the substance of the evidence of Holliday, the deceased witness, and that he thought the bill of exceptions contained the substance of the testimony. It is urged that the court committed error in allowing the witness, Cravens, to look at the bill of exceptions to refresh himself as to the name of the witness. This we think was permissible and we can see no error in it authorizing a disturbance of the judgment. The evidence being thus identified, was read from the bill of exceptions, and it appears on the face of it, that the witness, Holliday, was examined in chief, cross-examined, re-examined and re-cross-examined. Looking through the whole case, from beginning to the end of the trial, we have discovered no error authorizing an interference with the judgment. The defendant has been twice put upon his trial, and has been twice found guilty of the crime of murder in the first degree. The evidence seems to warrant the finding of the jury. All the circumstances proven in the case

(which we deem unnecessary to advert to here) point to defendant as the guilty party.

Judgment affirmed, the other judges concurring.

Affirmed.[40]

II. DYING DECLARATIONS

THE KING v. JOHN.

(Court of King's Bench, 1790. 1 East, P. C. 357.)

On the prosecution of Thomas John for the murder of Rachael his wife, it was proved by the confession of the prisoner himself in conversation with others before his wife's death, that in September, 1789, upon a quarrel between them, he had laid hold of his wife, and they had fallen down, he uppermost, and he had given her several violent kicks and blows, so that according to his own words, he knew she never would raise her hand against him again. It was also proved that she died in the same month; that she was taken ill on a Friday, took to her bed the next day, and died on the Sunday seven night following, being confined to her bed by her illness, which was severe, the whole time. But it did not appear that she had expressed any apprehension of danger, though she retained her senses till the day before her death. Three witnesses deposed to conversations during her illness, at which the husband was present, in which she attributed her situation to his ill treatment; and the conduct and answers of the husband were given in evidence, although it was objected on his behalf that what was said by the wife even in the presence of the husband, and to which he returned answers tending to charge himself, ought not to have been received. Evidence was also given of her declarations in the prisoner's absence, after she was confined to her bed, all of which tended to shew the circumstances of violence he had committed upon her. It was objected, that the declarations of the wife in the absence of the prisoner ought not to have been admitted in evidence, as it was not proved that she considered herself at the time as a dying person; the evidence not being express on that head; but that if the evidence were admissible, it ought to have been left to the jury to consider whether the wife were at the time conscious of approaching death. Objection was also made, that there being declarations of a wife against her husband were not on that account evidence. The court was of opinion, that the reason of the rule that a wife shall not be admitted to give evidence against her husband did not apply to this case. And upon the other point, that the evidence of the state of the wife's health at the time the declarations

[40] In Ruch v. Rock Island, 97 U. S. 693, 24 L. Ed. 1101 (1878), the same rule was applied to the proof of the contents of a deposition which had been destroyed in the Chicago fire.

were made was sufficient to shew that she was actually dying; and that it was to be inferred from it, that she was conscious of her situation; and no particular direction was given to the jury on the subject. The jury having found the prisoner guilty, these points were referred to the judges; who at a conference in Easter term, 1790, all agreed that it ought not to be left to the jury to say, whether the deceased thought she was dying or not; for that must be decided by the judge before he receives the evidence. And if a dying person either declare that he knows his danger, or it is reasonable to be inferred from the wound or state of illness that he was sensible of his danger, the declarations are good evidence. But as to the declarations themselves in this case, all the judges, except two, thought that there was no foundation for supposing that the deceased considered herself in any danger at all.[41]

DOE dem. SUTTON v. RIDGWAY.

(Court of King's Bench, 1820. 4 Barn. & Ald. 53.)

Ejectment to recover lands in the county of Somerset. Plea, general issue. At the trial, before Burrough, J., at the last Summer assizes for that county, the lessor of the plaintiff, who claimed, as heir at law of Anne Walker, the person last seised, in order to deduce the pedigree, offered in evidence the dying declarations of one Barrett, who had as she herself stated, been servant to Margaret Walker, through whom the pedigree [42] was traced. This person had, during her last illness, at the age of 103, after she had expressed her full conviction that she could not recover, and only a few days before her death, made these declarations. The learned judge rejected the evidence; and the defendant having obtained a verdict,

Scarlett moved for a new trial. These declarations ought to have been received in evidence. The principle on which such evidence is receivable is stated to be founded partly on the situation of the dying person, which is considered as powerful over his conscience as the obligation of an oath, and partly on the absence of interest at such a time, which dispenses with the necessity of a cross-examination, Phillipps on Evidence, 100, 1st edit.; and this equally applies to civil as to criminal cases. This will be found laid down in the case of the subscribing witness to a bond, whose dying declarations were allowed to be given in evidence, by Heath, J., cited by Lord Ellenborough in Avison v. Kinnaird, 6 East, 195, to prove it a forgery and in Wright dem. Clymer v. Littler, 3 Burr. 1244. And in Drummond's Case, 1 Leach, Cro. Cas.

[41] For the respective functions of the judge and jury in such cases, see Brister v. State, 26 Ala. 107 (1855), ante, p. 120; State v. Monich, 74 N. J. Law, 522, 64 Atl. 1016 (1906).

[42] See Johnson v. Lawson, post, p. 664.

378, it seems to have been admitted, that the dying declarations of a person, as to his having stolen a watch, would be admissible, although there the evidence was rejected, on the ground that the party making the declarations was an attainted convict. Here the party was in articulo mortis, and could have no motive for deceit. The declarations ought, therefore, to have been received. He also referred to Tinkler's Case, 1 East, Pl. Cr. 354.

ABBOTT, C. J. The cases cited, are I believe, the only exceptions to the general rule of not receiving evidence, unless upon oath, and with the opportunity for cross-examination. I am not aware of any other; and it seems to me, that the present case does not fall within these exceptions. The evidence, therefore, was properly rejected by the learned judge.

BAYLEY, J. In the case of Avison v. Kinnaird, the declarations were received upon a very different principle. There they were part of the res gestæ; and, in Tinkler's Case, the declarations received were those of the party who had taken the poison. The case of the subscribing witness seems to be founded on this; he must have been called as a witness, if he had been alive, and it would then have been competent to prove, by cross-examination, his declarations as to the forgery of the bond. Now the party ought not, by the death of the witness, to be deprived of obtaining the advantage of such evidence. This case, however, is very different.

HOLROYD and BEST, JJ., concurred.

A rule nisi was afterwards granted on other grounds.

COMMONWEALTH v. COOPER.

(Supreme Judicial Court of Massachusetts, 1862. 5 Allen, 495, 81 Am. Dec. 762.)

Indictment for manslaughter in killing Phebe Fuller by striking her upon the head with a certain instrument called a "fid."

At the trial in the superior court, before Brigham, J., it appeared that Phebe died on the 12th of December, 1860, in consequence of wounds and injuries inflicted upon her by some person at her home in Nantucket, on the evening of November 22, 1860. John H. Sherman, the physician who attended her, testified that on the morning of the 25th of November she told him that she should never be any better, or should never recover; that he told her he hoped she might, that she was better; and that she replied that she had received a mortal injury. Nathaniel Fitzgerald, called as a witness on the part of the Commonwealth, testified that a little after noon on the 25th of November he called to see Phebe; that she said she could not live, and had sent for him to make one request, and said: "I cannot live, let no one follow me to the grave; I am principled against it." The wit-

ness was then allowed to testify, under objection, that Phebe stated to him that Patience Cooper committed the deed; that she came in and said, "How do you do? I have come to pay my bill," and the deceased got up to snuff the wick of the lamp, when Patience struck her.

The defendant offered to prove by several witnesses with whom Phebe was well acquainted that she had met them and talked with them, mistaking them at the time for other persons whom they did not resemble, and that she was in the habit of thus mistaking persons; but the evidence was rejected.

The jury returned a verdict of guilty, and the defendant alleged exceptions.[48]

METCALF, J. The court are of opinion that the testimony of Fitzgerald, as to the statement made to him by the deceased concerning the assault upon her by the defendant, was rightly admitted in evidence as a dying declaration. The deceased had said to him that she could not live, and that she had sent for him to make a request respecting her funeral. We think this satisfactorily shows that her subsequent statement was made under a sense of impending death—a consciousness that she was near her end. 1 Greenl. Ev. § 158; Commonwealth v. Casey, 11 Cush. 421, 59 Am. Dec. 150. She lived seventeen days afterwards; but declarations made by a deceased person, when he believed that he should not recover, have been decided to be admissible although he lived eleven days after making them. Rex v. Mosley, 1 Mood. C. C. 97, and Regina v. Reaney, 7 Cox, C. C. 209. And our judgment concurs with that of the English court of criminal appeal, as expressed by Chief Baron Pollock, in the latter of those cases. "In order," he says, "to render such a declaration admissible, it is necessary that it should be made under the apprehension of death. The books certainly speak of near approaching death; but there is no case in which any particular interval, any number of hours or days, is specified as the limit. In truth, the question does not depend upon the length of interval between the death and declaration, but on the state of the man's mind at the time of making the declaration, and his belief that he is in a dying state." S. C. Dearsly & Bell, 151. See also Matthews on Crim. Law, 254; Powell on Ev. 125–127; 1 Phil. Ev. (4th Amer. Ed.) 293. Rosc. Crim. Ev. (5th Ed.) 34. * * *

But the court are of opinion that the testimony should not have been excluded which was offered to show that the deceased had met with persons well acquainted with her, and with whom she was well acquainted, and had mistaken them at the time for other persons whom they did not resemble; and that she was in the habit of thus mistaking persons. We think this was testimony proper for the consideration of the jury.

[48] Statement condensed and part of opinion omitted.

The great question in the case was, whether the defendant was the person who caused the deceased's death—a question of identity. And according to the declaration of the deceased, the assault was made upon her immediately after the person making it had entered her room, which was dimly lighted, and before that person had uttered a dozen words.

A defendant against whom dying declarations are received has not the opportunity of cross-examining the declarant. Hence it is justly held that he is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of a more full investigation by means of cross-examination. Ashton's case, 2 Lewin, C. C. 147. "It is to be considered," says Mr. Greenleaf, "that the particulars of the violence, to which the deceased has spoken, were in general likely to have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed; and leading both to mistakes as to the identity of persons, and to the omission of facts essentially important to the completeness and truth of the narrative." 1 Greenl. Ev. § 162.

New trial granted.[44]

THE QUEEN v. JENKINS.

(Court of Criminal Appeal, 1869. L. R. 1 Cr. Cas. 187.)

The defendant was found guilty of murder and sentenced accordingly, but execution was stayed in order that the opinion of the court might be taken on the admissibility of a dying declaration.[45]

KELLY, C. B. We are all of opinion that the conviction must be quashed. The question, and the only question, is, whether the declaration of the dying woman was admissible in evidence, because it is clear that if the declaration is to be excluded, there was no evidence to go to the jury. This question depends upon what passed between the clerk and the deceased just before and at the time when the statement was made. She was asked if she felt she was in a dangerous state, whether she felt she was likely to die? She said "I think so." She did not express an absolute belief, but an impression, that she was likely to die. There is nothing conclusive in this part of the statement. The clerk then went on to ask her why she thought that she was about to die. She replied, "From the shortness of my breath." The clerk says, "Her breath was extremely short—the answers were disjointed from its shortness. Some intervals elapsed between her answers." The clerk then said to her, "Is it with the fear of death before you

[44] But where the victim lives for a considerable time after making a dying declaration, it cannot be assumed that later statements were made under the same sense of impending death, as the first. Carver v. United States, 160 U. S. 553, 16 Sup. Ct. 388, 40 L. Ed. 532 (1896).

[45] Statement condensed.

that you make these statements?" And added, "Have you any present hope of your recovery?" She said, "None." Thereupon he wrote out what he conceived to be the substance of her statement. After detailing the facts of the case, the statement as he wrote it made her say, "I have felt great pain in my chest, bosom, and back. From the shortness of my breath, I feel that I am likely to die, and I have made the above statement with the fear of death before me, and with no hope of my recovery." If the deceased had subscribed this declaration, a very difficult question might have arisen. But it appears that after reading over these words to her, and asking her to correct any mistake he might have made, she suggested the words "at present." She said no hope "at present" of my recovery. The clerk then interlined the words "at present."

The question is, whether this declaration as it now stands was admissible in evidence. The result of the decision is, that there must be an unqualified belief in the nearness of death, a belief without hope that the declarant is about to die. If we look at reported cases, and at the language of learned judges, we find that one has used the expression "every hope of this world gone" Per Eyre, C. B., Woodcock's Case, 1 Leach, C. C. at page 502; another "settled hopeless expectation of death" Per Willes, J., Reg. v. Peel, 2 F. & F. at page 22; another "any hope of recovery, however slight, renders the evidence of such declarations inadmissible." Per Tindal, C. J., Rex v. Hayward, 6 C. & P. at page 160. We, as judges, must be perfectly satisfied beyond any reasonable doubt that there was no hope of avoiding death; and it is not unimportant to observe that the burthen of proving the facts that render the declaration admissible is upon the prosecution.

If the present case had rested upon the expression, "I have made the above statement with the fear of death before me, and with no hope of my recovery," a difficult question might have been raised. But when these words were read over to the declarant, she desired to put in the important words "at present;" and the statement so amended is "with no hope at present of my recovery." We are now called upon to say what is the effect of these words, taking into consideration all the circumstances under which they were put in. The counsel for the prosecution has argued that the words "at present" do not alter the sense of the statement. We think, however, that they must have been intended to convey some meaning, and we must endeavor to give effect to that meaning.

It is possible that when the statement was first read over to the deceased, she may have remembered that what she had been asked was, whether she had "any present hope of recovery," and observing that the word "present" was omitted, that she merely wished to correct the discrepancy between the words as spoken and those written down, without wishing to make any alteration in the meaning of those words. On the other hand, she may have meant to alter and qualify the statement as first written. She may have wished to express, "All I meant to say

was, 'I have not hope at present;' " but not to say that she had absolutely no hope. The case is capable of either of these two constructions, one of which is against and the other in favour of the prisoner; and if we had simply to choose between the two, without anything to guide us as to the real meaning of the deceased, we should resolve the doubt in favour of the prisoner in favorem vitæ.

But another mode of solution is presented which calls on us to decide for the prisoner on another ground. The deceased was asked in express terms by the clerk "to correct any mistake that he might have made." She then said, "Put in the words 'at present.' " Even if this were not a criminal case, this would be sufficient to show that the omission of "at present" was a mistake—that she meant "no present hope" as distinguished from "no hope." She therefore intended the words to have some substantial meaning; and if they have any meaning at all, they must qualify the absolute meaning which the declaration must contain in order to render it admissible evidence. The conviction must therefore be quashed.

BYLES, J. As I tried the case, I wish to state that I entertain no doubt that the declaration was not admissible. There being no other evidence against the prisoner, I thought it best to admit the declaration, and reserve the point whether it was admissible evidence.

Dying declarations ought to be admitted with scrupulous, and I had almost said with superstitious, care. They have not necessarily the sanction of an oath; they are made in the absence of the prisoner; the person making them is not subjected to cross-examination, and is in no peril of prosecution for perjury. There is also great danger of omissions, and of unintentional misrepresentations, both by the declarant and the witness, as this case shews. In order to make a dying declaration admissible, there must be an expectation of impending and almost immediate death, from the causes then operating. The authorities shew that there must be no hope whatever.

In this case the deceased said originally she had no hope at present. The clerk put down that she had no hope. She said in effect when the statement was read over to her, "No, that is not what I said, nor what I mean. I mean that at present I have no hope;" which is, or may be, as if she had said, "If I do not get better, I shall die." The conviction must be quashed.

Conviction quashed.[46]

[46] Mulkey, J., in Tracy v. People, 97 Ill. 101 (1880):

"* * * Assuming that the deceased was a believer in a future state of rewards and punishments, and such is the presumption where nothing appears to the contrary, the use of profane language immediately preceding the statement is hardly to be reconciled with the assumption that he was at the time of sound mind and impressed with a sense of almost immediate death. To say the least of it, it was a fact which, if proved, would have tended strongly to negative that hypothesis, and should therefore have been received and considered by the court in connection with the other facts and circumstances bearing upon the question. It is hard to realize how any sane man who believes in his accountability to God can be indulging in profanity when

BARFIELD v. BRITT.[47]

(Supreme Court of North Carolina, 1854. 47 N. C. 41, 62 Am. Dec. 190.)

BATTLE, J.[48] Two questions are presented by the bill of exceptions: First: Whether in the issue joined, upon the plea of justification, the dying declarations of Jacob Britt could be given in evidence by the defendant, to prove the truth of the words for which the action was brought? Secondly: Whether his Honor was right in refusing to instruct the jury that the defendant must sustain his plea by the same cogency of proof as would be required against the plaintiff, were he on trial for his life, under a charge of murder; but on the contrary, saying to them that a preponderance of evidence, as in a civil case, was all that was necessary.

The first question is raised by the plaintiff's exceptions to the admission of the testimony, and we think the exception is well founded. The reasons by which his Honor's decision was influenced are not stated, and we do not know that he felt himself bound by the case of McFarland v. Shaw, 4 N. C. 200; or whether he thought the issue before him was the same as it would have been had the plaintiff been on trial for the murder of Jacob Britt, and that therefore this was an exception to the general rule, that dying declarations are not per se admissible in civil cases. We say per se, because where dying declarations constitute part of the res gestæ, or come within the exception of declarations against interest, or the like, they are admissible, as in other cases, irrespective of the fact that the declarant was under the apprehension of death. 1 Greenlf. Ev. § 156. Whether the decision was influenced by the one reason or the other, or by both combined, we are satisfied that it is not supported by principle, while it is opposed by the whole current of the recent cases in England and in this country.

at the same time he really believes that in a few short hours at most he will be called upon to appear before Him to answer for the deeds done in the body.

"But outside of this, the fact sought to be shown was important in another point of view. It strikes at the very foundation of the reasons upon which dying declarations are admitted at all. There are certain guaranties of the truth of dying declarations, growing out of the solemnity of the time and circumstances under which they are made, which, in contemplation of law, are supposed to compensate for the fact that they are not sanctioned by an oath, and the party against whom they are used has had no opportunity to cross-examine. But when it is affirmatively shown that the declarant in making the statement was not actuated by the motives and influences which the law contemplates, or where, upon the whole of the evidence, there is a reasonable doubt of this fact, the statement should be excluded; for in such case it would be without those guaranties for its truth which the law contemplates."

[47] For the statement of this case, see ante, p. 38.

[48] Part of opinion omitted.

The case of McFarland v. Shaw, was decided by the Supreme Court under its former organization, in the year 1815. The action was by a father for the seduction of his daughter: the defendant pleaded not guilty, and on the trial, the plaintiff, to prove the seduction, offered to show that after all hope of life was gone, his daughter, who was then sick in child-bed, desired that the defendant might be sent for; and upon being informed that he would not see her, exclaimed, "I am going: he will soon go too, when he will be obliged to see me, and will not dare to deny the truth." The testimony was objected to, but received by the Court; and the case came before the Supreme Court on a motion for a new trial: The Court, after stating that such testimony was admissible in certain criminal cases, in which life was at stake, contended that, though they had no precedent to guide them, it ought, from reason and analogy, to be admitted in a case like the one before them; but they grounded themselves chiefly on the circumstance, "that the fact disclosed in her declaration could only be proven by herself; she was the injured party through whom the cause of action arose to the father." The Court then say further, "we give no opinion how far the dying declarations of an indifferent person, not receiving an injury and not a party to the transaction, would be evidence in a civil case. Our decision is confined to the state of facts presented in this case." It is manifest that the Court labored under the impression, which then generally prevailed, that dying declarations were admissible upon the general principle "that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is influenced by the most powerful considerations to speak the truth: a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath in a court of justice." If the admission stood upon this general principle alone, it might well have been contended, as it was contended, that dying declarations ought to be admitted in all cases, civil as well as criminal. But another element in the test of truth was overlooked by those who insisted upon this latitude of admission, to wit: the opportunity of confronting and cross-examining the declarant. The privilege of cross-examination has been carefully secured to the party, to be affected by them, in depositions taken before magistrates, and the testimony of deceased witnesses on a former trial. The importance of preserving it, has no doubt restricted the admission of dying declarations to the criminal cases only "where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the declarations." Such declarations, then, are admitted "upon the ground of the public necessity of preserving the lives of the community by bringing man-slayers to justice. For it often happens that there is no third person present to be an eye witness to the fact, and the usual wit-

ness [49] in other cases of felony, namely, the injured party, is himself destroyed." See Cowen and Hill's notes to Phil. on Ev. pt. 1, 610; 1 Greenlf. on Ev. § 156, and the cases there cited. The principle of admission, being thus restricted, necessarily overrules the case of McFarland v. Shaw, and shows that even if the issue be, as in this case, whether the plaintiff murdered the deceased, the dying declarations cannot be heard, because such issue is joined in a civil case. * * *

Venire de novo.[50]

REG. v. HIND.

(Court of Criminal Appeal, 1860. 8 Cox, Cr. Cas. 300.)

Case reserved by Keating, J., for the opinion of this Court.

John Daubeney Hind was tried before me, at the last assizes for the county of Gloucester, and convicted upon an indictment charging him with feloniously and unlawfully using certain instruments upon the person of one Mary Woolford, deceased, with intent to procure the miscarriage of the said Mary Woolford.

On the trial, a dying declaration of the said Mary Woolford was tendered in evidence on the part of the prosecution and objected to on the part of the prisoner, upon the ground that the death of Mary Woolford was not the subject of the inquiry.

I received the evidence, but reserved the question as to its admissibility, and respited the execution of the sentence until the Court of Criminal Appeal should pronounce its decision upon the point. See R. v. Baker, 2 M. & Rob. 53.

If the Court should be of opinion that the evidence was not admissible, then the judgment is to be reversed, inasmuch as without the evidence of the dying declaration of Mary Woolford the prisoner could not have been convicted.

If the Court should think the evidence admissible, then the judgment is to stand.

POLLOCK, C. B. In this case we are all of opinion that the dying declaration of the woman was improperly received in evidence. The rule we are disposed to adhere to, is to be found laid down in Rex v. Mead, 2 Barn. & Cres. 608. There Abbott, C. J., said, "The general rule is, that evidence of this description is only admissible where

[49] But the use of dying declarations is not confined to cases where there are no other witnesses, but, if otherwise competent, they are admitted in cases where the other evidence is ample. Commonwealth v. Roddy, 184 Pa. 274, 39 Atl. 211 (1898).

[50] Accord: Stobart v. Dryden, 1 M. & W. 615 (1836); Daily v. New York & N. H. Ry. Co., 32 Conn. 356, 87 Am. Dec. 176 (1865); Marshall v. Chicago & G. E. Ry. Co., 48 Ill. 475, 95 Am. Dec. 561 (1868); Brownell v. Pacific Ry. Co., 47 Mo. 244 (1870); Wilson v. Boerem, 15 Johns. (N. Y.) 286 (1818). Contra: Thurston v. Fritz, 91 Kan. 468, 138 Pac. 625, 50 L. R. A. (N. S.) 1167, Ann. Cas. 1915D, 212 (1914), admitting a dying declaration as to a business transaction.

the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration." Speaking for myself, I must say that the reception of this kind of evidence is clearly an anomalous exception in the law of England, which I think ought not to be extended.

Conviction quashed.[51]

BROWN v. COMMONWEALTH.

(Supreme Court of Pennsylvania, 1873. 73 Pa. 321, 13 Am. Rep. 740.)

At April Term, 1872, of the court below, the grand jury found a true bill against Joseph Brown for the murder of Daniel S. Kraemer.

The indictment was tried August 27th, 1872.

The evidence was that the deceased was found on the 26th of February, 1872, in a lane about three hundred yards from his house, and that the wife shortly before, on the same day, was found on her bed in the house, with her head beaten badly; she died from the injuries on the 4th of March. The husband was about sixty years old, and the wife about fifty.

The Commonwealth recalled Sophia Fehr, and proposed to examine her as to dying declarations of Mrs. Kraemer on Monday and Tuesday, upon the subject of the murder of her husband.

The defendant objected, amongst other things, that the dying declarations of Mrs. Kraemer, as a part of the res gestæ, or surrounding circumstances, proposed to be offered, on Monday following, are inadmissible, because not accompanying the transactions, not concomitant with the murder of Daniel S. Kraemer, on Sunday evening, preceding, but are mere hearsay evidence, not made in the presence of the prisoner; and they are irrelevant in this issue as to the murder of Daniel S. Kraemer.

The Court admitted the offer and sealed a bill of exceptions.

The Commonwealth then gave in evidence the declarations of Mrs. Kraemer tending to connect the prisoner with the murder.[52]

READ, C. J. * * * Under this head is ranged the reception under objection of the dying declarations of Mrs. Kraemer, the wife of the murdered man. "The dying declarations of a person who expects to die, respecting the circumstances under which he received a mortal injury, are constantly admitted in criminal prosecutions, where the death is the subject of criminal inquiry, though the prosecution be for manslaughter; though the accused was not present when they were made, and had no opportunity for cross-examination, and against

[51] Accord: Johnson v. State, 50 Ala. 456 (1874); Com. v. Homer, 153 Mass. 343, 26 N. E. 872 (1891); People v. Davis, 56 N. Y. 95 (1874); Ralling v. Com., 110 Pa. 100, 1 Atl. 314 (1885).

[52] Statement condensed and part of opinion omitted.

or in favor of the party charged with the death." "When every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth, a situation so solemn and awful is considered by the law as creating the most impressive of sanctions." 1 Wharton's Criminal Law, § 669; 3 Russell, by Greaves, 250; 1 Greenleaf, §§ 156, 162, 346; 1 Taylor on Evidence, 616.

"The constitutional provision," says Dr. Wharton, "that the accused shall be confronted by the witnesses against him does not abrogate the common law principle, that the declarations in extremis of the murdered person in such cases are admissible in evidence." Id.

In Woodsides v. State, 2 How. (Miss.) 655, the court, at page 665, in answer to the constitutional objection that the prisoner had a right to be confronted with the witness against him, say: "But it is upon the ground alone, that the murdered individual is not a witness, that his declarations made in extremis can be offered in evidence upon the trial of the accused. If he were or could be a witness, his declaration upon the clearest principle would be inadmissible. His declarations are regarded as facts or circumstances connected with the murder, which, when they are established by oral testimony, the law has declared to be evidence. It is the individual who swears to the statements of the deceased that is the witness, not the deceased." In Anthony v. State of Tennessee, Meigs (Tenn.) 277, 33 Am. Dec. 143, the court say, upon the first ground of objection, "We are all of opinion that the Bill of Rights cannot be construed to prevent declarations properly made in articulo mortis from being given in evidence against defendants in cases of homicide."

The same doctrine is to be found in State of Iowa v. Nash, 7 Iowa, 347, and in Robbins v. State of Ohio, 8 Ohio St. 131; Com. v. Casey, 11 Cush. (Mass.) 417, 59 Am. Dec. 150, and very directly in Com. v. Carey, 12 Cush. (Mass.) 246. There are also various statements to the same effect in most of the decisions cited above in relation to the admission of evidence of the testimony of a deceased witness.

All these cases are confined to the dying declarations of the murdered person upon the trial of the individual accused of the murder. At the York assizes on the 17th July, 1837, in Rex v. Baker, 2 Moo. & Rob. 53, it was held, on an indictment against a prisoner for the murder of A. by poison, which was also taken by B., who died in consequence, that B.'s dying declarations were admissible. Coltman, J., after consulting Parke, B., expressed himself of opinion that as it was all one transaction, the declarations were admissible, and accordingly allowed them to go to the jury, but he said he would reserve the point for the opinion of the judges. The prisoner was acquitted. This case is entitled to greater weight, as Baron Parke, the year before, in Stobart v. Dryden, 1 Mees. & Welsby, 615, had been considering the question of dying declarations, after full argument, and delivered

the opinion of the court. This case is mentioned in 1 Phillips and Arnold, 243, and 3 Russell, 268; 1 Taylor on Evidence, 618.

In State v. Terrell, 12 Rich. (S. C.) 321, it was held upon the trial of an indictment for the murder of A. by poison, which was taken at the same time by B. and C., both of whom as well as A. died from its effects, the dying declarations of B. are admissible against the prisoner, although the general rule seems to be, that dying declarations are admissible only, where the indictment is for the murder of the party making the declarations. The murder was effected by putting strychnine in a bottle of whiskey, administered by the defendant, at the same time, to three persons, and caused the deaths of the grandfather and uncle of the prisoner, and of a third person, whose dying declarations were received in evidence upon the trial of the accused for the murder of his grandfather.

Upon the authority of these cases the learned judge admitted the dying declarations of the wife, upon the trial of the defendant for the murder of her husband. In this there was error, for the husband was found dead on Monday morning 26th Feb., 1872, three hundred yards from his dwelling, and his wife was discovered on the same morning lying across her bed in the house in an insensible condition and with her face and head terribly beaten and disfigured. Kraemer and his wife were both advanced in years and there was no doubt that robbery of gold and silver which was known to be in the house led to their murder, but we do not see any facts that would bring these dying declarations of Mrs. Kraemer within those two authorities, supposing them to be good law.

If the prisoner had been tried upon the indictment for the murder of Mrs. Kraemer, her dying declarations would have been strictly legal evidence against him. * * *

Judgment reversed.

STATE v. DRAPER.

(Supreme Court of Missouri, 1877. 65 Mo. 335, 27 Am. Rep. 287.)

NORTON, J.[58] The defendant was indicted for murder in the first degree in the circuit of Jasper county, at the September term, 1876, for the killing of one J. L. Gilbert. On defendant's application the venue of the cause was changed to the circuit court of Greene county. In this latter court defendant was put upon his trial, at its May term, 1877, which resulted in his conviction for murder in the first degree. Unsuccessful motions for a new trial and in arrest of judgment having been made, the cause is brought here for review on appeal. * * *

[58] Part of opinion omitted.

In the progress of the trial witness Carter was permitted to testify as to the dying declaration of Gilbert, against defendant's objections. His evidence was as follows: "Gilbert told him he could not live till morning, that he could not live through the night. Gilbert's voice was very weak. He told me his trouble with Draper originated about a trunk; that Draper and his wife had boarded with him; that some two or three weeks before, they went away, owing him for board, and he left the trunk; that he and Draper had trouble about it then, that they quarreled, and Draper abused him; that Draper had been to him afterwards for the trunk and threatened him; that he refused to let him have it till he paid him, and that he had kept the trunk; that Draper came to his house on Saturday evening before that evening, and called him out doors and outside the gate and told him that by G——d, the d——d son of a bitch, if he did not give up the trunk he would cut his G——d d——d heart out, and skin him, and hang his skin upon the fence to dry; that Draper knocked him down, and inflicted the wounds of which he, Gilbert, believed he was dying."

It is urged as an objection to the evidence that no proper foundation had been laid for its introduction, and that all that portion of the statement made by Gilbert, relating to what occurred two or three weeks anterior to the difficulty in which he was stabbed, and all that he said in regard to a quarrel about a trunk, and the threats of Draper previously made, was incompetent, even though the State had laid a proper foundation for the introduction of the dying declarations of the deceased. * * *

It seems to be well established law that dying declarations are admissible as to those facts and circumstances constituting the res gestæ of the homicide, but as to all other matters occurring anterior to the killing, and not immediately connected with it, they are inadmissible. In 1 Green. Ev. § 156, it is said, "it is now well settled that dying declarations are admissible as such, only in cases of homicide, when the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration." We have not been able to find any case where such evidence has been given a wider scope than is laid down in the above rule. In the case of Leiber v. Commonwealth, 9 Bush (Ky.) 11, it was held that dying declarations should be restricted to the act of killing, and the circumstances immediately attending it, and forming a part of the res gestæ. In that case the declarations given in evidence, not only conduced to identify the defendant as the perpetrator of the homicide, and the circumstances immediately attending it, but it also purported to disclose former and distinct transactions, from which the jury might have inferred malice on the part of the defendant. Hardin, Justice, in delivering the opinion, says: "the court erred in admitting a part of the dying statements, however competent the evidence may have been, and for that cause, if for no other, the judgment should be reversed." In the case of Mose (a slave) v. State, 35 Ala. 421, the defendant was charg-

ed with killing one Martin Oaks, an overseer. On the trial, the dying declarations of the deceased were admitted giving the circumstances attending to the homicide, in giving which, deceased stated "that Moses, the defendant, was the only slave on the plantation at enmity with him," and that "Moses was a runaway." In the opinion of the court it is said that the declarations by deceased, that Moses was the only slave on the place at enmity with him, and that Moses was a runaway, do not fall within the principle admitting dying declarations, and the court in admitting them erred. The enmity of the defendant towards deceased, of which previous threats and previous attempts to commit the same act would have been, evidence in the case, pointing to the accused as the guilty party, was a fact extrinsic to the circumstances attending the homicide. The judgment was reversed for that error; so also in the following cases: Johnson v. State, 17 Ala. 618; Ben v. State, 37 Ala. 103.

In the case of State v. Shelton, 47 N. C. 360, 64 Am. Dec. 587, the deceased, in making his dying declarations, stated that two or three hours before the encounter in which he received the blow, which caused his death, he had had a difficulty and quarrel with the defendant. This latter declaration was admitted, and for the error in admitting it, the judgment was reversed and a new trial awarded, the court holding that dying declarations must be restricted to the act of killing, and the circumstances immediately attending the act and forming a part of the res gestæ. In the case of Nelson v. State, 7 Humph. (Tenn.) 542, the defendant was indicted and convicted for the murder of one Sellers. On the trial the following dying declarations of deceased were admitted: "That Nelson, the prisoner, had stabbed him; that Nelson had tried to kill him two or three times before." It was held that dying declarations were admissible from the necessity of the case to identify the prisoner and establish the circumstances of the res gestæ or direct transaction from which death results. When they relate to former and distinct transactions, they do not come within the principle of necessity. In the case of Hackett v. People, 54 Barb. (N. Y.) 370, the dying declarations of deceased were admitted. They contained not only an account of the transaction which terminated in the death of the deceased, but also other facts, and among them the statement "that Hackett, the defendant, had often threatened to kill him." The prisoner's counsel objected to reading the whole statement, admitting that a portion might be read. This objection was overruled. Ingraham, Justice, delivering the opinion of the court, in speaking of that portion of the declaration in which deceased stated "that Hackett had often threatened to kill him," observed that "this statement was clearly open to the objection that it did not relate to the transaction from which the death resulted," and adds that its effect on the jury may have been very injurious. "The prisoner was on trial for his life, and the whole question, whether he could be convicted of murder in the first degree, was to be decided by proof of prior ill-will, or prior cause for a premedi-

tated act. It seems to me to be a dangerous precedent to extend the rule which admits dying declarations, made under conviction that the party must die, beyond the immediate transactions which led to his death. The evidence referred to should not have been received and the judgment should be reversed." The limits prescribed to the admissibility of dying declarations in the rule as laid down by Greenleaf, supra, and as illustrated in the adjudicated cases above alluded to, in which the rule has been practically applied, necessarily lead to a reversal of the judgment in this case, on the ground that only so much of Gilbert's dying declarations as related to the killing and the facts and circumstances attending it, and constituting a part of the res gestæ, should have been allowed to go to the jury. The cause in other respects seems to have been well tried. Judgment reversed and cause remanded, in which the other judges concur.

Reversed.[54]

JONES v. STATE.

(Supreme Court of Mississippi, 1901. 79 Miss. 309, 30 South. 759.)

Jones, the appellant, was indicted, tried, and convicted of the murder of one Ella Bradley, by shooting her, and was sentenced to be hanged. From the judgment and sentence he appealed to the Supreme Court.

The principal error assigned was that the court erred in admitting the dying declaration of Ella Bradley. The facts as to the shooting are as follows: Deceased was in a room with several other persons, sitting near the fireplace, with her side or back to a window. It was night, and the room was lighted, but it was dark outside. The window shade was down, being slightly raised at one corner, so as to expose the lower part of the window pane of glass in the bottom row of the lower sash. Some one on the outside of the house shot deceased through this window, the bullet striking her in the back part of the right side. She died in a short while after she was shot. I. L. Gordin, a witness for the state, testified that he was at the house of Ella Bradley a short time before her death, and after she knew she was going to die he asked her who she thought shot her, and she said it was Wash Jones; that Wash had told her that he was coming to her house that night, and if he saw any other negro man talking to her he would kill her, and no one would know it. This testimony was objected to by defendant, the objection was overruled, and defendant excepted.

WHITFIELD, C. J.[55] It was fatal error to admit in evidence the testimony of Gordin as to the dying declaration of Ella Bradley. It is

[54] Accord: State v. McKnight, 119 Iowa, 79, 93 N. W. 63 (1903); State v. O'Shea, 60 Kan. 772, 57 Pac. 970 (1899); People v. Smith, 172 N. Y. 210, 64 N. E. 814 (1902).

[55] Part of opinion omitted.

manifest that she did not see, and could not possibly have seen, who shot her, and that she said appellant shot her simply because he had threatened to shoot her. She was therefore clearly not testifying as a fact that Jones shot her, but was merely stating her opinion that he must have shot her, since he had told her he was going to do so. This was not competent. All the evidence in the case as to the situation of the parties in the room and as to the manner of the killing makes it too clear for disputation that she could not have seen the person who shot her. The killing was an atrocious assassination, and the chief point of inquiry was, who did the killing? There is no question as to the crime being murder. The only question was whether Wash Jones was the party who committed the murder. Identity being the sole issue involved, the tremendous importance of the dying declaration testified to by Gordin becomes at once manifest. This evidence is too vital to say that the error is not reversible. The attorney general, with that admirable candor and fairness which has ever characterized his arguments to this court, recognizing it to be his duty as well to see that the innocent go free as that the guilty are punished, concedes that the admission of this testimony was error, endeavoring to show the error not to be a reversible one. But we think it is. Nor is the error cured by instructions 10 and 12. The twelfth instruction told the jury that, if they believed that the alleged dying declaration was the statement of an opinion, they should wholly disregard it. But it was for the court, not the jury, to say whether it was the statement of an opinion. Whether it was the statement of an opinion or of fact was a question as to its admissibility,—a question for the court alone, the determination of which could not be left to the jury. Lipscomb v. State, 75 Miss., at pages 600–602, 23 South., at pages 221, 222; McDaniel's Case, 8 Smedes & M. 401, 47 Am. Dec. 93; Chism's Case, 70 Miss. 754, 12 South. 855. * * *

Reversed.

CARVER v. UNITED STATES.

(Supreme Court of the United States, 1897. 164 U. S. 694, 17 Sup. Ct. 228, 41 L. Ed. 602.)

This was a writ of error to review the conviction of the plaintiff in error for the murder of one Anna Maledon at Muskogee, in the Creek Nation of the Indian Territory. The conviction was a second one for the same offense, the first having been set aside by this court upon the ground that improper evidence had been received of an alleged dying declaration. 160 U. S. 553, 16 Sup. Ct. 388, 40 L. Ed. 532.[56]

Mr. Justice BROWN, * * * There was also error in refusing to permit the defendant to prove by certain witnesses that the deceased,

[56] Statement condensed and part of opinion omitted.

Anna Maledon, made statements to them in apparent contradiction to her dying declaration, and tending to show that defendant did not shoot her intentionally. Whether these statements were admissible as dying declarations [57] or not is immaterial, since we think they were admissible as tending to impeach the declaration of the deceased, which had already been admitted. A dying declaration by no means imports absolute verity. The history of criminal trials is replete with instances where witnesses, even in the agonies of death, have, through malice, misapprehension, or weakness of mind, made declarations that were inconsistent with the actual facts; and it would be a great hardship to the defendant, who is deprived of the benefit of a cross-examination, to hold that he could not explain them. Dying declarations are a marked exception to the general rule that hearsay testimony is not admissible, and are received from the necessities of the case, and to prevent an entire failure of justice, as it frequently happens that no other witnesses to the homicide are present. They may, however, be inadmissible by reason of the extreme youth of the declarant (Rex v. Pike, 3 Car. & P. 598), or by reason of any other fact which would make him incompetent as an ordinary witness. They are only received when the court is satisfied that the witness was fully aware of the fact that his recovery was impossible, and in this particular the requirement of the law is very stringent. They may be contradicted in the same manner as other testimony, and may be discredited by proof that the character of the deceased was bad, or that he did not believe in a future state of rewards or punishment. State v. Elliott, 45 Iowa, 486; Com. v. Cooper, 5 Allen, 495, 81 Am. Dec. 762; Goodall v. State, 1 Or. 333, 80 Am. Dec. 396; Tracy v. People, 97 Ill. 101; Hill v. State, 64 Miss. 431, 1 South. 494.

It is true that, in respect to other witnesses, a foundation must be laid for evidence of contradictory statements by asking the witness whether he has made such statements; and we have held that, where the testimony of a deceased witness given upon a former trial was put in evidence, proof of the death of such witness subsequent to his former examination will not dispense with this necessity. Mattox v. U. S., 156 U. S. 237, 15 Sup. Ct. 337, 39 L. Ed. 409. That case, however, was put upon the ground that the witness had once been examined and cross-examined upon a former trial. We are not inclined to extend it to the case of a dying declaration, where the defendant has no opportunity by cross-examination to show that by reason of mental or physical weakness, or actual hostility felt towards him, the deceased may have been mistaken. Considering the friendly relations which had

[57] That dying declarations are admissible on behalf of the defendant, see Green v. State, 89 Miss. 331, 42 South. 797 (1907); People v. Southern, 120 Cal. 645, 53 Pac. 214 (1898); Mattox v. United States, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917 (1892) semble; Tittle v. State, 52 L. R. A. (N. S.) 910 (1914), annotated.

existed between the defendant and the deceased for a number of years, their apparent attachment for each other, and the alcoholic frenzy under which defendant was apparently laboring at the time, the shooting may possibly not have been with deliberate intent to take the life of the deceased, notwithstanding the threats made by the defendant earlier in the evening. In nearly all the cases in which the question has arisen, evidence of other statements by the deceased inconsistent with his dying declarations has been received. People v. Lawrence, 21 Cal. 368 (an opinion by Chief Justice Field, now of this court); State v. Blackburn, 80 N. C. 474; McPherson v. State, 9 Yerg. (Tenn.) 279; Hurd v. People, 25 Mich. 405; Battle v. State, 74 Ga. 101; Felder v. State, 23 Tex. App. 447, 5 S. W. 145, 59 Am. Rep. 777; Moore v. State, 12 Ala. 764, 46 Am. Dec. 276.

Our attention has been called to but one case to the contrary, viz. Wroe v. State, 20 Ohio St. 460, cited with apparent approval in Mattox Case. But we think, as applied to dying declarations, it is contrary to the weight of authority.

As these declarations are necessarily ex parte, we think the defendant is entitled to the benefit of any advantage he may have lost by the want of an opportunity for cross-examination. Rex v. Ashton, 2 Lewin, Crown Cas. 147.

The disposition we have made of these assignments renders it unnecessary to consider the others. The judgment of the court must be reversed, the conviction set aside, and a new trial ordered.

Mr. Justice BREWER and Mr. Justice PECKHAM concurred in reversing upon the sixth assignment only.[58]

III. ADMISSIONS[59]

(*A*) *In General*

DILLON v. CRAWLY.

(Court of King's Bench, 1702. Holt, 299.)

Error of a judgment upon a demurrer to evidence in C. B. the witness to the sealing and delivery of a deed, being subpœnaed, did not appear; but to prove it the party's deed, they proved an indorsement made by him thereupon three years after; reciting a proviso within, that if he paid such a sum the deed should be void, and acknowledging

[58] Lack of religious belief may also be shown to discredit a dying declaration. Hill v. State, 64 Miss. 431, 1 South. 494 (1877).

[59] Greenleaf on Evidence, § 169: "Under the head of exception to the rule rejecting hearsay evidence, it has been usual to treat of admissions and confessions by the party, considering them as declarations against his interest, and therefore probably true. But in regard to many admissions, and especially those implied from conduct and assumed character, it cannot be sup-

that the said sum was not paid; and a fine was levied of the very lands mentioned in the deed to Crawly, and by the indorsement he expressly own'd it to be his deed; and upon this the deed was read. And now

posed that the party, at the time of the principal declaration or act done, believed himself to be speaking or acting against his own interest; but often the contrary. Such evidence seems, therefore, more properly admissible as a substitute for the ordinary and legal proof, either in virtue of the direct consent and waiver of the party, as in the case of explicit and solemn admissions; or on grounds of public policy and convenience, as in the case of those implied from assumed character, acquiescence, or conduct."

Wigmore on Evidence, § 1049: "The use of the admissions is on principle not obnoxious to the Hearsay rule; because that rule affects such statements only as are offered for their independent assertive value after the manner of ordinary testimony, while admissions are receivable primarily because of their inconsistency with the party's present claim and irrespective of their credit as assertions; the offeror of the admissions, in other words, does not necessarily predicate their truth, but uses them merely to overthrow a contrary proposition now asserted. Just as the Hearsay rule is not applicable to the use of a witness' prior self-contradictions, so it is not applicable to the use of an opponent's admissions. Nevertheless, because most statements used as admissions do happen to state facts against interest, judges have been found who, misled by this casual feature, have treated admissions in general as obnoxious to the Hearsay rule, and therefore as entering under an exception to that rule. That this is a mere local error of exposition and in no sense represents a rule anywhere obtaining may be seen from two circumstances: First, that the limitation of the Hearsay exception to facts against pecuniary or proprietary interest has never been attempted to be applied to admissions; secondly, that the further requirement of the Hearsay exception, namely, that the declarant must first be accounted for as deceased, absent from the jurisdiction, or otherwise unavailable, has never been enforced for the use of a party's admissions."

Redfield, J., in Stevens v. Whitcomb, 16 Vt. 121 (1844): "* * * If the witness be the real party to the suit, he cannot be compelled to testify, and by consequence his declarations and admissions against his interest become evidence against the party standing in his right." See same suggestion in The King v. Inhabitants of Hardwick, 11 East, 578 (1809) post, p. 504.

"An English Evidence Code," 20 Solicitor's Journal, 894 (1876): "'An admission is a statement, oral or written, suggesting any inference as to any fact in issue or relevant fact unfavorable to the conclusion contended for by the person by whom or on whose behalf the statement is made;' to which is added, 'Every admission is (subject to the rules hereinafter stated) a relevant fact as against the person to whom it is unfavorable.' In this definition Mr. Stephen appears anxious to recognize the two elements implied in the common as well as in the technical use of the word. These are, first, that an admission is a statement made by the person against whom it is offered in evidence, or by some one for whose statements he is, by virtue of some relationship between them, answerable; and, second, that it is a statement of something injurious to the case of that person. The definition recognizes these two elements, but it fails to represent correctly the relation between them. For all evidence which is offered by the one party against the other is, or is at least intended and supposed to be, unfavorable to the party against whom it is offered. But what is really characteristic of an admission is that, without calling him, the one party makes the other, or some one for whose statements he is answerable, or whose interest is identical with his own, a witness for him. The rules of evidence are for the protection of each party against the reception of improper evidence against him. If his adversary chose to make him a witness in his own favour there would be no reason on his part for objecting; but naturally his adversary does not do so. He will, however, as naturally object, if possible, to be made a witness against himself without being called; and what enables his adversary to do so in spite of his objection is that he has himself furnished the weapon with which he is attacked. What is characteristic, therefore, of an admission is not that ele-

it was objected that this was not good evidence, because not the best the nature of the thing could bear; but only circumstantial; which never ought to be admitted, where better may be had ex natura rei; because circumstances are fallible and doubtful; and it is upon this reason that a copy of a record is good, because one cannot have the record itself; but a copy of a copy will not do. Upon non est factum to a bond, one of the witnesses being subpœnaed did not appear; and it was offered to prove that he owned it his bond; but denied.

HOLT, C. J. Can there be better [60] evidence of a deed than to own it, and recite it under his hand and seal? Et per totam Cur' Jud' affirm'.[61]

HARINGTON et al. v. MACMORRIS..

(Court of Common Pleas, 1813. 5 Taunt. 228.)

This was an action for money paid, money had and received, money lent, and upon an account stated: the defendant gave notice of set-off, paid £67. 12s. into court, and, under a judge's order, delivered a particular of set-off in the following terms: "Paid R. Dashwood, Esq., under a foreign attachment against the present defendant, founded on a plaint or suit in the mayor's court of London, brought by the said R. Dashwood against the plaintiffs in this cause, being the amount, or part of the amount, of a debt at that time owing by the present defendant to the present plaintiffs in this cause, £112. 10s. To costs paid by the above defendant on such foreign attachment £3. 14s. 4d." Upon the trial of this cause at Guildhall, at the sittings after Trinity term, 1813, before Mansfield, C. J., it appeared that the action was brought to recover a sum of money which had been lent in India, in pagodas. Lens, Serjt., objected that the averment that the defendant was indebted for "lawful money of Great Britain" lent to him was not supported by this evidence. The plaintiffs gave no other evidence of the debt than the defendant's own particular of set-off, which, they contended admitted a debt of £112. 10s. to be due from himself to the plaintiffs over and above the £67. 10s. which the defendant had paid into court. The plaintiffs had delivered a particular of their demand,

ment which it has in common with all the evidence tendered by his adversary, but that which is peculiar to it, namely, that it is furnished by himself. The latter element should, therefore, occupy the first place; the former should occupy the second place, or rather, indeed, does not require to be noticed at all. We should therefore suggest that an admission would be more appropriately defined (if, indeed, any definition is needed) as 'a statement, oral or written, as to a fact in issue or relevant fact made by a party to an action, or by a person deemed to be entitled to make such statement on his behalf.'"

[60] In an anonymous case, 7 Modern, 49 (1703), the same judge observed: "Confession is the worst sort of evidence, that is, if there be no proof of a transaction or dealing, or, at least, a probability of dealing between them: as here there was, the one being a sailor, and the other a captain of a ship."

[61] Compare Call v. Dunning, 4 East, 53 (1803), ante, p. 219.

by which they claimed only £161. 15s. in the whole, of which £67. 10s. being paid into court, only £94. 5s. by their own account, remained due to them. The defendant failing, in the opinion of the jury, to substantiate the validity of the foreign attachment under which he had paid the money to Dashwood, there being an insinuation that it was collusive, and he having neither proved that the debt originated within the jurisdiction of the marshall's court, nor that the parties resided within it, nor that the defendant in that cause had been actually summoned before the attachment issued, the plaintiffs had a verdict for £112. 10s., subject to the objections, which the chief justice reserved.

Lens, Serjt., now moved to set aside the verdict, and enter a nonsuit, in case the court should think that the count for money lent did not properly describe the coin, or that the foreign attachment could be supported, for that the plaintiff could not avail himself of the defendant's particular of set-off in evidence.

GIBBS, J. Suppose that this allusion to the debt had been contained in a plea, instead of a notice of set-off; I wish to know whether before a defendant came to make use of a plea, on which the defendant himself did not rely, nor want to resort to it for his defense, relying only on the general issue, a plaintiff could have made use of the defendant's plea, in order to extract such parts of it as made for the plaintiff, and to use them against the defendant? I think the plaintiff cannot carry the use of the particular of set-off, which he calls upon the defendant to deliver under the notice of set-off, further than he can carry the notice of set-off itself. As to the foreign money, the doctrine contended for has been exploded these 30 years.

The Court granted a rule nisi upon the other grounds.[62]

MANSFIELD, C. J. Now that the matter comes to be talked of and understood, though the objection strongly struck me at the trial, and puzzled me at the moment, there seems to be no difficulty in it at all. Since the statute of Anne, the defendant may plead a set-off of a mutual debt; or, instead of so pleading, it was considered convenient for some purpose or other, that he might give notice of set-off. This notice then is equivalent to a plea, and it is usually given in the general terms of money paid, money had and received, &c. The party receiving this notice of set-off may be much at a loss to know what it means. Money had and received is one of the widest expressions in the law: it may mean fees received by the intruder into an office, or many other things equally dissimilar to the real transaction; and, therefore, it is the modern practice to require, by a judge's authority, an explanation called a particular. When that is given, it is exactly the same as if it had been originally given in the notice of set-off; if so, it is every day's practice, that the defendant's language in one plea cannot be used to disprove another plea, as in the familiar instance I have given

[62] Statement condensed and opinion of Dallas, J., omitted.

of trespass, and not guilty and a justification pleaded, where the justification would certainly, if admissible, prove the act, in the case the reason of the justification fails. Therefore the particulars of the set-off must be incorporated with the notice of set-off, and cannot be given in evidence to prove the plaintiff's demand on the issue of non assumpsit.

HEATH, J., concurred. It is a common case to plead not guilty, and a justification of the act which the defendant has in his first plea denied. The particular of set-off is the same thing as the notice of set-off, and is engrafted with it; the notice of set-off is equivalent to a plea of set-off, and cannot therefore be given in evidence for this purpose.

Rule absolute to enter a nonsuit.[63]

BOILEAU v. RUTLIN.

(Court of Exchequer, 1848. 2 Exch. 665.)

PARKE, B.[64] This case was argued before my Brothers Alderson, Rolfe, and Platt, and myself, on two days in the course of the sittings in and after Hilary Term, on showing cause against a rule nisi to enter a verdict for the plaintiff, pursuant to leave reserved by Lord Denman. The action was for the use and occupation of the plaintiff's house for four years and a quarter, ending at Christmas, 1846. The defendant's answer was, that he had been let into possession on an agreement to purchase the plaintiff's leasehold interest for £630., and continued in such possession for some time. The defendant paid into court a sum sufficient to cover the compensation for the occupation from the end of that time till Christmas; and the question was, whether he was bound to pay the remainder. In order to discharge himself from the rent for this period, it was necessary for him to prove that there was an agreement to purchase, under which he entered. He had given notice to produce the agreement; and, though the plaintiff offered to produce it, he did not call for it, but he put in, as evidence of the agreement, the plaintiff's bill in Chancery, which had been filed to compel the defendant to perform it, and which of course stated the terms of it. The defendant had answered, and the cause had proceeded to a hearing. It was objected, that the statements in the bill were inadmissible as evidence against the plaintiff. Lord Denman received the bill as some evidence of the contract, reserving the point; and the question in the case is,

[63] But under some of the modern codes, which require defenses to be consistent, it seems that an express admission or assertion in one defense may destroy or qualify the effect of a general denial. Hartwell v. Page, 14 Wis. 49 (1861): Derby v. Gallup, 5 Minn. 119 (Gil. 85 [1861]).

That the failure to plead a fact may be treated as an admission, see Mathews v. Livingston, 86 Conn. 263, 85 Atl. 529, Ann. Cas. 1914A, 195 (1912).

[64] Statement and part of opinion omitted.

whether the bill ought to have been received for that purpose. It was not doubted that, if it was to be received, it was primary evidence, on the principle of the case of Slatterie v. Pooley, 6 M. & W. 664.

It is certain that a bill in Chancery is no evidence against the party in whose name it is filed, unless his privity to it is shown. That was decided in Woollett v. Roberts, 1 Ch. Ca. 64, though no such decision was wanted. The proceedings on such a bill, after answer, tend to diminish the presumption that it might have been filed by a stranger, and appear to have been held sufficient to establish the privity of the party in whose name it was filed: Snow d. Lord Crawley v. Phillips, 1 Sid. 220. When that privity is established, there is no doubt that the bill is admissible to show the fact that such a suit was instituted, and what the subject of it was; but the question is, whether the statements in it are any evidence against the plaintiff of their truth, on the footing of an admission. Upon this point the authorities are conflicting.

In the case referred to in Siderfin, it would seem that the bill, which was filed by the defendant to be relieved from a bond as simoniacal, was used against him to prove that he was simoniacally presented; but it does not very distinctly so appear.

In Buller's Nisi Prius, page 236, a bill in Chancery is said to be "evidence against the complainant, for the allegations of every man's bill shall be supposed to be true; and therefore, it amounts to a confession and admission of the truth of any fact; and if the counsel have mingled in it any fact that is not true, the party may have his action." And, after referring to the conflicting authority in Fitzgibbon, 196, the author of that Treatise on the Law of Nisi Prius lays it down as a clear proposition, that where the matter is stated by the bill as a fact on which the plaintiff founds his claim for relief, it will be admitted in evidence, and will amount to proof of a confession.

These are the authorities in favour of the defendant. The recent case of Lord Trimlestown v. Kemmis, 9 C. & F. 749, which was also mentioned, is not one in his favour, for the bill was there admitted to show what the subject of the suit was, and to explain a subsequent agreement for a settlement between the parties.

On the other hand, in the above-mentioned case of Lord Ferrers v. Shirley, Fitz. 195, a bill preferred by the defendant, stating the existence of a deed at that time, was objected to as proof of that fact, on the ground that it was no more than the surmise of counsel for the better discovery of the title; and the Court would not suffer it to be read. And Lord Kenyon, in Doe d. Bowerman v. Sybourn, 7 T. R. 2, where the distinction was insisted upon between facts stated by way of inducement, and those whereon the plaintiff founds his claim for relief, rejected that distinction, and pronounced his judgment, in which the Court acquiesced, that a bill in Chancery is never admitted

farther than to show that such a bill did exist, and that certain facts were in issue between the parties, in order to let in the answer or depositions. * * *

These authorities, therefore, afford no reason for doubting the propriety of the decisions above referred to as to bills in equity. It would seem that those, as well as pleadings at common law, are not to be treated as positive allegations of the truth of the facts therein, for all purposes, but only as statements of the case of the party, to be admitted or denied by the opposite side, and if denied to be proved, and ultimately submitted for judicial decision.

The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are evidence between them, and that conclusive, upon a different principle, and for the purpose of terminating litigation; and so are the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, but only if the traverse is found against the party making it. But the statements of a party in a declaration or plea, though, for the purposes of the cause, he is bound [65] by those that are material, and the evidence must be confined to them upon an issue, ought not, it should seem, to be treated as confessions of the truth of the facts stated.

Many cases were suggested in the argument before us, of the inconveniences and absurdities which would follow from their admission as evidence in other suits, of the truth of the facts stated. There is, however, we believe, no direct authority on this point. The dictum of Lord Chief Justice Tindal, in The Fishmonger's Company v. Robinson, 5 M. & G. 192, which was referred to in argument, seems

[65] Powers, J., in Brown v. Aitken (Vt.) 99 Atl. 265 (1916): "B. F. Combs was called as a witness by the plaintiff, and testified, without objection, that in 1911 he acted as agent for the defendants, and as such agent sold the plaintiff the premises in question, and that the plaintiff paid him thereon two payments, amounting to $450. In cross-examination, the defendants sought to ask the witness about the financial condition of the defendants and the scope and limitations of his agency. This was excluded, and the defendants excepted. Here was no error. The whole subject-matter of the witness' agency was outside the issue, so far as his being agent for the defendants in making the sale was determined by the first special verdict. Moreover, if anything regarding that agency in its scope or effect was open to litigation in the second trial, it was eliminated by the conduct of counsel by expressly and impliedly limiting the issues as hereinbefore shown. Cases are tried in court upon the issues joined by the parties, and evidence is to be received only as it bears upon those issues. Probate Court v. Enright, 79 Vt. 416, 65 Atl. 530 (1907). These issues are usually such as are made by the pleadings; but counsel may, by conduct or agreement, limit them to one or more of those, and such limitation, unless otherwise ordered by the court, will bind them and their clients throughout the trial. They amount to binding waivers of all issues not included. National Life Ass'n v. Speer, 111 Ark. 173, 163 S. W. 1188 (1914); Leonard v. New England Mut. L. Ins. Co., 22 R. I. 519, 48 Atl. 808 (1901); Metlen v. Oregon Short Line R. Co., 33 Mont. 45, 81 Pac. 737 (1905). They are not, in character and effect, unlike an admission of fact, which is binding, unless by leave of court withdrawn. United States for Use of Elias Lyman Coal Co. v. United States Fire & Guaranty Co., 83 Vt. 278, 75 Atl. 280 (1910); Clark v. Tudhope, 89 Vt. 246, 95 Atl. 489 (1915)."

to be considered as amounting to a decision on this point; but it was unnecessary for the determination of that case. It is enough, however, to say, that as to bills of equity, the weight of authority is clearly against their admissibility, for the only purpose for which they were material in the present case; and we are bound by that authority.

It becomes unnecessary to consider the other point argued before us. The rule must be absolute to enter a verdict for the larger sum, as the defendant cannot be allowed anything for repairs.

Rule absolute.[66]

[66] Earl, C., in Cook v. Barr, 44 N. Y. 156 (1870): "When a party to a civil action has made admissions of facts material to the issue in the action, it is always competent for the adverse party to give them in evidence, and it matters not whether the admissions were in writing or by parol, nor when nor to whom they were made. Admissions do not furnish conclusive evidence of the facts admitted, unless they were made under such circumstances as to constitute an estoppel, or were made in the pleadings in an action, when they are conclusive in that action. They may be contained in a letter addressed to the opposite party, or to a third person, and in either case are entitled to equal weight and credit. They are received in evidence, because of the great probability that a party would not admit or state anything against himself or his own interest unless it were true. And I am unable to see why the rule does not apply to admissions contained in the pleadings in an action under our system of practice, which requires the facts to be alleged truly in the pleadings. It must first be shown, however, by the signature of the party, or otherwise, that the facts were inserted with his knowledge, or under his direction, and with his sanction. Here the answer, which is claimed to show the admissions, contains the assertion of facts which, from the nature of the case, if true, must have been within the knowledge of the defendant, and it is verified by the defendant. I can conceive of no principle or reason for holding that admissions made under such circumstances are not evidence against the defendant. It is said in Phillips on Evidence (vol. 1 [Van Cott's Ed., 1849] p. 366), that 'a person's answer in chancery is evidence against him, by way of admission, in favor of a person who was no party to the chancery suit; for the statement, being upon oath, cannot be considered conventional merely.'"

And so in Robbins v. Butler, 24 Ill. 387 (1860), verified answer in chancery.

In a number of the modern cases the courts have treated ordinary pleadings as admissions, on the assumption that the statements contained in them were made with the knowledge and consent of the party on whose behalf they were filed. Lindner v. St. Paul Fire & Marine Ins. Co., 93 Wis. 526, 67 N. W. 1125 (1896); Anderson v. McPike, 86 Mo. 293 (1885).

Where a pleading can be treated as the statement or assertion of the party, it will not be excluded because it purports to be made on information and belief only. Pope v. Allis, 115 U. S. 363, 6 Sup. Ct. 69, 29 L. Ed. 393 (1885). As to the question of personal knowledge, see Shaddock v. Town of Clifton, 22 Wis. 114, 94 Am. Dec. 588 (1867), post, p. 509.

A plea of guilty to a criminal charge may be received as an admission in a civil suit based on the same matter. Corwin v. Walton, 18 Mo. 71, 59 Am. Dec. 285 (1853). For the use of a plea of guilty as an admission, after a plea of not guilty has been substituted. See Heim v. United States, 46 Wash. Law Rep. 242 (1918), post, p. 552.

The deposition of the adverse party, though not competent as a deposition, may be used as an admission. Faunce v. Gray (Mass.) 21 Pick. 243 (1838).

SENAT v. PORTER.

(Court of King's Bench, 1797. 7 Term R. 158.)

On the trial of this action on a policy of insurance at the Guild-hall Sittings before Lord Kenyon a question arose respecting the admissibility in evidence of the captain's protest. The facts were these; when Vaux, the broker, applied to the defendant informing him of the loss and demanding payment, he produced the different papers relating to the subject, and among the rest the protest signed by the captain; the defendant told him he had looked into the papers, but that "there was a point in the case," and he refused payment. On the part of the defendant it was contended that the protest was made evidence in this case by the plaintiff as a paper delivered by his agent to the defendant, containing an account of the loss on which he rested his claim; and therefore that it amounted to a declaration made by the plaintiff to the defendant of the facts on which he required payment. Lord Kenyon was clearly of opinion that the protest was not admissible in evidence, and the plaintiff obtained a verdict.

On a former day in this term the Court reluctantly granted a rule calling on the plaintiff to shew cause why there should not be a new trial, on the ground that the protest ought to have been received in evidence.

LORD KENYON, C. J. Great complaints have been made in the commercial world, and not without reason, of the enormous expence attending the trials of insurance causes; it therefore becomes the Court not to suffer that expence to be encreased by unnecessary motions; and it was with great reluctance that I was induced to consent to grant the rule to shew cause in this case. I have considered and reconsidered this question, and I cannot figure to my imagination any arguable point in it. That the protest per se cannot be evidence is admitted. Then what facts were proved to make it evidence in this case? why, that it was in Vaux's hands, and that he shewed it to the defendant on an application for payment. But if that circumstance would render the protest evidence, it might equally be argued that the allegations in a plaintiff's bill in equity might be read against him merely because the bill with its contents must have been shewn to the defendant; but that cannot be pretended. If the plaintiff had availed himself of any part of this paper to prove his case, the defendant would have been entitled to read the whole of it: but the mere circumstance of Vaux's shewing the protest to the defendant when he applied to him for payment surely cannot render the protest evidence in this case.

GROSE, J. This protest was merely produced to the defendant as a paper containing the account of the loss given by the captain: if the captain had been called as a witness and had given a different account

of the loss from that contained in the protest, the protest might have been produced to shew that he was not worthy of credit; but it could not be read on behalf of the defendant to prove any fact in the case.

LAWRENCE, J. It seems to me that the protest does not become evidence on account of it's having been voluntarily shewn by Vaux to the defendant any more than it would if the plaintiff had been compelled by a Judge's summons to shew it to the defendant. It was not necessary for the plaintiff to shew this protest to the defendant before he brought his action; but the defendant might have obtained a Judge's summons to compel him to permit the defendant to inspect the paper; instead of this Vaux, the plaintiff's agent, who wished to act candidly, voluntarily shewed this as well as the other papers to the defendant: but that does not amount to an admission of the facts contained in the paper.

Rule discharged.[67]

COMMONWEALTH v. KENNEY.

(Supreme Judicial Court of Massachusetts, 1847. 12 Metc. 235, 46 Am. Dec. 672.)

SHAW, C. J.[68] The defendant was indicted for stealing money and a bag, the property of Barzillai Russell, from the person of said Russell. The averment of the fact of stealing, and that the money was the property of Russell, were material averments. Russell was not called as a witness, doubtless because he could not be found. But evidence was offered to show that declarations were made at the watch house, by Russell, in the presence and hearing of the defendant, in regard to the theft, to which the defendant made no reply. This evidence was objected to by the defendant, but was admitted by the court; and this is the ground of exception.

One of the specific grounds on which this exception was placed, we think, is not tenable; namely, that the testimony of Russell was the best evidence, and that the defendant was entitled to it, with the right of cross-examination. The testimony of the person robbed is not necessary evidence, nor are other kinds of evidence, if sufficient to establish the necessary averments, secondary proof. The evidence,

[67] But a party may use the statement of a third person in such a way as to adopt it. Roe v. Rawlings, 7 East, 279 (1806).

So the use of an affidavit or a deposition to establish a given fact may amount to an adoption of the statements contained in it. Richards v. Morgan, 10 Jur. (N. S.) 559 (1864).

See, also, Mutual Ben. Life Ins. Co. v. Newton, 22 Wall. 32, 22 L. Ed. 793 (1874), semble, that where plaintiff, in furnishing proofs of death, submitted a copy of the coroner's inquest, she might be treated as adopting it.

[68] Statement omitted.

if competent at all, was competent on the ground of admission by the defendant, which, though often slight as to weight, is not secondary.

But on another ground, we take a different view of the admissibility of the evidence, depending on the question whether the statements of Russell in the hearing of the defendant, and the silence of the latter, do amount to a tacit admission of the facts stated. It depends on this: If a statement is made in the hearing of another, in regard to facts affecting his rights, and he makes a reply, wholly or partially admitting their truth, then the declaration and the reply are both admissible; the reply, because it is the act of the party, who will not be presumed to admit any thing affecting his own interest, or his own rights, unless compelled to it by the force of truth; and the declaration, because it may give meaning and effect to the reply. In some cases, where a similar declaration is made in one's hearing, and he makes no reply, it may be a tacit admission of the facts. But this depends on two facts; first, whether he hears and understands the statement, and comprehends its bearing; and secondly, whether the truth of the facts embraced in the statement is within his own knowledge, or not; whether he is in such a situation that he is at liberty to make any reply; and whether the statement is made under such circumstances, and by such persons, as naturally to call for a reply, if he did not intend to admit it. If made in the course of any judicial hearing, he could not interfere and deny the statement; it would be to charge the witness with perjury, and alike inconsistent with decorum and the rules of law. So, if the matter is of something not within his knowledge; if the statement is made by a stranger, whom he is not called on to notice; or if he is restrained by fear, by doubts of his rights, by a belief that his security will be best promoted by his silence; then no inference of assent can be drawn from that silence. Perhaps it is within the province of the judge, who must consider these preliminary questions in the first instance, to decide ultimately upon them; but in the present case he has reported the facts, on which the competency of the evidence depended, and submitted it, as a question of law, to this court. The circumstances were such, that the court are of opinion that the declaration of the party robbed, to which the defendant made no reply, ought not to have been received as competent evidence of his admission, either of the fact of stealing, or that the bag and money were the property of the party alleged to be robbed. The declaration made by the officer, who first brought the defendant to the watch house, he had certainly no occasion to reply to. The subsequent statement, if made in the hearing of the defendant, (of which we think there was evidence,) was made whilst he was under arrest, and in the custody of persons having official authority. They were made, by an excited, complaining party, to such officers, who were just putting him into confinement. If not strictly an official complaint to officers of the law, it was a proceeding very similar to it, and he might well suppose that he had no right to

say anything until regularly called upon to answer. We are therefore of opinion that the verdict must be set aside and a

New trial granted.[69]

WIGGINS et al. v. BURKHAM.

(Supreme Court of the United States, 1869. 10 Wall. 129, 19 L. Ed. 884.)

Mr. Justice SWAYNE stated the case, and delivered the opinion of the court.[70]

This is a writ of error to the Circuit Court of the United States for the District of Indiana. The action is assumpsit. The declaration contained only the common counts. The case, as shown by the bill of exceptions, is as follows: Burkham, the plaintiff, lived in Chicago, and the defendants at Hagerstown, in Indiana, distant from Chicago about 220 miles by railroad. Upon the trial, evidence was given tending to prove that the plaintiff, on or about the 16th of May, 1866, sent to the defendants by mail a written statement of the account sued upon, in the nature of an account current, and that the defendants made no objection to it till on or about the 28th of that month, when they addressed a letter to the plaintiff by mail objecting to some items of the account, but making no objection to others, to which latter items it did not appear they ever objected until after the commencement of the suit. * * *

The first instruction given by the court below, embraces two propositions:

1. That an account rendered, and not objected to within a reasonable time, is to be regarded as admitted by the party charged to be primâ facie correct.

2. That if certain items in an account under such circumstances are objected to within a reasonable time, and others not, the latter are to be regarded as covered by such an admission.

We see nothing objectionable in these propositions. They are in accordance with all the leading authorities on the subject.

[69] See elaborate discussion following and applying the rule of the principal case. State ex rel. Tiffany v. Ellison, 266 Mo. 604, 182 S. W. 996, Ann. Cas. 1918C, 1 (1916).

Where a defendant did not testify on his own behalf on the preliminary examination, such fact could not be used against him on the trial as an admission. Parrott v. State, 125 Tenn. 1, 139 S. W. 1056, 35 L. R. A. (N. S.) 1073, Ann. Cas. 1913C, 239 (1911).

Compare Diggs v. United States, 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502 (1917), ante, p. 242, sanctioning an inference against a defendant who failed to deny or explain certain matters in his testimony.

See, also, Connecticut Mut. Life Ins. Co. v. Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656 (1893); Morris v. McClellan, 154 Ala. 639, 45 South. 641, 16 Ann. Cas. 305 (1908), ante, p. 241.

[70] Part of opinion omitted.

The other exception also involves two propositions:

1. That the court refused to instruct the jury that, upon the hypothesis stated, the account was objected to by the defendants within a reasonable time.

2. That the court did instruct that what was a reasonable time was not a question of law to be decided by the court, but a question of fact for the jury.

Judge Story says: "Between merchants at home, an account which has been presented, and no objection made thereto, after the lapse of several posts, is treated, under ordinary circumstances, as being, by acquiescence, a stated account."

The principle which lies at the foundation of evidence of this kind is, that the silence of the party to whom the account is sent warrants the inference of an admission of its correctness. This inference is more or less strong according to the circumstances of the case. It may be repelled by showing facts which are inconsistent with it, as that the party was absent from home, suffering from illness, or expected shortly to see the other party, and intended, and preferred, to make his objections in person. Other circumstances of a like character may be readily imagined. As regards merchants residing in different countries, Judge Story says: "Several opportunities of writing must have occurred."

We see no objection to the rule as he lays it down, in respect to parties in the same country.

When the account is admitted in evidence as a stated one, the burden of showing its incorrectness is thrown upon the other party. He may prove fraud, omission, or mistake, and in these respects he is in no wise concluded by the admission implied from his silence after it was rendered. * * *

Judgment affirmed.[71]

ALLEN v. UNITED STATES.

(Supreme Court of the United States, 1896. 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528.)

Mr. Justice BROWN[72] delivered the opinion of the court.

This was a writ of error to a judgment of the circuit court of the United States for the Western district of Arkansas sentencing the

[71] Compare Wiedeman v. Walpole, L. R. 2 Q. B. D. 534 (1891), to the effect that the failure to answer a letter charging the defendant with having promised to marry the plaintiff could not be taken as an admission of the truth of such statement.

That generally there is no implied admission from a failure to answer a self-serving written statement. Viele v. McLean, 200 N. Y. 260, 93 N. E. 468 (1910).

[72] Part of opinion omitted.

plaintiff in error to death for the murder of Philip Henson, a white man, in the Cherokee Nation of the Indian Territory. The defendant was tried and convicted in 1893, and, upon such conviction being set aside by this court (150 U. S. 551, 14 Sup. Ct. 196, 37 L. Ed. 1179), was again tried and convicted in 1894. The case was again reversed (157 U. S. 675, 15 Sup. Ct. 720, 39 L. Ed. 854), when Allen was tried for the third time, and convicted, and this writ of error was sued out.

The facts are so fully set forth in the previous reports of the case that it is unnecessary to repeat them here. * * *

6. The fourteenth assignment is to the following language of the court upon the subject of the flight of the accused after the homicide: "Now, then, you consider his conduct at the time of the killing and his conduct afterwards. If he fled, if he left the country, if he sought to avoid arrest, that is a fact that you are to take into consideration against him, because the law says, unless it is satisfactorily explained,—and he may explain it upon some theory, and you are to say whether there is any effort to explain it in this case,—if it is unexplained, the law says it is a fact that may be taken into account against the party charged with the crime of murder upon the theory that I have named, upon the existence of this monitor called conscience, that teaches us to know whether we have done right or wrong in a given case."

In the case of Hickory v. United States, 160 U. S. 408, 422, 16 Sup. Ct. 327, 332 (40 L. Ed. 474), where the same question, as to the weight to be given to flight as evidence of guilt, arose, the court charged the jury that: "The law recognizes another proposition as true, and it is that 'the wicked flee when no man pursueth, but the innocent are as bold as a lion.' That is a self-evident proposition that has been recognized so often by mankind that we can take it as an axiom, and apply it to this case." It was held that this was error, and was tantamount to saying to the jury that flight created a legal presumption of guilt, so strong and conclusive that it was the duty of the jury to act on it as an axiomatic truth. So, also, in the case of Alberty v. United States, 162 U. S. 499, 509, 16 Sup. Ct. 864, 868, 40 L. Ed. 1051, the court used the same language, and added that from the fact of absconding the jury might infer the fact of guilt, and that flight was a silent admission by the defendant that he was unwilling or unable to face the case against him, and was in some sense, feeble or strong, as the case might be, a confession. This was also held to be error. But in neither of these cases was it intimated that the flight of the accused was not a circumstance proper to be laid before the jury as having a tendency to prove his guilt. Several authorities were quoted in the Hickory Case (page 417, 160 U. S., page 330, 16 Sup. Ct., 40 L. Ed. 474) as tending to establish this proposition. Indeed, the law is entirely well settled that the flight of the accused is competent evidence against him as having a tendency to establish his guilt. Whart. Hom. § 710; People v. Pitcher, 15 Mich. 397.

This was the substance of the above instruction, and, although not accurate in all its parts, we do not think it could have misled the jury. * * *

Affirmed.

MORSE v. MINNEAPOLIS & ST. L. RY. CO.

(Supreme Court of Minnesota, 1883. 30 Minn. 465, 16 N. W. 358.)

MITCHELL, J.[78] This was an action to recover damage for the alleged negligence of defendant, causing the death of plaintiff's intestate while employed as an engineer on its railroad. One of the acts of negligence alleged to have contributed to the injury was defendant's allowing its track to become and remain out of repair; the defects in that respect consisting of a broken rail and defective switch, which caused the engine upon which the deceased was to be thrown from the track and upset. * * *

Plaintiff was also permitted to show that after the accident defendant repaired the switch alleged to have been defective. The court held, in O'Leary v. Mankato, 21 Minn. 65, that such evidence was under certain circumstances competent. This case was followed in Phelps v. Mankato, 23 Minn. 276, and Kelly v. Southern M. R. Co., 28 Minn. 98, 9 N. W. 588, and this position is not without support in the decisions of other courts. But, if competent, such evidence is only so as an admission of the previous unsafe condition of the thing repaired or removed, and to render it admissible as such the act must have been done so soon after the accident and under such circumstances as to indicate that it was suggested by the accident, and was done to remedy the defect which caused it. All courts who admit the evidence at all so hold. In the present case the change in this switch was made over a year after the accident, and after it had been removed to another place. Under such circumstances the repairs were, presumably, merely an ordinary betterment. Under such a state of facts such evidence would not be admissible under any rule, and its admission was, therefore, error. But, on mature reflection, we have concluded that evidence of this kind ought not to be admitted under any circumstances, and that the rule heretofore adopted by this court is on principle wrong; not for the reason given by some courts, that the acts of the employés in making such repairs are not admissible against their principals, but upon the broader ground that such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty.

A person may have exercised all the care which the law required, and yet in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may

[78] Part of opinion omitted.

adopt additional safe-guards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence. Dougan v. Champlain Transp. Co., 56 N. Y. 1; Sewell v. City of Cohoes, 11 Hun (N. Y.) 626; Baird v. Daly, 68 N. Y. 547; Payne v. Troy & Boston R. Co., 9 Hun (N. Y.) 526; Salters v. D. & H. Canal Co., 3 Hun (N. Y.) 338; Dale v. Del., L. & W. R. Co., 73 N. Y. 468. * * *

New trial granted.[74]

HARRINGTON v. INHABITANTS OF LINCOLN.

(Supreme Judicial Court of Massachusetts, 1855. 4 Gray, 563, 64 Am. Dec. 95.)

Action of tort to recover damages occasioned to the person of the plaintiff by a defect in a highway. Trial at April term, 1855, before Bigelow, J., who made the following report thereof:

"The defendants offered evidence of a conversation between their selectmen and the plaintiff, when the former asked the plaintiff how he would settle with the defendants. The plaintiff objected to any evidence of the statements made by him at this interview, on the ground that they were made for the purpose of effecting a compromise. The court ruled that no offer, made by the plaintiff in the course of this conversation, for the purpose of settling this case, was competent; but that all statements and declarations of independent facts, relative to the issue, made by the plaintiff during this interview, were competent.

"Thereupon it was testified by the witness that the selectmen told the plaintiff they were willing to pay him for his loss of time and his actual expenses incurred in consequence of the accident; and asked the plaintiff what these items would actually amount to. The plaintiff, in reply to questions, then stated the amount of wages he was receiving per month at the time of the accident; how much time he lost in consequence of the accident; the amount of his doctor's bill;

[74] Accord: Columbia & P. S. R. Co. v. Hawthorne, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405 (1892), where a number of the cases are collected.

Where the question is as to who had control of the premises, or whose business it was to repair, such matters have sometimes been received, not as admissions, but as acts of dominion. Shinners v. Proprietors of Locks & Canals, 154 Mass. 168, 28 N. E. 10, 12 L. R. A. 554, 26 Am. St. Rep. 226 (1891).

The subsequent discharge of an alleged negligent employé cannot be treated as an implied admission of negligence. Engel v. United Traction Co., 203 N. Y. 321, 96 N. E. 731, Ann. Cas. 1913A, 859 (1911).

the cost of his board, while ill; the expense of nursing; and the amount due to his employer for his lost time. These items were not given by the plaintiff as offers upon which he was willing to settle, but as being his actual loss and expenses. To these statements the plaintiff objected, but they were admitted by the court.

"The defendants also offered in evidence the declaration of the plaintiff to a third person, of the amount for which he had at some previous time offered to settle with the town. This was objected to by the plaintiff; but it not being an offer of compromise, but only a declaration of the plaintiff to a third person, it was admitted. * * *

"The jury returned a verdict for the plaintiff, [and assessed damages at twenty dollars.] If either of the foregoing rulings was erroneous, the verdict is to be set aside; otherwise, judgment is to be entered on the verdict."

B. F. Butler, for the plaintiff. 1. The plaintiff's statement of sums and amounts was not made as a statement of independent facts, but in reply to an offer to pay these items of loss of time and expenses, accompanied by an inquiry what the amounts were, as a basis of settlement. It was equivalent to saying to the selectmen, "Your offer amounts to only the sums, which I name, which I do not choose to accept." A refusal of an offer of compromise can be no better evidence than the offer itself.

2. The law does not allow an offer of compromise to be proved, because the law encourages attempts at settlement, and because such offers are not the unbiassed action of the mind, but induced by hope of settlement and fear of litigation. The party's admission to a third person is only one means of proving the offer, and equally inadmissible with proof of the offer itself. Besides, it is wholly irrelevant to the issue between the parties, as it only tends to show for what sum the plaintiff was willing to adjust his claim.[75]

THOMAS, J. 1. The first exception cannot be sustained. The presiding judge ruled that no offer of settlement, made by the plaintiff in a conversation had with the agents of the defendants, with a view to the adjustment of the controversy, was competent; but that statements of independent facts, made in the course of such conversation, might be admitted. The distinction is sound. The facts stated were capable of being proved by any competent evidence, including the admission of the plaintiff. The amount of a doctor's bill, the cost of board during sickness, the loss of time by absence from the service of his employer, were simple facts, capable of exact certainty—facts, the statement of which would not be modified by the occasion on which it was made, certainly not to the prejudice of the party making it.

The offer of compromise stands upon a very different ground. Peace is of such worth that a reasonable man may well be presumed to seek after it even at the cost of his strict right, and by an abatement

[75] Statement condensed and part of opinion omitted.

from his just claim. The offer which a man makes to purchase it is to be taken, not as his judgment of what he should receive at the end of litigation, but what he is willing to receive and avoid it.

2. The evidence of the subsequent admission by the plaintiff of the offer of compromise which he had made was not competent. It was but one of the modes of proving a fact which, upon the soundest principles of public policy, cannot be proved at all. Such offers are not to be used to the prejudice of the party making them, in subsequent litigation upon the subject. If the plaintiff had made the offer of compromise in open town meeting, proof of it would have been excluded. His admission to his neighbor, upon his return from the meeting, that he had made it, is excluded for the same reason. It is not a particular mode of proof, which the law rejects, but the subject matter. * * *

New trial ordered.[76]

HEMINGS v. ROBINSON.

(Court of Common Pleas, 1729. Barnes' Notes Cas. 436.)

A point was reserved at the sittings of Nisi Prius, whether the proof of the indorser of a promissory note his acknowledgment that the name indorsed on said note was his handwriting, be sufficient to prove the indorsement in an action brought by plaintiff as indorsee against defendant as drawer? The objection was, that no person's confession but the defendant's himself can be evidence, and the indorser's hand must be proved. The objection was held good; and the verdict as to the second promise in the declaration, was ordered to be vacated.

HANSON v. PARKER.

(Court of King's Bench, 1749. 1 Wils. 257.)

This is an action of debt upon a bond, with condition for the payment of a certain sum of money to one Lydia Dovey: the defendant craves oyer of the condition, and pleads payment post diem to Lydia Dovey. At the trial it was given in evidence, that Lydia Dovey, in conversation touching this bond, being asked if the defendant owed her any money, declared he did not owe her any thing, whereupon the jury gave a verdict for the defendant. And now it was moved for a new trial, that the declaration of Lydia Dovey, who was not the party plaintiff in this action, ought not to affect the plaintiff; and Lydia Dovey made an affidavit that the money had not been paid

[76] See Rideout v. Newton, 17 N. H. 71 (1845), and Colburn v. Town of Groton, 66 N. H. 151, 28 Atl. 95, 22 L. R. A. 763 (1889), where a number of cases are reviewed.

to her, and that she looked upon the defendant to be indebted to the plaintiff, who was the obligee in the bond.

But PER CURIAM. A new trial was refused, for Lydia Dovey is to be considered as if she were really plaintiff, and the action (as appears to us) is brought for her benefit; and if the condition of the bond (being taken for payment of money to her) was capable of any explanation, it ought to have been explained to the jury at the trial, and we cannot admit of affidavits to explain evidence given at a trial, so the plaintiff took nothing by the motion.

BAUERMAN et al. v. RADENIUS.

(Court of King's Bench, 1798. 7 Term R. 663.)

This was an action on the case, wherein the declaration stated that in consideration that the plaintiffs had shipped on board a certain vessel then lying at Embden, and whereof the defendant was master, certain goods to be carried from thence to London there to be delivered in good condition and dry (except in case of inevitable damage or leakage) to Messrs. Van Dyck and Co. for a certain reasonable freight to be paid to the defendant, the defendant promised to carry and deliver the same accordingly; that the ship with the goods arrived safely from Embden at London; and although Messrs. Van Dyck and Co. paid the freight for the same, yet the defendant did not deliver the goods in good condition and dry, although not prevented from so doing by inevitable damage or leakage, but on the contrary delivered the same wet and ill-conditioned, and the said goods were through the neglect and default of the defendant much damaged and spoiled &c. To this the general issue was pleaded.

At the trial before Lord Kenyon at Guildhall much evidence was at first gone into in order to shew that the injury arose from the unskilful stowing of the goods on board the vessel, and not from the inevitable danger of the sea as the defendant endeavoured to establish. But the principal question arose on the production in evidence by the defendant of a letter from the plaintiffs, who were the shippers of the goods to Van Dyck and Co., entirely exculpating the defendant from all blame or imputation of negligence or misconduct, and stating that he acted in every respect according to their (the plaintiffs') orders by stowing the goods under their direction. But it also appeared in the same letter that Van Dyck and Co. were the persons on whose risk the goods were shipped, that they were the persons really interested in the suit, and had indemnified the plaintiffs their agents in whose name they had brought this action. Whereupon it was contended at the trial in support of the action that as it was disclosed that Van Dyck and Co. were the real plaintiffs, and the nominal plaintiffs only their agents, the former ought not to be concluded by the admissions of their agents

proved too by letter without the sanction of an oath, and that therefore this evidence ought to be rejected: but Lord Kenyon being of a different opinion, the plaintiff was nonsuited.

Gibbs and Park moved to set aside the nonsuit.[77]

LORD KENYON, C. J. This was an action brought by Bauerman and Co. against the defendant Radenius; and in the course of the trial an admission by the plaintiffs themselves was proved that there was no colour for the action, which admission was not fraudulently obtained from them but was the opinion that the plaintiffs really entertained on the merits of the case. And the only question now is whether or not that ought to conclude the case against the plaintiffs who made the admission. It was said by a very learned Judge, Lord Macclesfield, towards the beginning of this century that the most effectual way of removing land marks would be by innovating on the rules of evidence; and so I say. I have been in this profession more than 40 years, and have practiced both in courts of law and equity; and if it had fallen to my lot to form a system of jurisprudence, whether or not I should have thought it advisable to establish two different courts with different jurisdictions, and governed by different rules, it is not necessary to say. But, influenced as I am by certain prejudices that have become inveterate with those who comply with the systems they found established, I find that in these courts proceeding by different rules a certain combined system of jurisprudence has been framed most beneficial to the people of this country, and which I hope I may be indulged in supposing has never yet been equalled in any other country on earth. Our courts of law only consider legal rights: our courts of equity have other rules, by which they sometimes supersede those legal rules, and in so doing they act most beneficially for the subject. We all know that, if the courts of law were to take into their consideration all the jurisdiction belonging to courts of equity, many bad consequences would ensue. * * *

I cannot conceive on what ground it can be said that Bauerman and Co. may be considered not as the parties in the cause for the purpose of rejecting their admissions, and yet as the parties in the cause for the purpose of preventing their being examined as witnesses. I take it to be an incontrovertible rule that the admission made by a plaintiff on the record is admissible evidence; and on the trial of this cause there was proof of an admission by the plaintiffs that they had no ground upon which to support the action. With regard to the case of Biggs v. Laurence [3 Term R. 454], which was cited to shew that an acknowledgement made by the defendant's agent was evidence against the principal, it is sufficient to say that that was not the point on which the case was argued or determined in this court. It is my wish and my comfort to stand super antiquas vias: I cannot legislate, but by my in-

[77] Statement condensed and part of opinion of Lord Kenyon, C. J., and opinion of Grose, J., omitted.

dustry I can discover what our predecessors have done, and I will servilely tread in their footsteps. I am therefore clearly of opinion on principles of law that the plaintiffs cannot recover in this action, and that we cannot in this case assume the jurisdiction of a court of equity in order to overrule the rigid rules of law.

ASHHURST, J. It was competent to Van Dyck and Co. to have made themselves parties to the record, instead of which they have chosen to sue in the names of Bauerman and Co., by which they have made the latter the real plaintiffs in a court of law, and are bound by their acts and by the acts of other persons done by the orders of Bauerman and Co. Here it is admitted that if the letter in question were to be read as against Bauerman and Co. considering them as the plaintiffs, it afforded sufficient ground to convince a jury that the plaintiffs ought not to recover: but it is argued that, though the letter be admissible in evidence, as it appears by the latter part of it that Bauerman and Co. were acting only as agents for Van Dyck and Co. the admission made by the former ought not to prejudice the latter. But that argument cannot be supported. When A. appoints B. his agent, he is bound by every act and order of his done within the scope of his authority. Here it appears by the letter that Bauerman and Co. were present when the ship was loading and approved of the mode in which it was effected: then if the loss happened in consequence of the directions given by Bauerman and Co., Van Dyck and Co. must be bound by it as much as if the orders had been given by themselves

LAWRENCE, J. The ground, on which it must be contended that the admission made by a mere trustee is not evidence, is that he has no interest in the subject, and may therefore be induced to admit what is not true. But in this case Van Dyck and Co. are in this difficulty; the present plaintiffs either have or have not an interest: but it must be considered that they have an interest in order to support the action, and if they have, an admission made by them that they have no cause of action is admissible evidence. I have looked into the books to see if I could find any case in which it was holden that the admission of a plaintiff on the record was not evidence, but have found none. There is a case in Salkeld, where Lord Holt said that if the plaintiff in ejectment, who is considered only as a trustee for the lessor, released the action, he might be committed for a contempt of the court, but he did not say that the release would not defeat the action; this therefore appears to be the most that a court of law can do in cases of this kind.

Rule discharged.

WHITCOMB v. WHITING.

(Court of King's Bench, 1781. Doug. 652.)

Declaration, in the common form, on a promissory note executed by the defendant; Pleas; the general issue, and non assumpsit infra sex annos; Replication, assumpsit infra sex annos: The cause was tried before Hotham, Baron, at the last Assizes for Hampshire. The plaintiff produced a joint and several note executed by the defendant, and three others; and, having proved payment, by one of the others, of interest on the note, and part of the principal, within six years, and the Judge thinking that was sufficient to take the case out of the statute, as against the defendant, a verdict was found for the plaintiff.

On Friday, the 4th of May, a rule was granted to shew cause, why there should not be a new trial, on the motion of Lawrence, who cited Bland v. Haslerig, C. B. H. 1 & 2 W. & M. 2 Ventr. 151; and, this day, in support of the application, he contended, that the plaintiff, by suing the defendant separately, had treated this note exactly as if it had been signed only by the defendant; and, therefore, whatever might have been the case in a joint action, in this case, the acts of the other parties were clearly not evidence against him. The acknowledgment of a party himself does not amount to a new promise, but is only evidence of a promise. This was determined in the case of Heylin v. Hastings, reported in Salkeld, 29, and 12 Modern 223; and, in Hemings v. Robinson, C. B. M. 6 Geo. 2. Barnes Qto Ed. 436, it was decided, that the confession of nobody but a defendant himself is evidence against him. That last case was an action by an indorsee of a note, against the drawer, and the plaintiff proved the acknowledgment of a mesne indorsor that the indorsement on the back of the note was in his handwriting; but the court was of opinion, that this was not evidence against the drawer, but that the indorsement must be proved. It would certainly open a door to fraud and collusion if this sort of evidence were, in any case, to be admitted. A plaintiff might get a joint drawer to make an acknowledgment, or to pay part, in order to recover the whole, although it had been already paid.

LORD MANSFIELD. The question, here, is only, whether the action is barred by the statute of limitations. When cases of fraud appear, they will be determined on their own circumstances. Payment by one, is payment for all, the one acting, virtually, as agent for the rest; and, in the same manner, an admission by one, is an admission by all; and the law raises the promise to pay, when the debt is admitted to be due.

WILLES, Justice. The defendant has had the advantage of the partial payment, and, therefore, must be bound by it.

ASHHURST and BULLER, Justices, of the same opinion.

The rule discharged.[78]

[78] The American cases appear to repudiate the doctrine that an acknowledgment or new promise by one joint promisor will take the case out of the statute of limitations as to the others. See cases collected in 25 Cyc. 1356.

THE KING v. INHABITANTS OF HARDWICK.

(Court of King's Bench, 1809. 11 East, 578.)

An appeal against an order for the removal of Joseph Vipond, Mary his wife, and their children, by name, was entered at the sessions in the name of "The Churchwardens and Overseers of the Poor of the Parish of Hardwick in the County of Norfolk, Appellants, and the Churchwardens and Overseers of the Poor of the Parish of Fulham Saint Mary the Virgin, in the same County, Respondents." And upon the hearing of the appeal, the Sessions confirmed the order, subject to the opinion of this Court upon a case which stated,

The respondents, in order to prove the pauper's settlement in Hardwick, called the father, who being a settled inhabitant of that parish, refused to be examined. They then called the pauper himself, who proved from his knowledge, that his father had resided on the tenement at Hardwick for 25 years, and that it was now worth more than 10*l.* per annum. And the Court admitted the pauper to give evidence of his father's declarations to him, that he (the father) had purchased the house when the pauper was 16 years of age for 87*l.* and that he had about 10 years ago laid out above 100*l.* on the premises. The Court were of opinion, that the pauper was not emancipated by his residing in Besthorpe under the indenture of apprenticeship, nor by any other act subsequent to it; and therefore confirmed the order.[79]

LORD ELLENBOROUGH, C. J. Evidence of an admission made by one of several defendants in trespass will not, it is true, establish the others to be co-trespassers: but if they be established to be co-trespassers by other competent evidence, the declaration of the one, as to the motives and circumstances of the trespass, will be evidence against all who are proved to have combined together for the common object. With respect to the case at the bar, two questions have been made; but that which has been argued most at length, and is considered to be of most importance, is, Whether the declaration of the father, as proved by the son, were admissible evidence? If, from the occupation of this estate by the father for 25 years, within the knowledge of the son, now only 37 years old, during the greater part of that time, as it would appear, without any payment of rent, added to the facts that 40 years ago the estate was rented at 5*l.* 10*s.* per annum, and is now worth above 10*l.* a year, the Justices at the Sessions had drawn the inference, which they might fairly have done, that the father had purchased it before the son came of age for above 30*l.*, we might have been saved this discussion; but as it is, the question becomes material to be decided. The question then is, Whether the declaration of a parishioner respecting the circumstances of a settlement, of which he could not be compelled to give evidence as a party to the appeal de-

[79] Statement condensed and part of opinion of Lord Ellenborough, C. J., and opinions of Le Blanc and Bayley, JJ., omitted.

pending, be admissible in evidence? I consider all appeals against orders of removal, though technically carried on in the names of the churchwardens and overseers of the respective parishes, yet in substance and effect to be the suits of the parishioners themselves, who are to contribute to the expense of maintaining the paupers. The parishioner, therefore, being a party, could not be called upon as a witness.

Then what is there to differ this from other cases of aggregate bodies, who are parties to a suit. In general cases it cannot be questioned that the declarations of the parties to a suit are evidence against them; and how is this case distinguishable from those upon principle? What credit is due to such evidence is another consideration: his declaration does not conclude the parish; but will be more or less weighty according to his means of knowledge, the genuineness of the declaration, and other circumstances of which the Court would judge. A declaration made by such a party loosely, and without competent grounds of knowledge of the fact, would not be entitled to weight; but the credibility of such evidence is quite a different question from its competency; and it is always open to contradiction like other evidence. Here, however, the father had very competent means of knowledge as to the fact declared by him: but it is sufficient for us to say, that the evidence was competent to be received. * * *

Orders confirmed.[80]

NUSSEAR v. ARNOLD.

(Supreme Court of Pennsylvania, 1825. 13 Serg. & R. 323.)

Error to the Court of Common Pleas of Adams county. The plaintiff in error, Michael R. Nussear, was plaintiff below, and the defendant in error, George Arnold, was defendant below; where a verdict and judgment were rendered in favor of the defendant.

It was a trial on a feigned issue, directed by the register's court, to try the validity of a writing purporting to be the testament and last will of John Arnold, deceased. Three bills of exception were taken to the opinion of the court below on points of evidence.

The third bill of exceptions was to the admission in evidence of the declarations of Margaret King, that the testator was incapable of transacting business. Margaret King was a principal devisee in the will, which gave her the whole estate (except a few legacies to a small amount) for her life; after her death one-half was to her relations, and one-half to the testator's relations.

[80] For the difference between such bodies and ordinary private corporations, see Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n, 77 Conn. 83, 58 Atl. 467 (1904).

In the case of private corporations, the admission of a stockholder is not ordinarily receivable against the corporation.

Errors were now assigned on these points by the plaintiff in error.[81]

TILGHMAN, C. J. * * * The third bill of exception was, to the admission of evidence "of the declarations of Margaret King, that the testator was incapable of transacting business." Margaret King was a principal devisee in the will, which gave her the whole estate (except a few legacies to a small amount), for her life; after her death, one-half was to go to her relations, and one-half to the relations of the testator. It is said, in support of this evidence that Margaret King was the real plaintiff in this issue, the plaintiff on record, Nussear, being no more than her agent. If the whole estate had been devised to her, there would have been no question but her declarations would have been evidence, because the plaintiff on record has, in truth, no interest in the cause, and his name is used as mere matter of form. If the issue had been framed between John Doe and Richard Roe, it would have answered the purpose fully as well, security having been given for the costs, which was done in this case. But Margaret King is not the only person interested in the establishment of the will, and hence arises the difficulty of the present question; the testator's own relations, one of whom is said to be an infant, are also interested. The register's court having ordered the trial of this issue, the verdict and judgment are conclusive as to the personal estate, and if given against the will, will be evidence, not to be contradicted, against all persons claiming personal estate under it. The declarations of Margaret King, therefore, if received in evidence, would affect, not only herself, but others in no manner connected with her, nor implicated in her conspiracy. Granting that she is so much a party to the suit, that her confessions might be evidence against herself, these confessions are not the confessions of the others, who have a separate interest. It is not like the case of joint partners, where the confession of one may be used against both.

We are now to establish a general principle to govern all cases of this kind. It happens, that Margaret King has a large interest under this will; but if her declarations are evidence, so also must be the declarations of a legatee, who takes but five dollars, or any other sum; the quantum of interest will make no difference. It was this consideration which induced the court to reject evidence of the declaration of one of the devisees, in the case of Bovard and wife v. Wallace and another, 4 Serg. & R. 499. Now, that I have mentioned that case, I will correct an error in the opinion of the court, in which it is said, that the same point was determined in Miller v. Miller, 3 Serg. & R. 267, 8 Am. Dec. 651. When the opinion in Bovard v. Wallace was delivered at Chambersburg, the case of Miller v. Miller had not been published, and the manuscript was in the hands of the reporters; hearing that the point had arisen in that case, I thought it had been decided, and thence arose the error. But on mature reflection, I think the decision in Bovard v. Wallace was right. The same question was decided,

[81] Statement condensed and part of opinion omitted.

in the same manner, by the Supreme Court of Massachusetts in Phelps & Co. v. Hartwell & Co., 1 Mass. 71, and that is the only decision, directly in point, which I have been able to find, out of Pennsylvania. It is a case sui generis, where the rights of several persons, depending all on the same instrument, are tried together, and where, so far as concerns personal estate, the law admits of no other mode of trial. Under these circumstances, it is unsafe and unjust, to permit the rights of one to be affected by the declarations of another, and therefore, I am of opinion, that the evidence ought not to have been admitted.

The judgment is to be reversed and a venire facias de novo awarded.[82]

TAYLOR v. GRAND TRUNK RY. CO.

(Supreme Judicial Court of New Hampshire, 1869. 48 N. H. 304, 2 Am. Rep. 229.)

Case to recover for injuries alleged to have been sustained by Emma Taylor, in Sept., 1866, while travelling on defendants' road. In the writ, dated Oct. 3, 1866, plaintiff was described as a minor suing by A. W. Pope, her next friend. At April Term, 1867, the death of plaintiff was suggested, and John Bailey, 2d, her administrator, was admitted to prosecute the action. * * *

It appeared that Emma Taylor died under twenty-one years of age, unmarried, and without issue. Defendants offered to prove declaration made after the accident, and before the death of Emma, by her father, who is still living. The evidence was excluded, subject to defendants' exception.[83]

BELLOWS, J. * * * Upon the subject of the father's admissions it appears that they were made during the daughter's life, and when he had no interest in the suit which she had commenced by her next friend, A. W. Pope; and the competency of those admissions is urged upon the ground that the avails of this suit now prosecuted by the daughter's administrator, will go to the father as the sole representative of the daughter, and that the father thus became the party in interest.

At the time the admissions proposed to be proved were made, the father occupied no position that would render his admissions competent. In Haney v. Donnelly, 12 Gray (Mass.) 361, it was held that the declarations of the father in respect to injuries received by his

[82] And so in Shailer v. Bumstead, 99 Mass. 112 (1868); Schierbaum v. Schemme, 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 604 (1900); McCune v. Reynolds, 288 Ill. 188, 123 N. E. 317 (1919); Old Colony Trust Co. v. Di Cola (Mass.) 123 N. E. 454 (1919); James v. Fairall, 154 Iowa, 253, 134 N. W. 608, 38 L. R. A. (N. S.) 731 (1912), annotated, where a number of the cases are collected.

But see Armstrong v. Farrar, 8 Mo. 627 (1844), where it was assumed that the parties took a joint interest under the will.

[83] Statement condensed and part of opinion omitted.

minor son were not admissible in favor of the defendant in a suit afterwards brought by the son by the father as his next friend. This was put upon the ground that there was no proof that up to the time of those declarations the father was the son's agent.

If in this case the son was regarded as the real plaintiff it would seem to be inequitable that he should be affected by the declarations of his father at a time when he was in no way the agent or representative of the son. If, however, the father after such declarations became the sole party in interest to a suit for injuries to the son, a very different case would be presented.

In the case of negotiable paper transferred after it is dishonored, and sued by the endorsee, the declarations of the endorser made while he held the bill or note are admissible against the endorsee, upon the ground that they are the admissions of one under whom the endorsee derives his title. He will not, however, be affected by admissions of the endorser after the transfer, nor by his statements made before he became the holder of the bill or note.

If the endorser retains an interest in the bill or note, as if he has pledged it for less than the amount due, then his declarations made after the transfer may be received to affect his own interest, but not to affect the interest of the endorsee. 1 Greenl. Evi. § 190, and notes and cases; Bond v. Fitzpatrick, 4 Gray (Mass.) 89, 92; Sylvester v. Crapo, 15 Pick. (Mass.) 92.

If a suit is brought by the holder of such bill or note, the defendant, we think, may prove the admissions of such holder, made before as well as after it came into his possession. At common law the defendant could not call the plaintiff to prove the fact so admitted, and it certainly is just that he should be allowed to prove the admissions, nor can we perceive any legal objection to it. On the contrary the general principle is that the admissions of a party against himself are competent, and we are not aware that this is limited to admissions made while he held the claim in question. Whether his admissions shall affect a third person is a very different question as we have already seen.

Upon the whole, if under the circumstances the father is to be considered the party in interest here, we are of the opinion that his admissions, though made before he acquired such interest, are competent to be proved by the defendant.

The true rule is, we think, laid down in Plant v. McEwen, 4 Conn. 544, in these words: "On general principles, the declarations and acts of the party of record, whether he had or had not an interest in the subject at the time of making or performing them, are admissible in evidence against him." And see Starke's Evi. 4th part, page 30.

The question is, then, whether the father was to be regarded as the party in interest in this cause. If the disposition of the estate is to be governed by our statute of distributions, then it would seem that the whole estate of the daughter including the claim here in suit would

go to the father. It does not appear, however, that the suit is prosecuted by him, nor does it appear that he has the sole interest in it, or that others would not have claims upon the amount recovered, as creditors of the deceased or by way of lien for costs and disbursements in this suit.

In the case of Plant v. McEwen, 4 Conn. 544, before cited, which was a suit upon a probate bond given by the defendant as executor of his father, the plaintiff offered in evidence the acts of the defendant before the testator's death in order to establish a claim against the estate. The evidence was received at the trial, and on motion for a new trial it was held that although the evidence might be competent if it affected the interests of defendant alone, it was not admissible to affect the heirs of the testator, and a new trial was granted. * * *

Upon these authorities it does not appear that enough has been shown to give the father the character of a party in interest, or to make his declarations admissible against the administrator or the persons he may represent. Should he be shown to the party in interest for whose benefit the suit is prosecuted, his admissions would be competent the same as if he were the party of record; for the law, with a view to evidence, regards the real parties. Starkie's Evi. 4th part, pages 31, 32, and Carleton v. Patterson [29 N. H. 580], before cited; 1 Greenl. Evi. 180. * * *

New trial granted.

SHADDOCK et ux. v. TOWN OF CLIFTON.

(Supreme Court of Wisconsin, 1867. 22 Wis. 114, 94 Am. Dec. 588.)

Action by husband and wife for injuries to the wife alleged to have been caused by the negligence of the defendant in maintaining one of its streets in an unsafe condition, whereby the wagon in which the wife was riding was overturned. The trial court excluded certain admissions by the husband.[84]

DIXON, C. J. Has the husband such an interest in the action that his admissions of facts tending to defeat it ought to be received in evidence? We think he has. The action is by husband and wife, to recover damages for injuries done to the person of the wife. Such damages, when recovered, are not the separate property of the wife, under the statute enlarging the rights of married women as to property. Rights of actions for torts of this nature are not included, but only such real and personal property as a married woman may receive by inheritance, or by gift, grant, devise, or bequest from any person other than her husband. Rev. St. chap. 95, § 3. The damages, therefore, when recovered, will belong to the husband. He may re-

[84] Statement condensed and part of opinion omitted.

duce them to possession, and dispose of them as he pleases. He controls the action, and may discontinue it, or give a release. Any settlement made or discharge properly given by him, will bind the wife. Southworth v. Packard, 7 Mass. 95; Beach v. Beach, 2 Hill (N. Y.) 260, 38 Am. Dec. 584; Ballard v. Russell, 33 Me. 196, 54 Am. Dec. 620. It is true, should the husband die before the wife, and before a recovery, and without having released the damages, the right of action would survive to the wife, and it might be prosecuted in her name alone. But the right of the wife is so remote and uncertain as scarcely to be considered during the lifetime of the parties. It may, with almost strict legal accuracy be said, that the husband has the exclusive interest. For these reasons, we think his admissions should be received. * * *

The admissions of the husband being receivable, the next question is, whether there was anything in the nature of the admissions offered which justified the circuit court in excluding them from the consideration of the jury. The first offer was, to prove by the witness Daniel Currier, that in an interview between him and the husband, the day after the accident happened, the husband said that the accident would not have occurred if Anna McGray (the person driving the team) had not struck the off horse, and made him jump against the near one and push him off. It appears from other parts of the record, that the husband was not present at the time and place of the accident, and consequently that his knowledge or information as to what then occurred must have been derived from the statements of either Anna McGray or his wife, or both. For the plaintiffs it is contended that the admission was properly rejected, because it was of matter of hearsay.[85] Mr. Greenleaf (1 Greenl. Ev. § 202) says it has been made a question, whether the admission of matters stated as mere hearsay

[85] Napton, J., in Sparr v. Wellman, 11 Mo. 230 (1847): "It is the province of a witness to state facts and circumstances, from which the jury may draw inferences, but is not for the witness to state his own inferences or opinions. The language used by Sparr was therefore properly accompanied with the circumstances under which it was used, and it was for the jury to determine what meaning should be given to it under these circumstances. The circumstances detailed by the witness—that he was a collector of news; that the conversation was about dinner time, when a crowd was assembled; that it was a hurried conversation—might lead the jury to the conclusion, that Sparr was merely stating what he had heard from others, and about which he had formed no opinion. If this was the conclusion of the jury, it was their duty to disregard it. It could not amount to an admission. On the other hand, there were other circumstances, in addition to those mentioned by the witness, but which were in evidence, from which a different conclusion might have been drawn. Sparr was an innkeeper, and Wellman was his guest. A robbery was alleged—and the innkeeper himself, in this conversation with Crenshaw, and afterwards with another witness, speaks of it as a fact, without qualification. Might it not be inferred, from the relation of the parties, that the innkeeper, upon hearing such a report, would feel sufficient solicitude for the credit of his house, to make the necessary inquiries and satisfy himself of the truth of the reported robbery, before he would contribute to its promulgation through the columns of a daily newspaper? If he had made such inquiries, and became convinced of the truth of the

is to be received in evidence, and leaves it in doubt. The Court of Appeals, by a majority decision, in Stephens v. Vroman, 16 N. Y. 381, held such an admission not receivable. But the admission here offered was not of a matter stated as mere hearsay, but of a matter stated as a fact—a fact not, however, as it would seem, within the personal knowledge of the party making the admission, but derived by information from others. Ought such an admission to be received? We are inclined to think that it should. Verbal admissions are in some respects evidence of a very weak character; and, now that the parties themselves are in general competent witnesss, they are open to the fullest explanation. If the husband had received such information as satisfied him that the striking of the horse was the cause of the accident, and as induced him deliberately to admit it as a fact, it was certainly some evidence to go to the jury to show that the plaintiffs' claim of damages was unfounded. It was an admission strongly against the interest of the party making it, and appears to us to be within the general rule sanctioning evidence of that nature. * * *

Venire de novo.[86]

SPARF et al. v. UNITED STATES.

(Supreme Court of the United States, 1895. 156 U. S. 51, 715, 15 Sup. Ct. 278, 39 L. Ed. 343.)

Mr. Justice HARLAN [87] delivered the opinion of the court.

The plaintiffs in error and Thomas St. Clair were indicted jointly for the murder of Maurice Fitzgerald upon the high seas, on board of an American vessel, the bark Hesper, as set forth in the indictment mentioned in St. Clair v. U. S., 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936. On motion of the accused, it was ordered that they be tried separately. St. Clair was tried, found guilty of murder, and sen-

report, he was then stating as fact, what he had not only heard, but believed. An admission is the statement of a fact against the interest of a party making it—but it is not essential to constitute it an admission, that the fact should have come under the personal observation of the declarant. Undoubtedly admissions of the latter kind are much stronger than where the declaration is of a fact, of which the party could have no personal knowledge. But where a party believes a fact upon evidence sufficient to convince him of its existence, his declaration of the existence of that fact, if against his interest, is evidence against him. It is no doubt evidence of a very unsatisfactory character, depending altogether on the circumstances under which it is made, but it is competent."

[86] Where modern statutes have destroyed the husband's interest in the wife's chose in action, the fact that he is joined as a nominal party with her is not sufficient to make his admission competent against her. White v. Ingram, 110 Mo. 474, 19 S. W. 827 (1892).

[87] Part of opinion omitted; also dissenting opinions of Mr. Justice Brewer and Mr. Justice Gray.

tenced to suffer the punishment of death. Subsequently the order for separate trials was set aside, and the present defendants were tried together, and both were convicted of murder. A motion for a new trial having been overruled, a like sentence was imposed upon them.

The general facts of this case do not differ from those proved in St. Clair's Case, and some of the questions arising upon the present assignments of error were determined in that case. Only such questions will be here examined as were not properly presented or did not arise in the other case, and are of sufficient importance to require notice at our hands.

In the night of January 13, 1893, Fitzgerald, the second mate of the Hesper, was found to be missing, and it was believed that he had been killed, and his body thrown overboard. Suspicion being directed to St. Clair, Sparf, and Hansen, part of the crew of the Hesper, as participants in the killing, they were put in irons, by order of Capt. Sodergren, master of the vessel, and were so kept during the voyage from the locality of the supposed murder to Tahiti, an island in the South Pacific, belonging to the French government. They were taken ashore by the United States consul at that island, and subsequently were sent, with others, to San Francisco, on the vessel Tropic Bird.

At the trial, Capt. Sodergren, a witness for the government, was asked whether or not after the 13th day of January, and before reaching Tahiti, which was more than 1,000 miles from the locality of the alleged murder, he had any conversation with the defendant Hansen about the killing of Fitzgerald. This question having been answered by the witness in the affirmative, he was fully examined as to the circumstances under which the conversation was held. He said, among other things, that no one was present but Hansen and himself. Being asked to repeat the conversation referred to, the accused, by the counsel who had been appointed by the court to represent them, objected to the question as "irrelevant, immaterial, and incompetent, and upon the ground that any statement made by Hansen was not and could not be voluntary." The objection was overruled, and the defendants duly excepted. The witness then stated what Hansen had said to him. That evidence tended strongly to show that Fitzgerald was murdered pursuant to a plan formed between St. Clair, Sparf, and Hansen; that all three actively participated in the murder; and that the crime was committed under the most revolting circumstances.

Thomas Green and Edward Larsen, two of the crew of the Hesper, were also witnesses for the government. They were permitted to state what Hansen said to them during the voyage from Tahiti to San Francisco. This evidence was also objected to as irrelevant, immaterial, and incompetent, and upon the further ground that the statement the accused was represented to have made was not voluntary. But the objection was overruled, and an exception taken. * * *

The declarations of Hansen, as detailed by Sodergren, Green, and

Larsen, were clearly admissible in evidence against him. There was no ground on which their exclusion could have been sustained. * * *

The declarations of Hansen after the killing, as detailed by Green and Larsen, were also admissible in evidence against Sparf, because they appear to have been made in his presence, and under such circumstances as would warrant the inference that he would naturally have contradicted them if he did not assent to their truth.

But the confession and declarations of Hansen to Sodergren after the killing of Fitzgerald were incompetent as evidence against Sparf. St. Clair, Hansen, and Sparf were charged jointly with the murder of Fitzgerald. What Hansen said after the deed had been fully consummated, and not on the occasion of the killing, and in the presence only of the witness, was clearly incompetent against his codefendant, Sparf, however strongly it tended to connect the latter with the commission of the crime. If the evidence made a case of conspiracy to kill and murder, the rule is settled that "after the conspiracy has come to an end, and whether by success or by failure, the admissions of one conspirator by way of narrative of past facts are not admissible in evidence against the others." Logan v. U. S., 144 U. S. 263, 309, 12 Sup. Ct. 617, 36 L. Ed. 429; Brown v. U. S., 150 U. S. 93, 98, 14 Sup. Ct. 37, 37 L. Ed. 1010; Wright, Cr. Consp. (Carson's Ed.) 212, 213, 217; 1 Greenl. Ev. § 233. The same rule is applicable where the evidence does not show that the killing was pursuant to a conspiracy, but yet was by the joint act of the defendants. * * *

We are of opinion that as the declarations of Hansen to Sodergren were not, in any view of the case, competent evidence against Sparf, the court, upon objection being made by counsel representing both defendants, should have excluded them as evidence against him, and admitted them against Hansen. The fact that the objection was made in the name of both defendants did not justify the court in overruling it as to both, when the evidence was obviously incompetent, and could not have been made competent against Sparf, and was obviously competent against Hansen. It was not necessary that counsel should have made the objection on behalf of one defendant, and then formally repeated it, in the same words, for the other defendant. If Sparf had been tried alone, a general objection in his behalf, on the ground of incompetency, would have been sufficiently definite. Surely, such an objection coming from Sparf when tried with another ought not to be deemed ineffectual because of the circumstance that his counsel, who, by order of the court, represented also his codefendant, incautiously spoke in the name of both defendants. Each was entitled to make his own defense, and the jury could have found one of them guilty, and acquitted the other. Insurance Co. v. Hillmon, 145 U. S. 285, 293, 12 Sup. Ct. 909, 36 L. Ed. 706. See, also, Com. v. Robinson, 1 Gray (Mass.) 555, 560.

For the error of the court in not sustaining the objection referred to so far as it related to Sparf, the judgment must be reversed as to him. * * *[ss]

WILLIAMS v. JUDY.

(Supreme Court of Illinois, 1846. 8 Gilman, 282, 44 Am. Dec. 690.)

CATON, J. This suit was brought by Judy against Williams, on a promissory note made by Williams, and payable to one Whiteside, and dated on the 13th of April, 1839, for the sum of two hundred dollars, and payable 30 days from date, and by Whiteside assigned to Judy. The defendant filed pleas of the general issue, and that the consideration of said note was for money won at gaming. On the trial of the said cause, the defendant proved by one Reed, that he had seen the note in the possession of Whiteside in September, 1839, after the same became due, and that at that time the note had not been assigned. The defendant then offered to prove, that at the same time Whiteside, the payee of the note, admitted that it was given for money won at gaming. Upon the objection of the plaintiff's counsel, the court held these admissions to be incompetent evidence. This decision of the court presents the only material question for our consideration, and is presented for the first time to this court for its decision.

We find it abundantly settled by authority, and it is well supported by reason, that the admissions of an assignor of a chose in action may be given in evidence against the assignee, if the admissions were against his interest at the time, especially if a cause of action existed presently, when the admissions were made.

In the case of Pocock v. Billing, 2 Bing. 269, Best, C. J., said: "In order to render these declarations receivable, it ought to have been shown, that the party making them was the holder of the bill at the time. They are admissions, and as such receivable only when they are supposed to be adverse to the interest of the party." In this case subsequently, at Nisi Prius, these admissions of the assignor of the bill were admitted in evidence against the assignee, it having been proved that the admissions were made before the assignment. Ry. & Mood. 127.

In Shirley v. Todd, 9 Greenl. (Me.) 83, it was held that such admissions were competent evidence. Weston, J., in giving the opinion of the court says: "We are satisfied that the declarations of Moses Shirley, the payee of the order, while the interest was in him, are ad-

[ss] See, also, Rex v. Martin, 9 Ont. L. R. 218, 2 B. R. C. 336 (1905), annotated, where such evidence was admitted with a caution to the jury, not to consider it against the other defendant; in this case the former practice of admitting only such parts of the statement as referred to the speaker is disapproved as unfair to him.

missible in evidence." In that case the admissions were made, as in this, after the maturity of the paper, and before its transfer.

We deem it unnecessary to refer to the great multitude of cases on this subject, especially as they are principally all collected and commented upon by Messrs. Cowen & Hill, in their notes to Phillips' Evidence, 663–668. It may be said that there is but one court whose decisions form an exception to this rule, and that is the supreme court of New York. Since the collection of the cases on this subject by Cowen & Hill, this question has again been before that court, in the case of Beach v. Wise, 1 Hill (N. Y.) 612. There the present chief justice of that court, in the decision of the case, expressed his disapprobation of the rule, as formerly established by that court, but finally follows the former decisions, not feeling himself at liberty to overrule the decisions of those who had gone before him. He says: "As an original question I should be unable to see any settled distinction between cases relating to real property, where the declarations of the former owner are constantly admitted, and those relating to choses in action and other personal property, where, as we have seen, such declarations are rejected." I confess myself unable to see any distinction at all.

It was objected by the defendant in error, that there is no averment in the pleas, that the note was assigned after it became due. That was unnecessary, for by our statute, notes, etc., given for money won at gaming are declared to be absolutely void, even in the hands of the assignee; hence, it was unnecessary to show that the note was received by the assignee mala fide. Besides, this is not a question of pleading, but of evidence, and the presence or absence of such an averment could have no influence upon the admissibility of the proposed evidence.

The judgment of the circuit court must be reversed with costs, and the cause remanded for a new trial.

Judgment reversed.[88]

VROOMAN v. KING.

(Court of Appeals of New York, 1867. 36 N. Y. 477.)

DAVIES, C. J.[89] This is an action of ejectment; and upon the trial the plaintiff sought to show title in herself and out of the defendant, by proving the declarations of one Reeves, a former owner of the land, and through whom the defendant claimed title.

[88] Accord: Murray v. Oliver, 18 Mo. 405 (1853), admission by the assignor of a bond; Robb v. Schmidt, 35 Mo. 290 (1864), admission of payment by the prior holder of a past-due promissory note.

Contra: Paige v. Cagwin, 7 Hill (N. Y.) 361 (1843), excluding the admission of payment by the prior holder of a past due note.

[89] Part of opinion of Davies, C. J., and opinion of Grover, J., omitted.

Solomon Higgins, a witness for the plaintiff, was asked, "While Reeves was in possession, what did you hear him say in relation to the title or ownership of that land?" Answer—"I heard him say he had no title to the land; he had better get a little something for it than lose it; that the widow Kissam was coming to claim it. (The defendant's counsel objected to the evidence, as being what Reeves had said after he sold his possession. Objection overruled for the present, and exception taken.) I heard Reeves say to his wife that he had nothing but a squatter's title; she was desiring to know why he sold it (same objection, ruling and exception as above); the first conversation was with a young man who lived there; the next was when he sold; the old man Reeves had been to Jones, and when he came home he said: 'Wife, I have sold my pine land;' she said, 'You have been in a scrape and given old Jim Jones that land;' he said he had not; that he had sold it to Jones and given him twenty years to pay for it in; that the widow Kissam was coming to take the land away from him; that he could not hold it if she came." This evidence here objected to by the defendant's counsel, because it was sayings of Reeves after the sale of land by him, and not evidence against Jones and those claiming under him. The objection was overruled for the present, and to be considered in the charge, and the defendant excepted. * * *

Were the statements made by Reeves after the sale by him and while in possession of the premises, competent evidence? The reason why the declarations or statements of a party are ever admissible is that they affect his title or possession and characterize the same while owner or in possession, and are consequently binding upon the party making the same, and his privies. But if made by a party not an owner at the time, upon what principle can they be held to affect his grantee? Thompson, Ch. J., in Jackson v. Aldrich, 13 Johns. 106, thought this rule very clear, as he says: "For it is a proposition that cannot be questioned that a grantor cannot after the execution of his deed lawfully do any act to prejudice the rights of his grantee; nor are declarations, confessions or admissions of his to be admitted against the grantee."

The same principle was affirmed by the chancellor in Varick v. Briggs, 6 Paige, 323. The doctrine is very fully discussed by the chancellor in Padgett v. Lawrence, 10 id. 170, 40 Am. Dec. 232. The chancellor says: "As a general rule, declarations made by a person in possession of real estate as to his interest or title in the property may be given in evidence against those who subsequently derive title under him, in the same manner as they could have been used against the party himself if he had not parted with his possession or interest. On the other hand, it is equally well settled that no declaration of a former owner of the property, made after he had parted with his interest therein, can be received in evidence to affect the legal or equitable title to the premises. * * *

The declarations of Reeves, while a mere tenant at sufferance of Jones, as he certainly was after the sale to him, could not under any circumstances be received as evidence against the latter, or those claiming under him, to prejudice or impair his or their title to the premises. And if it be doubtful whether the declarations were made by the grantor before or after he made the sale and gave his deed, they cannot be received in evidence. It is incumbent on the party claiming to put in evidence such declarations to lay the proper foundation for their introduction. It therefore becomes his duty clearly to establish in the first instance that the declarations were made before the execution of the deed, and before he parted with his interest in the premises. 1 Cow. & Hill Notes, 686; Stockett v. Watkins' Adm'rs, 2 Gill & J. (Md.) 326, 343, 344, 20 Am. Dec. 438.

It is very clear that in this case the whole statement of Reeves must be taken as an entirety.[91] And by one portion of it it distinctly appears that previous to the making thereof he had sold the premises to Jones. This fact thus appearing, the residue of the declaration in relation to his title was inadmissible, and should not have been received. And as it already had been, notwithstanding the defendant's objection, it should have been stricken out on his motion and wholly withdrawn from the consideration of the jury. For this error a new trial must be granted. * * *

Judgment reversed.

[91] By the court in Rex v. Paine, 5 Modern, 163 (1696): "As to the first point, there was no proof that he was the composer of it, or that he wrote it, but by his own confession before the mayor. Now if such confession shall be taken as evidence to convict him, it is but justice and reason, and so allowed in the civil law, that his whole confession shall be evidence as well for as against him, and then there will be no proof of a malicious and seditious publication of this paper; for he confessed that it was delivered by mistake." And so in Randle v. Blackburn, 5 Taunt. 245 (1813).

Best, C. J., in Smith v. Blandy, R. & M. 257 (1825): "I agree with the case just stated, which seems perfectly consistent with the account given of Remmie v. Hall. The whole of what a party says at the same time must be given in evidence and what he says in his favor must not be taken as true, but must be left, under all the circumstances, for the jury to say whether they believe it or not. I think this paper must be left to the jury without further proof."

But the party against whom the admission is used is not entitled to prove distinct assertions in his own favor, not limiting or qualifying the admission, though made in the course of the same conversation. Prince v. Samo, 7 Ad. & El. 627 (1838), disapproving the dictum to the contrary by Lord Tenterden in the Queen's Case, 2 Br. & Ring. 297 (1820).

HUGHES v. DELAWARE & H. CANAL CO.

(Supreme Court of Pennsylvania, 1896. 176 Pa. 254, 35 Atl. 190.)

This was an action of trespass for the death of plaintiff's husband who had been struck and injured at a railroad crossing by a locomotive operated by the defendant.

When Martin Crippen, a witness for defendant, was on the stand, defendant offered to prove by him that on September 10, 1890, he called upon William J. Hughes, plaintiff's husband, at the hospital; that Mr. Hughes there made a statement to him which he put down in a small memorandum book; that he dictated this statement to W. H. Jessup, Jr., who reduced it to writing, and the witness thereupon took it back to the hospital and read it to Mr. Hughes, who thereupon stated that it was correct and signed it in his presence; which statement is as follows:

"Scranton, Sept. 10, 1890.

"I, William J. Hughes was driving down Carbon street, in a westerly direction, on Sept. 3, 1890, about 6:45 o'clock in the evening in an open one-horse buggy. David Y. Jones was in the buggy with me. I was driving and we drove upon the Carbon street crossing. We were struck by a locomotive and both thrown out. The horse was killed and the buggy broken to pieces. We were driving along very easy and did not stop before we were struck, and we did not know there was any train coming. [Signed] William J. Hughes.

"Witness: I. L. Sutto.

"U. G. Bull."

This was offered for the purpose of showing the declaration of William J. Hughes, the decedent, for the injuries to whom, resulting in his death, this suit was brought, and to substantiate the proposition that decedent was guilty of contributory negligence, and that therefore the plaintiff cannot recover. The offer was objected to by counsel for plaintiff as incompetent. The court overruled the offer, saying, "We think this offer is incompetent. We do not understand that the present plaintiff is the successor in interest of the decedent. The action is an independent action given by the statute to the widow, and, therefore, we think it is not the admissions of a party, and that it is a mere declaration, not made under the sanction of an oath, and therefore incompetent."

Exception noted for defendant, at whose request a bill was sealed.

The defendant's seventh point that upon the whole evidence the decedent was guilty of contributory negligence and the plaintiff was not entitled to recover, was reserved, and motion for judgment thereon for defendant non obstante veredicto was afterwards overruled.

Verdict for plaintiff for $9,499.50. The defendant appealed.[92]

[92] Statement condenesed and part of opinion omitted.

MITCHELL, J. * * * For the same reason it was also error to exclude the statement by Hughes, the plaintiff's husband. It should have gone to the jury, in connection with the circumstances under which it was made. This was excluded, also, on the ground that it was not made by a party to the suit, and was not, therefore, admissible against the plaintiff. This, however, is no more tenable than the other. At the time his statement was made, the only right of action there was at all was in Hughes. Plaintiff had no claim until he died, and then the foundation of her claim was the injury to him, for which he might have sued in his lifetime. If the defendant would not have been liable to him in the first instance, it was not made liable to her by his death. We are not aware of any case, and certainly our attention has not been called to any, in which a widow has recovered for injuries to her husband, where he could not have done so himself if he had survived; and on principle, it is perfectly clear that she never can do so, for the original right of action is in him, and hers is but in succession or substitution for his, where he has not asserted it himself. If he has done so, his action survives; if he has not, then by virtue of the statute she brings hers, in its place, but for the same cause. Birch v. Railroad Co., 165 Pa. 339, 30 Atl. 826. In this connection appellee cites the remarks in Bradford City v. Downs, 126 Pa. 622, 17 Atl. 884,[98] as to the declarations of an infant, who was injured, not being admissible against the father, in an action for loss of services, unless they were part of the res gestæ. The cases might easily be distinguished,on the ground that the father's action in his own right, and not derived through the infant. A much closer analogy may be found in the declarations of a predecessor in title while in possession, which have always been held admissible. Weidman v. Kohr, 4 Serg. & R. 174. But the point in Bradford City v. Downs was comparatively unimportant, and in Ogden v. Railroad Co. (Pa.) 16 Atl. 353, the court distinctly declined to include it in the affirmance of the judgment. We entertain so strong a doubt of its soundness that we should be unwilling to extend the rule to the present case, even if the analogy were closer than it is.

It is not worth while to discuss the minor assignments of error, or the evidence relative to the place where the deceased stopped to look and listen, because, on the whole case, his contributory negligence was so unquestionable that the court should have pronounced upon it as a matter of law. * * *

Judgment reversed.

[98] See to the same effect, Farber v. Missouri Pac. Ry. Co., 139 Mo. 272, 40 S. W. 882 (1897).

FAIRLIE v. HASTINGS.

(Court of Chancery, 1804. 10 Ves. 123.)

THE MASTER OF THE ROLLS.[94] The subject of this cause is a loan of money by the late Plaintiff Maha Rajah Nobkissen to the Defendant. As it is not by bill in Equity that money lent is to be recovered, it is incumbent upon the Plaintiff to state, and to prove, some ground for coming into this Court for the payment, or the means of obtaining payment of his demand. The question of jurisdiction must depend upon the allegations of the bill; which states, that the Defendant applied to the Plaintiff for the loan of three lacks of rupees upon the security of the Defendant's bond; that the Plaintiff agreed to advance that sum by instalments; that a bond was executed; which it was agreed should remain with Caunto Baboo, an agent of the Defendant, until the whole money should be advanced, and then should be delivered to the Plaintiff; that the money was advanced, but the Plaintiff never received the bond; Caunto Baboo in answer to his repeated applications at length informing him that it had been delivered up to the Defendant.

In support of this statement the Plaintiff has not read, and could not read, any part of the answer. But the Plaintiff has gone into evidence of declarations by Gobindee Baboo and Caunto Baboo; and the question is, whether these declarations can amount to proof of such facts as are alleged by the bill.

Upon that question my opinion is, that these declarations do not come within the principle upon which they are supposed to be admissible. As a general proposition, what one man says, not upon oath, cannot be evidence against another man. The exception must arise out of some peculiarity of situation, coupled with the declarations made by one. An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement; and in many cases by his acts. What the agent has said may be what constitutes the agreement of the principal; or the representations or statements made may be the foundation of, or the inducement to, the agreement. Therefore, if writing is not necessary by law, evidence must be admitted, to prove the agent did make that statement or representation. So, with regard to acts done, the words with which those acts are accompanied frequently tend to determine their quality. The party, therefore, to be bound by the act, must be affected by the words. But, except in one or the other of those ways, I do not know, how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it; though it may have some relation to the business, in which the person making that assertion was employed as agent. For instance, if it was a material fact, that there was the bond of the

[94] Statement omitted.

Defendant in the hands of Caunto Baboo, that fact would not be proved by the assertion, that Gobindee Baboo, supposing him an agent, had said there was; for that is no fact, that is, no part of any agreement which Gobindee Baboo is making, or of any statement he is making, as inducement to an agreement. It is mere narration: communication to the witness in the course of conversation; and therefore could not be evidence of the existence of the fact.

The admission of an agent cannot be assimilated to the admission of the principal. A party is bound by his own admission; and is not permitted to contradict it.[95] But it is impossible to say, a man is precluded from questioning or contradicting any thing any person has asserted as to him, as to his conduct or his agreement, merely because that person has been an agent of his. If any fact, material to the interest of either party, rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion. Lord Kenyon carried this so far as to refuse to permit a letter by an agent to be read to prove an agreement by the principal; holding, that the agent himself must be examined; Maesters v. Abram, 1 Esp. N. P. Cas. 375. If the agreement was contained in the letter, I should have thought it sufficient to have proved that letter was written by the agent: but, if the letter was offered as proof of the contents of a pre-existing agreement, then it was properly rejected. This doctrine was discussed incidentally in Bauerman v. Radenius, 7 Term Rep. 663; and in that case there is a reference to another, Biggs v. Lawrence, 3 Term Rep. 454, in which Mr. Justice Buller held, that a receipt given by an agent for goods, directed to be delivered to him, might be read in evidence against the principal. The Counsel in Bauerman v. Radenius state, that the contrary had been frequently since held by Lord Kenyon at Nisi Prius, without its having ever been questioned. That statement does not appear to have been denied upon the other side; and seems to have been acquiesced in by Lord Kenyon; who said, "that was not the point, upon which the case was argued or determined;" meaning the point, that such a receipt could be admitted in evidence.

It will be found, however, that this question can hardly be said to arise in this case; when it is considered, what the concern of Caunto Baboo in this transaction was, and what are the facts, in proof of which his declaration was offered. Caunto Baboo is stated to have been in the employment of the Defendant. One of the witnesses says, he had the general management of his pecuniary concerns. But of this particular transaction he does not appear, either by the bill or the witness, to have had the management. Upon the whole of the statement and evidence it does not appear, that Caunto Baboo was concerned in the negotiation of the loan; that he was employed as the

[95] The early notion, that a party was bound by an admission, so that he could not contradict or explain it, has long since been exploded. Ridgway v. Philip, 1 C. M. & R. 415 (1834); Heane v. Rogers, 9 B. & C. 577 (1829); Anvil Mining Co. v. Humble, 153 U. S. 540, 14 Sup. Ct. 876, 38 L. Ed. 814 (1894).

agent for this purpose. The statement of the bill represents the Defendant himself to have made the agreement: therefore any representation of Caunto Baboo relative to an agreement, not stated to have been made by him, would not be the statement of an agent: supposing, such statement was to be admitted in evidence. The Plaintiff fails first in showing Caunto Baboo was the agent of the Defendant. In this case, such a fact as Counto Baboo is represented to have stated, is matter, not of admission, but of testimony. A man cannot admit what another has done, or has agreed to do: but he must prove it. When put upon the proof, that the Defendant made the agreement, it is absurd to say, Caunto Baboo admitted, he made it. In truth he does not admit, that the Defendant made it. But, suppose Caunto Baboo distinctly proved the agent of the Defendant, and that he said, he knew, the Defendant did make the agreement for this loan, and did promise and undertake to give a bond for the money, and did execute a bond, but gave the bond, not to the Plaintiff, but to the witness, and he gave it back to the Defendant, who undertook to calculate the interest, and to give a bond for the whole: all this would be no evidence whatsoever of what the Defendant had agreed to do, or had done, or omitted to do; and without evidence of his agreement, or his acts, or his breach of agreement, it is utterly impossible to support this bill.

Bill dismissed.

WOOD et al. v. BRADDICK.

(Court of Common Pleas, 1808. 1 Taunt. 104.)

This was an action brought to recover from the Defendant the proceeds of certain linens, which the bankrupts, in the year 1796, had consigned for sale in America, as the Plaintiffs alleged to the Defendant jointly with one Cox, who was then his partner, but, as the Defendant contended, to Cox only. The Defendant pleaded the general issue, and the statute of limitations: at the trial at Guildhall, before Mansfield, C. J., the Plaintiffs produced in evidence a letter from Cox, dated the 24th of June, 1804, stating a balance of £919. to be then due to the bankrupts upon this consignment.

It was in proof that on the 30th of July, 1802, Braddick and Cox dissolved their partnership, as from the 17th of November, 1800.

Cockell and Lens, Serjts., objected, that this letter being written after the dissolution of the partnership, was not admissible evidence to charge Braddick. The Chief Justice overruled the objection, but reserved the point: and the jury being of opinion that the agency was undertaken by Cox on the partnership account, found a verdict for the Plaintiff.

Cockell, Serjt., now moved for a new trial. He cited a case of Petherick v. Turner and Another, tried in Mich. term, 42 Geo. 3, before

Lord Alvanley, C. J. "Assumpsit for wages against two Defendants, who had been partners. One of them suffered judgment to go by default: the other pleaded non assumpsit. At the trial the Plaintiff proposed to read in evidence the answer, which the first mentioned Defendant had put in to a bill in the Exchequer, filed after the dissolution of the partnership against the same parties: the bill charged collusion, and also charged that the debt for which this action was brought, had not been paid; the answer denied the collusion, but admitted the money had not been paid. Lord Alvanley, C. J., held that it would have been good evidence against the Defendant who put in the answer, but that being made after the dissolution of the partnership, it could not be received as evidence against the other Defendant, and rejected it." Cockell, Serjt., inferred from this case, that the evidence given by a partner after the partnership had ceased, is not admissible for the purpose of proving the joint undertaking of himself and his former partner, even though the former existence of their partnership is established by other proof.

MANSFIELD, C. J. Clearly the admission of one partner, made after the partnership has ceased, is not evidence to charge the other, in any transaction which has occurred since their separation: but the power of partners with respect to rights created pending the partnership, remains after the dissolution. Since it is clear that one partner can bind the other during all the partnership, upon what principle is it, that from the moment when it is dissolved, his account of their joint contracts should cease to be evidence? and that those who are to-day as one person in interest, should tomorrow become entirely distinct in interest with regard to past transactions which occurred while they were so united?

HEATH, J. Is it not a very clear proposition, that when a partnership is dissolved, it is not dissolved with regard to things past, but only with regard to things future? With regard to things past, the partnership continues, and always must continue.

Cockell took nothing by his motion.

UNITED STATES v. GOODING.

(Supreme Court of the United States, 1827. 12 Wheat. 460, 6 L. Ed. 693.)

STORY, J.[99] This is the case of an indictment against Gooding for being engaged in the slave-trade, contrary to the prohibitions of the act of Congress of the 20th of April, 1818. It comes before us upon a certificate of division of opinions in the circuit court of the district of Maryland, upon certain points raised at the trial. We take this opportunity of expressing our anxiety, lest, by too great indulgence to the

[99] Statement and part of opinion omitted.

wishes of counsel, questions of this sort should be frequently brought before this court, and thus, in effect, an appeal in criminal cases become an ordinary proceeding, to the manifest obstruction of public justice, and against the plain intendment of the acts of Congress. Cases of real doubt and difficulty, or of extensive consequence as to principle and application, and furnishing matter for very grave deliberation, are those alone which can be reasonably presumed to have been within the purview of the legislature in allowing an appeal to this court upon certificates of division. In this very case some of the questions certified may have been argued and decided in the court below upon the motion to quash the indictment; and there are others upon which it is understood that the circuit court had no opportunity of passing a deliberate judgment.

The first question that arises is upon the division of opinions whether, under the circumstances of the case, the testimony of Captain Coit, to the facts stated in the record, was admissible. That testimony was to the following effect: That he, Captain Coit, was at St. Thomas while the General Winder was at that island, in September, 1824, and was frequently on board the vessel at that time; that Captain Hill, the master of the vessel, then and there proposed to the witness to engage on board the General Winder as mate for the voyage then in progress, and described the same to be a voyage to the coast of Africa, for slaves, and thence back to Trinidad de Cuba; that he offered to the witness 70 dollars per month, and five dollars per head for every prime slave which should be brought to Cuba; that on the witness inquiring who would see the crew paid in the event of a disaster attending the voyage, Captain Hill replied, "Uncle John," meaning, (as the witness understood,) John Gooding, the defendant.

It is to be observed that, as preliminary to the admission of this testimony, evidence had been offered to prove that Gooding was owner of the vessel; that he lived at Baltimore, where she was fitted out; and that he appointed Hill master, and gave him authority to make the fitments for the voyage, and paid the bills therefor; that certain equipments were put on board peculiarly adapted for the slave-trade; and that Gooding had made declarations that the vessel had been engaged in the slave-trade, and had made him a good voyage. The foundation of the authority of the master, the nature of the fitments, and the object and accomplishment of the voyage, being thus laid, the testimony of Captain Coit was offered as confirmatory of the proof, and properly admissible against the defendant. It was objected to, and now stands upon the objection before us. The argument is, that the testimony is not admissible, because, in criminal cases, the declarations of the master of the vessel are not evidence to charge the owner with an offence; and that the doctrine of the binding effect of such declarations by known agents, is, and ought to be, confined to civil cases. We cannot yield to the force of the argument. In general, the rules of evidence in criminal and civil cases are the same. Whatever the agent

does, within the scope of his authority, binds his principal, and is deemed his act. It must, indeed, be shown that the agent has the authority, and that the act is within its scope; but these being conceded or proved, either by the course of business or by express authorization, the same conclusion arises, in point of law, in both cases. Nor is there any authority for confining the rule to civil cases. On the contrary, it is the known and familiar principle of criminal jurisprudence, that he who commands or procures a crime to be done, if it is done, is guilty of the crime, and the act is his act. This is so true, that even the agent may be innocent, when the procurer or principal may be convicted of guilt, as in the case of infants or idiots employed to administer poison. The proof of the command or procurement may be direct or indirect, positive or circumstantial; but this is matter for the consideration of the jury, and not of legal competency. So, in cases of conspiracy and riot, when once the conspiracy or combination is established, the act of one conspirator, in the prosecution of the enterprise, is considered the act of all, and is evidence against all. Each is deemed to consent to or command what is done by any other in furtherance of the common object. Upon the facts of the present case, the master was just as much a guilty principal as the owner, and just as much within the purview of the act by the illegal fitment.

The evidence here offered was not the mere declarations of the master upon other occasions totally disconnected with the objects of the voyage. These declarations were connected with acts in furtherance of the objects of the voyage, and within the general scope of his authority as conductor of the enterprise. He had an implied authority to hire a crew, and do other acts necessary for the voyage. The testimony went to establish that he endeavored to engage Captain Coit to go as mate for the voyage then in progress, and his declarations were all made with reference to that object, and as persuasives to the undertaking. They were, therefore, in the strictest sense, a part of the res gestæ, the necessary explanations attending the attempt to hire. If he had hired a mate, the terms of the hiring, though verbal, would have been part of the act, and the nature of the voyage, as explained at the time, a necessary ingredient. The act would have been so combined with the declarations, as to be inseparable without injustice. The same authority from the owner which allows the master to hire the crew, justifies him in making such declarations and explanations as are proper to attain the object. Those declarations and explanations are as much within the scope of the authority as the act of hiring itself. Our opinion of the admissibility of this evidence proceeds upon the ground that these were not the naked declarations of the master, unaccompanied with his acts in that capacity, but declarations coupled with proceedings for the objects of the voyage, and while it was in progress. We give no opinion upon the point whether mere declarations, under other circumstances, would have been admissible. The principle which we maintain is stated with great clearness by Mr. Starkie, in his

Treatise on Evidence, 2 Stark. Evid. pt. 4, p. 60. "Where," says he, "the fact of agency has been proved, either expressly or presumptively, the act of the agent, coextensive with the authority, is the act of the principal, whose mere instrument he is; and then, whatever the agent says within the scope of his authority, the principal says, and evidence may be given of such acts and declarations as if they had been actually done and made by the principal himself." * * *

Opinion certified to the Circuit Court.

GARTH v. HOWARD & FLEMING.

(Court of Common Pleas, 1832. 8 Bing. 451.)

Detinue for plate. Plea, general issue. At the trial before Tindal, C. J., it appeared that Howard had, without authority, pawned, for £200., certain plate belonging to the plaintiff. The defendant, Fleming, was a pawnbroker; but the only evidence to show that the plate had ever been in his possession, was a witness, who stated that, at the house of the plaintiff's attorney, he heard Fleming's shopman say that it was a hard case, for his master had advanced all the money on the plate at 5 per cent.

This evidence being objected to, was received, subject to a motion to this Court; and a verdict having been given for the plaintiff.

Andrews, Serjt., obtained a rule nisi for a new trial.[97]

TINDAL, C. J. The rule in this case has been obtained upon two distinct grounds; but it is unnecessary to give an opinion upon any other than this, namely, whether the declaration of the shopman of the defendant Fleming, that the goods were in the possession of his master, was admissible: for it is clear that, unless Fleming is to be affected by such declaration, he is entitled to the verdict upon the general issue, non detinet. If the transaction out of which this suit arises had been one in the ordinary trade or business of the defendant as a pawnbroker, in which trade the shopman was agent or servant to the defendant, a declaration of such agent that his master had received the goods, might probably have been evidence against the master, as it might be held within the scope of such agent's authority to give an answer to such an inquiry made by any person interested in the goods deposited with the pawnbroker. In that case, the rule laid down by the Master of the Rolls in the case of Fairlie v. Hastings, 10 Ves. 128, which may be regarded as the leading case on this head of evidence, directly applies. But the transaction with Fleming appears to us, not a transaction in his business as a pawnbroker, but was a loan by him as by any other lender of money at 5 per cent. And there is no evidence to show the agency of the shopman in private transactions unconnected with the business of the shop. I doubted much at the time whether it could be

[97] Statement condensed.

received, and intimated such doubt by reserving the point; and now, upon consideration with the Court, am satisfied that it is not admissible. It is dangerous to open the door to declarations of agents, beyond what the cases have already done. The declaration itself is evidence against the principal, not given upon oath: it is made in his absence, when he has no opportunity to set it aside, if incorrectly made, by any observation, or any question put to the agent; and it is brought before the Court and jury frequently after a long interval of time. It is liable, therefore, to suspicion originally, from carelessness or misapprehension in the original hearer; and again to further suspicion, from the faithlessness of memory in the reporter and the facility with which he may give an untrue account. Evidence, therefore, of such a nature, ought always to be kept within the strictest limits to which the cases have confined it; and as that which was admitted in this case appears to us to exceed those limits, we think there ought to be a new trial.

Rule absolute.

HANEY v. DONNELLY.

(Supreme Judicial Court of Massachusetts, 1859. 12 Gray, 361.)

Action of tort by an infant, by his father and next friend, against the defendant, for breaking the plaintiff's leg on the 2d of July, 1855. Writ dated May 16, 1856.

At the trial in the superior court of Suffolk at March term, 1857, before Nash, J., it appeared that the plaintiff lived with his father. The defendant offered in evidence a conversation between him and Patrick Haney, the father, on the 3d of July, 1855, (at which time the defendant said he was first informed of the accident,) upon the subject of the injury suffered by the plaintiff, and upon the question by whom it was occasioned; and the defendant desired to put in all that was said by Patrick at that time on that subject; contending that he was then acting as agent of the plaintiff. But the judge excluded it.

The defendant was also asked by his counsel, "Who was present at the conversation, when information of the accident was communicated to you?" But it not being claimed that plaintiff was present, the judge excluded this evidence also. A verdict was returned for the plaintiff, and the defendant alleged exceptions.

MERRICK, J.[98] There is no ground upon which the defendant's exceptions can be sustained. The declarations and statements of the plaintiff's father, which he offered to put in evidence, were rightly rejected, because it had not been made to appear that he had, up to the time of the occurrence of the conversation proposed to be proved, ever been appointed or recognized as the agent of the plaintiff, or authorized to speak on any subject on his account or in his behalf. Be-

[98] Part of opinion omitted.

fore anything said or done by a supposed agent can be admitted in evidence to affect the rights of his alleged principal, the fact of agency must first be satisfactorily established, and it cannot be proved merely by his own admission or assertions. 2 Stark. Ev. (1st Amer. Ed.) 55; 1 Greenl. Ev. § 114. He may be called as a witness and the agency may be shown by his testimony. But his statements, declarations and admissions, made out of court, stand on different ground, and are never to be received as evidence for such purpose. They are to be considered and treated as mere hearsay, and are of course not admissible when offered in evidence as means or instruments of proof. The defendant could not therefore establish the fact of the agency of the father by proof of anything said by him; and he did not show it by any other positive or circumstantial evidence in the case. From the facts which were proved, as reported in the bill of exceptions, and which were adverted to by the defendant's counsel in his argument in support of the exceptions as being sufficient to justify an inference to that effect, no such deduction can be legitimately or legally drawn. * * *

Exceptions overruled.

PEOPLE v. DAVIS.

(Court of Appeals of New York, 1874. 56 N. Y. 95.)

Error to the General Term of the Supreme Court in the third judicial department to review order reversing a judgment of the Court of Oyer and Terminer of the county of Otsego, entered upon a verdict convicting defendant in error of a felony, upon an indictment under the statute "for the better prevention of the procurement of abortions," etc. (chapter 181, Laws of 1872.) Said order also granted a new trial.

Reported below, 2 Thomp. & C. 212.[1]

GROVER, J. * * * The counsel for the accused excepted to the ruling of the court admitting evidence of the statement of the deceased, in the absence of the accused, as to what was done at the doctor's office upon the occasion of a ride she took with him. This ruling is sought to be sustained upon the ground, first, that it was part of the res gestæ; and second, that it was competent as the act or declaration of a co-conspirator, while engaged in the purpose of the conspiracy. The case shows that the deceased, in company with the prisoner, left her residence, in his buggy, and was absent several hours; that he brought her back, and she came into the house; that the prisoner did not come in; that immediately after she came in, in answer to inquiries from her stepmother, she made the statement in question, telling what had been done by the doctor at his office, and how he did it, and exhibited cer-

[1] Statement condensed and part of opinion omitted.

tain medicine which she said the doctor gave her, and stated what he told her as to taking it when her pains came on. * * *

It is insisted that the statement was competent, as being the declaration of a co-conspirator. The evidence was such as to warrant the conclusion that the prisoner and the deceased had agreed or conspired together to procure the miscarriage of the latter; that in the prosecution of this purpose they went away from the residence of the deceased together, in the buggy of the prisoner. The counsel for the prisoner insists that the deceased was not an accomplice but a victim, and cites Dunn v. People [29 N. Y. 523, 86 Am. Dec. 319] in support of the position. This has no bearing upon the question under consideration. Irrespective of the ethical view of the conduct of the woman, section 2 of the statute makes her acts highly criminal. The perpetration of the crimes prohibited by the statute may be the subject of a conspiracy, and the female subject of the acts a co-conspirator. The general rule is, that when sufficient proof of a conspiracy has been given to establish the fact prima facie in the opinion of the judge, the acts and declarations of each conspirator in the furtherance of the common object are competent evidence against all. 1 Whart. Crim. Law, 702; 3 Greenl. Ev. 94; 1 Taylor, Ev. 527. But to make the declaration competent it must have been made in the furtherance of the prosecution of the common object, or constitute a part of the res gestæ of some act done for that purpose. A mere relation of something already done for the accomplishment of the object of the conspirators is not competent evidence against the others. 1 Taylor, Ev. 542, § 530. We have already seen that the statement in question was a mere narration of what had been done. True, she stated that the medicine exhibited was to be taken by her thereafter, but this was not for the purpose of producing her miscarriage, but to protect her from the danger to be apprehended therefrom. The means to produce the miscarriage, upon the theory of the prosecution, had already been applied. There remained nothing further to be done to effect this object. The conspiracy was therefore ended. Had it been shown that the medicine was to be taken to aid in producing the miscarriage, what was said in respect to it would have been admissible. This was not shown, and the entire statement was inadmissible. * * *

Order (granting new trial) affirmed.[2]

[2] In the conspiracy cases it frequently appears to be assumed that all that is necessary is that the declaration or statement should have been made while the conspiracy existed; perhaps the expression, "dum fervet opus," so frequently used, may account for this notion.—*Ed.*

WARNER v. MAINE CENT. R. CO.

(Supreme Judicial Court of Maine, 1913. 111 Me. 149, 88 Atl. 403, 47 L. R. A. [N. S.] 830.)

Action for damages for the destruction of certain property by fire alleged to have been set out by defendant's locomotive. The station agent's letter reporting the matter to the general manager was admitted on behalf of the plaintiff, who obtained a verdict in the court below.[3]

KING, J. * * * We are of opinion that the letter was both incompetent and prejudicial to the defendant, and should not have been received in evidence.

The rule governing the admission of declarations of an agent as evidence against his principal has been frequently stated by courts and text-writers, though in somewhat varying language. It is founded upon the idea of the legal identity of the agent and the principal, which presupposes authority from the principal to the agent to make the declarations. That authority may be expressly given as to make some specific declaration, or it may be derived by implication from authority given to the agent to do a certain act for the principal, in the doing of which the declaration is made. While acting within the scope of his authority, and in the execution of it, the agent is the principal, and his declarations and representations in reference to and accompanying his act are therefore admissible in evidence against the principal in the same manner as if made by the principal himself.

The language of Sir Wm. Grant in the leading case of Fairlie v. Hastings, 10 Ves. 123, is often quoted as a correct statement of the principles upon which the declarations of an agent can be received as evidence against his principal. In that opinion he said: "What the agent has said may be what constitutes the agreement of the principal, or the representations or statements may be the foundation of or the inducement to the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove the agent did make that statement or representation. So, in regard to acts done, the words with which those acts are accompanied frequently tend to determine their quality. The party, therefore, to be bound by the act must be affected by the words. But, except in one or the other of those ways, I do not know how what is said by an agent can be evidence against his principal."

Prof. Greenleaf says: "It is to be observed that the rule admitting the declarations of the agent is founded upon the legal identity of the agent and the principal, and therefore they bind only so far as there is authority to make them. Where this authority is derived by implication from authority to do a certain act, the declarations of the agent

[3] Statement condensed and part of opinion omitted.

to be admissible must be a part of the res gestæ." Greenleaf on Ev. (15th Ed.) § 114.

Mr. Mechem, in his work on Agency (section 714), states: "And (3) the statements, representations, or admissions must have been made by the agent at the time of the transaction, and either while he was actually engaged in the performance, or so soon after as to be in reality a part of the transaction. Or, to use the common expression, they must have been a part of the res gestæ. If, on the other hand, they were made before the performance was undertaken, or after it was completed, or while the agent was not engaged in the performance, or after his authority had expired, they are not admissible. In such case they amount to no more than the narrative of a past transaction, and do not bind the principal."

Our own court has said: "The declarations, representations, or admissions of an agent authorized to make a contract made as inducements to or while making the contract are admissible as evidence against his principal. They are also admissible as evidence against him, when made by his agent accompanying the performance of any act done for him. They are not admissible, and do not bind the principal, when not made as before stated, but at a subsequent time." Franklin Bank v. Steward, 37 Me. 519, 524.

In Packet Co. v. Clough, 20 Wall. 528, 540 (22 L. Ed. 406), the Supreme Court, by Mr. Justice Strong, said: "It is true that whatever the agent does in the lawful prosecution of the business intrusted to him is the act of the principal, and the rule is well stated by Mr. Justice Story that, 'where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting part of the res gestæ.' A close attention to this rule, which is of universal acceptance, will solve almost every difficulty."

Applying this rule to the present case, how does it stand? The thing of which the plaintiffs complain was that the defendant's locomotive engine emitted sparks or cinders, by which the buildings burned were set on fire. That, and that alone, constituted the alleged cause of action. That was the res gestæ. The station agent, Hayes, had no part in that. In writing the letter the next day after the fire he was doing no act for the defendant which formed a part of the particular transaction from which its alleged liability arose. His statements contained in the letter amount to no more than his narrative and opinion of a past transaction, and for that reason could not affect his principal.

But it is contended that the letter was admissible because the agent in writing it was performing a duty required of him by the company to report such occurrences. Granted that he was, upon what principle could it be held that the defendant would be bound by his statements and admissions contained in the report, without proof that it adopted those statements and admissions as its own, except for the purpose of charging it with notice thereof? As stated in Carroll v. East Tennessee,

V. & G. Ry. Co., 82 Ga. 452, 10 S. E. 163, 6 L. R. A. 214: "It surely cannot be sound law to hold that by collecting information, whether under general rules or special orders, and whether from its own officers, agents, and employés or others, a corporation acquires and takes such information at the peril of having it treated as its own admissions, should litigation subsequently arise touching the subject-matter."

In that case, which was an action to recover damages for personal injuries alleged to have been caused by the defendant's negligence, reports of the accident, made to the general manager of the company, by the superintendent and by the conductor of the train, supported by his affidavit and that of several others, embracing the engineer, fireman, flagman, and brakeman, were admitted in evidence on behalf of the plaintiff, over the defendant's objection. But it was held on exceptions that they were inadmissible.

Further, it needs no argument to sustain the proposition that Mr. Hayes had no authority by virtue of his office as station agent to bind the railroad company by an admission of its liability as alleged in this case. If authority in him to make such an admission is claimed, it should be shown by competent proof, for it cannot be inferred as within the scope of his authority as station agent.

In the case of Randall, Ex'r, v. Northwestern Tel. Co., 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17, which was a suit to recover damages for an injury occasioned, as alleged, by the negligence of the defendant in not keeping its line in proper repair, whereby the plaintiff while traveling along the highway became entangled in its wire, and was injured, the admission of the following telegram from the superintendent of the telegraph company was held reversible error: "To Gen. George C. Ginty: Many thanks for your kind words for us to the gentlemen who were hurt by our old wire. I hope to be with you tomorrow, and see them; but I must go home. Have them make a bill and send me. We will pay any reasonable bill. My instructions, if obeyed, would have prevented the accident; but the repairman neglected his duty, and we must pay the penalty." The court there said: "In the absence of any proof showing that the superintendent was authorized by the company to bind it by his admissions, we do not think the court was justified in assuming that he had such power. He was a competent witness for the plaintiff, and, though holding a high position as an agent of the defendant, he was still only an agent, and for the purpose of admitting away the rights of the defendant he cannot be presumed to have all the powers of the corporation. * * * The authority to make the admission for the principal or corporation is not to be inferred from the position or rank of the party making the same. If such authority is alleged to exist, it must be shown by competent proofs."

In the case at bar the letter was introduced by the plaintiff as affirmative evidence against the defendant, as an admission of liability binding upon the defendant. But according to well established principles of law it was incompetent for such purpose, and we are constrained to the

opinion that its admission was prejudicial to the defendant. We must hold, therefore, that there was reversible error in admitting the letter in evidence. This conclusion makes it unnecessary to consider the other exceptions or motion.

In each case the entry will be:

Exceptions sustained.[4]

(B) *Confessions* [5]

FELTON'S CASE.

(Court of King's Bench, 1628. 3 How. St. Trials, 367.)

[The defendant was under arrest for the murder of the Duke of Buckingham, and was brought up for examination.]

Afterwards Felton was called before the council, where he confessed much of what is before mentioned concerning his inducement to the murder: the council much pressed him to confess who set him on work to do such a bloody act, and if the Puritans had no hand therein; he denied they had, and so he did to the last, that no person whatsoever knew anything of his intentions or purpose to kill the duke, that he revealed it to none living. Dr. Laud, bishop of London, being then at the council-table, told him if he would not confess, he must go to the rack. Felton replied, if it must be so he could not tell whom he might nominate in the extremity of torture, and if what he should say then must go for truth, he could not tell whether his lordship (meaning the bishop of London) or which of their lordships he might name, for torture might draw unexpected things from him: after this he was asked no more questions, but sent back to prison. The council then fell into debate, whether by the law of the land they could justify the putting him to the rack; the King being at council said, before any such thing should be done, let the advice of the judges be had therein, whether it be legal or no, and afterwards his majesty the 13th of November, 4 Car., propounded the question to Sir Tho. Richardson, Lord Chief Justice of the Common Pleas, to be propounded to all the justices, (viz.) Felton now a prisoner in the Tower having confessed that he had killed the duke of Buckingham, and said he was induced to this, partly for private displeasure, and partly by reason of remonstrance in parliament, having also read some books, which, he said, defended that it was lawful to kill an enemy to the republic, the question therefore is, whether by the law he might not be racked, and whether there were any law against it (for said the king) if it might be done by law, he would not use his prerogative in this point, and having put

[4] For a collection of the cases on this point, see Atchison, T. & S. F. Ry. Co. v. Burks, 18 L. R. A. (N. S.) 231, annotated (1908).

[5] For the rule that a confession alone is not sufficient to prove the corpus delicti, see Wistrand v. People, 213 Ill. 72, 72 N. E. 748 (1904), post, p. 917.

this question to the Lord Chief Justice, the king commanded him to demand the resolutions of all the judges.

First the Justices of Serjeants Inn in Chancery-lane did meet and agree, that the king may not in this case put the party to the rack. And the 14th of November all the justices being assembled at Serjeants Inn in Fleet-street, agreed in one, that he ought not by the law to be tortured by the rack, for no such punishment is known or allowed by our law.

And this in case of treason was brought into this kingdom in the time of Henry the 6th; note Fortescue for this point, in his book 'de laudibus legum Angliæ,' see the preamble of the act 28 H. 8 for the trial of felony, where treasons are done upon the sea, and statute 14 Ed. 3,[6] ca. of jailors or keepers, who by duress make the prisoners to be approvers.

On Thursday the 27th of November, Felton was removed from the Tower to the Gate-House, in order to his trial, and was the same day brought by the sheriffs of London to the King's Bench bar, and the indictment being read, he was demanded whether he were guilty of the murder therein mentioned: He answered, he was guilty in killing the duke of Buckingham, and further said, that he did deserve death for the same, though he did not do it out of malice to him. So the court passed sentence of death upon him; whereupon he offered that hand to be cut off that did the fact; but the court could not, upon his own offer, inflict that further punishment upon him: Nevertheless the king sent to the judges to intimate his desire, that his hand might be cut off before execution. But the court answered, that it could not be; for in all murders, the judgment was the same, unless when the statute of 25 E. 3, did alter the nature of the offence, and upon a several indictment, as it was in queen Elizabeth's time, when a felon at the bar flung a stone at a judge upon the bench, for which he was indicted, and his sentence was to have his hand cut off, which was accordingly done. And they also proceeded against him upon the other indictment for felony, for which he was found guilty, and afterwards hanged. And Felton was afterwards hung up in chains, in manner as is usual upon notorious murders.

[6] "And if it happen that the keeper of the prison, or underkeeper, by too great duress of imprisonment, and by pain, make any prisoner that he hath in his ward to become an appellor against his will, and thereof be attainted, he shall have judgment of life and of member."

REX v. JONES.

(Court of Criminal Appeal, 1809. Russ. & Ry. 152.)

The prisoner was tried before Mr. Justice Chambre, at the Winchester Lent assizes, in the year 1809, upon an indictment for stealing money to the amount of £1. 8s., the property of John Webb, a private in the Somerset Militia.

A part of the evidence was as follows:

The prosecutor, who, as well as others, had been in pursuit of the prisoner, found him, at last, in a room of a public house, in custody of a constable, to whom he had been delivered by a serjeant of marines, who had apprehended him. On finding him there, the prosecutor asked him for the money that he, the prisoner, had taken out of the prosecutor's pack, upon which the prisoner took 11s. 6½d. out of his pocket, and said it was all he had left of it. The Serjeant (who was in the same room with the constable and the prisoner) gave the same account of the conversation and of the production of the money by the prisoner; but he added, that Webb the prosecutor, before the money was produced, said "he only wanted his money, and if the prisoner gave him that, he might go to the devil if he pleased."

The money (11s. 6½d.) was taken charge of by the serjeant.

The learned judge left the whole of this evidence for the consideration of the jury, and they found the prisoner guilty.

In Easter term, 29th of April, 1809, the majority of the judges present, viz., MACDONALD, C. B., CHAMBRE, J., LAWRENCE, J., LE BLANC, J., and HEATH, J., held that the evidence was not admissible, and the conviction wrong. WOOD, B., GROSE, J., MANSFIELD, C. J. of C. B., contra. LORD ELLENBOROUGH, dubitante.

REX v. JENKINS.

(Court of Criminal Appeal, 1822. Russ. & R. 492.)

The prisoner was convicted before Mr. Justice Bayley (present Mr. Justice Park), at the Michaelmas Old Bailey sessions, in the year 1822, of stealing several gowns and other articles. He was induced by a promise from the prosecutor to confess his guilt, and, after that confession, he carried the officer to a particular house as and for the house where he had disposed of the property, and pointed out the person to whom he had delivered it. That person denied knowing anything about it, and the property was never found. The evidence of the confession was not received; the evidence of his carrying the officer to the house as above-mentioned was; but as Mr. Justice Bayley thought it questionable whether that evidence was rightly received, he stated the point for the consideration of the judges.

In Michaelmas term, 1822, the case was considered by the judges, who were of opinion that the evidence was not admissible, and that the conviction was therefore wrong. The confession was excluded, because being made under the influence of a promise it could not be relied upon, and the acts of the prisoner, under the same influence, not being confirmed by the finding of the property, were open to the same objection. The influence which might produce a groundless confession, might also produce groundless conduct.[7]

REG. v. MOORE.

(Court of Criminal Appeal, 1852. 2 Denison, Crown Cas. 522.)

The prisoner was tried at the last Assizes for Sussex before Parke, B., on the coroner's inquisition, for wilful murder of her new born child. There was an indictment also against her for the same offence.

She was found guilty of the misdemeanor of concealing the birth of her child.

There was offered in evidence against her a confession made by her, in the presence of her mistress, to a surgeon who was attending her, of her having strangled her child with a thread, and placed the dead body in a privy, where it was found, with the thread around its neck. Her mistress had told her, before the surgeon came in, that "she had better speak the truth," and, in answer, she said she would tell it to the surgeon.

An objection was taken, that any subsequent confession was inadmissible. After consulting Coleridge, J., his Lordship received the evidence, being of opinion that in this case her husband, not being the prosecutor, nor the offence in any way connected with the management of the house, the prisoner's mistress could not be considered as having any control over the prosecution so as to raise a presumption that the inducement held out by her would be likely to cause her to tell an untruth.

The prisoner was acquitted of the murder, because the jury believed that she was in such a state of mind that she did not know what she was about at the time.

The learned Baron, therefore, requested the opinion of the Judges, whether the evidence was admissible.

On the 24th April, A. D. 1852, this case was argued before Pollock, C. B., Parke, B., Erle, J., Williams, J., and Crompton, J.

On the 14th June, A. D. 1852, the following Judges being present, Jervis, C. J., Parke, B., Alderson, B., Maule, J., Cresswell, J., Platt, B., Talfourd, J., and Martin, B., the following judgment was read by

[7] It had been held in 1783, in Warickshall's Case, Leach, 263, that, where stolen property is recovered as the result of a confession, that fact may be proved, though the confession itself may be inadmissible.

PARKE, B. The cases on this subject have gone quite far enough, and ought not to be extended.

It is admitted that confessions ought to be excluded unless voluntary, and the Judge,[8] not the jury, ought to determine whether they are so.

One element in the consideration of this question as to their being voluntary is, whether the threat or inducement was such as to be likely to influence the prisoner. Perhaps it would have been better to have held (when it was determined that the Judge was to decide

[8] That the judge conclusively settles the question of admissibility, see State v. Brister, ante, p. 120; Burton v. State, 107 Ala. 108, 18 South. 284 (1894); State v. Brennan, 164 Mo. 487, 65 S. W. 325 (1901); State v. Monich, 74 N. J. Law, 522, 64 Atl. 1016 (1906).

Contra: Fuller, C. J., in Wilson v. United States, 162 U. S. 613, 16 Sup. Ct. 895, 40 L. Ed. 1090 (1896): "When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant. Commonwealth v. Preece, 140 Mass. 276, 5 N. E. 494 (1885); People v. Howes, 81 Mich. 396, 45 N. W. 961 (1890); Thomas v. State, 84 Ga. 613, 10 S. E. 1016 (1890); Hardy v. United States, 3 Dist. Col. App. 35 (1893)."

Cave, J., in Regina v. Thompson, [1893] 2 Q. B. D. 12: "* * * 'The material question consequently is whether the confession has been obtained by the influence of hope or fear; and the evidence to this point being in its nature preliminary, is addressed to the judge, who will require the prosecutor to show affirmatively, to his satisfaction, that the statement was not made under the influence of an improper inducement, and who, in the event of any doubt subsisting on this head, will reject the confession.' The case cited in support of this proposition is Reg. v. Warringham [2 Den. C. C. 447, note (1851)], where Parke, B., says to the counsel for the prosecution: 'You are bound to satisfy me that the confession which you seek to use against the prisoner was not obtained from him by improper means, I am not satisfied of that; for it is impossible to collect from the answers of this witness whether such was the case or not.' Parke, B., adds, 'I reject the evidence of admission, not being satisfied that it was voluntary.' * * * If these principles and the reasons for them are, as it seems impossible to doubt, well founded, they afford to magistrates a simple test by which the admissibility of a confession may be decided. They have to ask, Is it proved affirmatively that the confession was free and voluntary—that is, Was it preceded by any inducement to make a statement held out by a person in authority? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible."

Compare Sherwood, J., in State v. Patterson, 73 Mo. 695 (1881): "Greenleaf, to whose work we are cited, states: 'Before any confession can be received in evidence in a criminal case, it must be shown that it was voluntary.' 1 Greenleaf, Ev. § 219. This assertion in all its broadness is not supported by the authorities. Wharton lays down the rule quite differently: 'In order to exclude evidence of a prisoner's confession, it must appear affirmatively that some inducement to confess was held out to him, by or in the presence of some one having authority.' 1 Am. Crim. Law, § 698. Roscoe is thought to state the rule more accurately. He says: 'For the purpose of introducing a confession, it is unnecessary in general, to negative any promise or inducement, unless there is good reason to suspect that something of the kind has taken place.' Roscoe, Crim. Ev. 54; Id. 40; Rex v. Clewes, 4 C. & P. 221 [1830]; Whart. Crim. Ev. § 689; 6 St. Tr. 807 [1666]; Reg. v. Garner, 1 Den. C. C. 329 [1848]; Reg. v. Williams, 3 Russ. on Crimes, 432 [1811]. In the case last cited Taunton, J., said: 'A confession is presumed to be voluntary unless the contrary is shown, and as no threat or promise is proved to have been made by the constables, it is not to be presumed.'"

whether the confession was voluntary), that in all cases he was to decide that point upon his own view of all the circumstances, including the nature of the threat or inducement, and the character of the person holding it out together, not necessarily excluding the confession on account of the character of the person holding out the inducement or threat.

But a rule has been laid down in different precedents by which we are bound, and that is, that if the threat or inducement is held out actually or constructively by a person in authority, it cannot be received, however slight the threat or inducement, and the prosecutor, magistrate, or constable, is such a person, and so the master or mistress may be.

If not held out by one in authority, they are clearly admissible.

The authorities are collected in Mr. Joy's very able Treatise on Confessions and Challenges, p. 23.

But in referring to the cases where the master or mistress have been held to be persons in authority, it is only when the offence concerns the master or mistress, that their holding out the threat or promise renders the confession inadmissible.

In Rex v. Upchurch, R. & M. C. C. 865, the offence was arson of the dwelling-house, in the management of which the mistress took a part. Reg. v. Taylor, 8 C. & P. 703, is to the like effect; so Rex v. Carrington, 109; Rex v. Howell, 534; so where the threat was used by the master of a ship to one of the crew, and the offence committed on board the ship by one of the crew towards another; and in that case also the master of the ship threatened to apprehend him, and the offence being a felony, and a felony actually committed, would have a power to do so, on reasonable suspicion that the prisoner was guilty. In Rex v. Warringham, tried before me, Surrey Spring Assizes, 1851, the confession was in consequence of what was said by a mistress of the prisoner, she being in the habit of managing the shop, and the offence being larceny from the shop. This appears from my note.

In the present case, the offence of the prisoner, in killing her child or concealing its dead body, was in no way an offence against the mistress of the house. She was not the prosecutrix then, and there was no probability of herself or the husband being the prosecutor of of an indictment for that offence; in practice the prosecution is always the result of a coroner's inquest. Therefore, we are clearly of opinion that the confession was properly received.

Conviction confirmed.[9]

[9] A ruling to the same effect had been made in the earlier case of Rex v. Row, Russell & Ryan, 153 (1809), where certain friends of the prisoner had urged him to consider his family and tell the truth.

REG. v. BALDRY.

(Court of Criminal Appeal, 1852. 2 Denison, Crown Cas. 430.)

While the defendant was in custody on a charge of poisoning his wife, a constable having charge of him, told him that he need not say anything to criminate himself, what he did say would be taken down and used as evidence against him. The prisoner thereupon made a confession, which was received at the trial. Lord Campbell reserved the question for the Court of Criminal Appeal. During the course of the argument counsel for the prisoner advanced the proposition that " 'The law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore, excludes the declaration if any degree of influence has been exerted.' It is gathered from this that if any inducement—of the slightest description —whereby any worldly advantage to himself as a consequence of making a statement, be held out to a prisoner, the law presumes the statement to be untrue." [10]

POLLOCK, C. B. You are overstating it. The law does not presume that it is untrue; but rather that it is uncertain whether a statement so made is true.

LORD CAMPBELL, C. J. I doubt whether the rule excluding confessions made in consequence of an inducement held out, proceeds upon the presumption that the confession is untrue; but rather that it would be dangerous to receive such evidence, and that for the due administration of justice it is better that it should be withdrawn from the consideration of the jury.

PARKE, B. I entirely agree with the Lord Chief Baron and with the view taken by Lord Campbell at the trial. The prisoner was tried upon an indictment charging him with having administered poison to his wife with intent to murder her. On the part of the prosecution a police constable was called, whose evidence thus began: "I went to the prisoner's house on the 17th December. I saw the prisoner. Dr. Vincent, and Page, another constable, were with me. I told him what he was charged with; he made no reply, and sat with his face buried in his handkerchief. I believe he was crying. I said he need not say anything to criminate himself, what he did say would be taken down and used as evidence against him." Objection was made on behalf of the prisoner that what he then said was not admissible. His Lordship thought that the words of the statute were merely a direction, and that although the caution of the constable differed from that directed by 11 & 12 Vict. c. 42, § 18, to be given by the justice to the prisoner in the word "will" instead of "may," it did not amount to any promise or threat to induce the prisoner to confess; that it could

[10] Statement condensed and concurring opinions omitted.

have no tendency to induce him to say anything untrue; and that in spite of it, if he did afterwards confess, the confession must be considered voluntary. In that I entirely concur, and I think that the reasons given by the Lord Chief Justice are satisfactory. By the law of England, in order to render a confession admissible in evidence it must be perfectly voluntary; and there is no doubt that any inducement in the nature of a promise or of a threat held out by a person in authority, vitiates a confession. The decisions to that effect have gone a long way; whether it would not have been better to have allowed the whole to go to the jury, it is now too late to inquire, but I think there has been too much tenderness towards prisoners in this matter. I confess that I cannot look at the decisions without some shame when I consider what objections have prevailed to prevent the reception of confessions in evidence; and I agree with the observation of Mr. Pitt Taylor, that the rule has been extended quite too far, and that justice and common sense have, too frequently, been sacrificed at the shrine of mercy. We all know how it occurred. Every Judge decided by himself upon the admissibility of the confession, and he did not like to press against the prisoner, and took the merciful view of it. If the question were res nova I cannot see how it could be argued that any advantage is offered to a prisoner by his being told that what he says will be used in evidence against him. I have the most unfeigned respect for Coleridge, J., and Maule, J., and in deference to their decisions, I offered to reserve a case at Aylesbury, but I cannot concur in their judgment. I have reflected on Reg. v. Drew and Reg. v. Morton, and I have never been able to make out that any benefit was held out to the prisoner by the caution employed in those cases. We ought therefore to be extremely obliged to Lord Campbell for having reserved the point in order that it might be settled.

Conviction affirmed.

REG. v. JARVIS.

(Court of Crown Cases Reserved, 1867. L. R. 1 Crown Cas. Res. 96.)

The following case was stated by the Recorder of London:

At a session of the Central Criminal Court, held on the 8th of July, 1867, and following days, Frank Jarvis, Richard Bulkley, and Wilford Bulkley, were tried before me on an indictment, for feloniously stealing 138 yards of silk and other property of William Leaf and others, the masters of Jarvis. There was a second count in the indictment for feloniously receiving the same goods. William Laidler Leaf was examined, and said: The prisoner Jarvis was in my employ. On the 13th of May we called him up, when the officers were there, into our private counting house. I said to him, "Jarvis, I think it is

right that I should tell you that, besides being in the presence of my brother and myself, you are in the presence of two officers of the police; and I should advise you that to any question that may be put to you you will answer truthfully, so that, if you have committed a fault, you may not add to it by stating what is untrue." I produced a letter to him, which he said he had not written; and I then said, "Take care, Jarvis; we know more than you think we know." I do not believe I said to him, "You had better tell the truth."

Counsel for the prisoner Jarvis objected to any statement of his made after the above was said being received in evidence, and referred to R. v. Williams, 2 Den. C. C. 433; Reg. v. Warringham, 15 Jur. 318; 2 Den. C. C. 447, note; Reg. v. Garner, 1 Den. C. C. 329; R. v. Shepherd, 7 C. & P. 579; and Reg. v. Millen, 3 Cox's Crim. Cas. 507.

Counsel for the prosecution referred to Reg. v. Baldry, 2 Den. C. C. 430; Reg. v. Sleeman, Dears. C. C. 249; and Reg. v. Parker, Leigh & Cave, C. C. 42. I decided that the statement was admissible.

The jury found Jarvis guilty, adding that they so found upon his own confession, but they thought that confession prompted by the inquiries put to him. They acquitted the other two. At the request of counsel for Jarvis I reserved for the Court for the consideration of Crown Cases Reserved the question,—Whether I ought to have admitted the statements of the prisoner in evidence against him?

KELLY, C. B. While it is our duty to watch with a jealous caution the rules of law as to inducements to confess, for the sake of public justice we must not allow consideration for prisoners to interfere with the rules or decisions of courts of law. In this case, do the words fairly considered import either a threat of evil or a promise of good? They are these: "Jarvis, I think it is right that I should tell you that, besides being in the presence of my brother and myself, you are in the presence of two officers of the police; and I should advise you that to any question that may be put to you you will answer truthfully." Pausing at these words, they would seem to operate as a warning rather than a threat, as advice given by a master to a servant. What follows?—"So that, if you have committed a fault, you may not add to it by stating what is untrue." These words appear to have been added on moral grounds alone; there was no inducement of advantage. Under these circumstances, putting no strain one way or the other, the words amount only to this: "We put certain questions to you; I advise you to answer truthfully, only that you may not add a fault to an offence committed, if any has been committed." With reference to the last words, "Take care; we know more than you think we know"—these amount only to a caution. The words, "You had better tell the truth," seem to have acquired a sort of technical meaning importing either a threat or a benefit; but they were not

used in this case. The words that have been used import only advice on moral grounds.

WILLES, J. The case would have been different, if it had appeared that the words used were, "It is better for you to tell the truth."

Conviction affirmed.

STATE v. BROUGHTON.

(Supreme Court of North Carolina, 1846. 29 N. C. 96, 45 Am. Dec. 507.)

Appeal from the Superior Court of Law of New Hanover County, at the Fall Term, 1846, his Honor Judge Settle, presiding.

The prisoner was indicted for the murder of Frank De Silva. The homicide occurred in Wilmington, during the term of New Hanover Superior Court, and the grand-jury then empannelled were engaged in an enquiry as to the circumstances, character, and perpetrator of the act. At the instance of the grand jury, Broughton was summoned and sworn in Court and sent to them as a witness. On the trial of the present indictment Mr. Savage, who was at the time the foreman of the grand-jury, was called, as a witness for the State, to prove that the prisoner, on his examination before the grand-jury on that occasion, charged one Gonzales with the murder of De Silva. The counsel for the prisoner objected to the examination of Mr. Savage, as to any matter that occurred before the grand-jury. But the Court received the witness for the purpose, to which he was called; and he stated that the prisoner charged Gonzales with murder and betrayed unusual anxiety to fix it upon him.[11]

RUFFIN, C. J. * * * The counsel for the prisoner took the further ground here, that it was incompetent to prove the evidence of the prisoner, because it was in the nature of a confession, which, compelled by an oath, was not voluntary. It is certainly no objection to the evidence, merely, that the statement of the prisoner was given by him, as a witness under oath. He might have refused to answer questions, when he could not do so without criminating himself; and the very ground of that rule of law is, that his answers are deemed voluntary and may be used afterwards to criminate or charge him in another proceeding, and such is clearly the law. 2 Stark. 28; Wheater's case, 2 Mood. Cr. Cas. 45. But it is true, that if a prisoner, under examination as to his own guilt, be sworn, his statement is not evidence; because the statute, Rev. Stat. ch. 35, § 1, (which is taken from that of Phil. and M.) intended to have the party free to admit or deny his guilt, and the oath deprives him of that freedom—2 Hawk. Pl. 6, ch. 46, § 37; Bul. N. P. 242. And we think it was also properly decided in Lewis' case, C., C. & P. 161, where a magistrate was engaged in the investigation of a felony, and no one in particular was then charged

[11] Statement condensed and part of opinion omitted.

with it, and the prisoner and other persons were summoned and sworn as witnesses, and the prisoner gave evidence, upon which he was committed for trial, that his examination was not admissible against him. For plainly it was a case within the reason of the statute; which could be completely evaded, if, instead of a direct examination of a suspected person, there could be a general inquisition and every individual made to betray himself. For that reason the Court would, in this case, have held, that the evidence given by the prisoner could not have been used against him, if it purported to confess his guilt and the grand-jury had founded a presentment on it; for the proceeding before the grand-jury at the time was in its nature inquisitorial and the witness was as much the object of it as any other person. But it is altogether a mistake to call this, evidence of a confession by the prisoner. It has nothing of that character. It was not an admission of his own guilt, but, on the contrary, an accusation of another person. That it was preferred on oath in no way detracts from the inference, that may be drawn from it unfavourably to the prisoner, as being a false accusation against another, and thus furnishing, with other things, an argument of his own guilt.

There was, in our opinion, no error in receiving the evidence. * * * [12]

COMMONWEALTH v. MOREY.

(Supreme Judicial Court of Massachusetts, 1854. 1 Gray, 461.)

Indictment for breaking and entering in the night the shop of Anson Chapman in Westhampton, and there stealing bank bills and silver coin.

At the trial in the court of common pleas, before Mellen, J., "Chapman, being called as a witness for the Commonwealth, and to prove certain confessions of the defendant, testified that after the defendant was arrested and committed on his complaint, and before the examination, he visited him at the jail alone, and told him he supposed he knew what he came for; the defendant replied that he did; that he then said to him, that if he wished for any conversation, he could have a chance; that the defendant made no reply for the minute or two; that he then told him he thought it was better for all concerned in all cases for the guilty party to confess; that the prisoner then said he supposed he should have to stay there whether he confessed

[12] See, also, People v. Molineux, 168 N. Y. 330, 61 N. E. 286, 62 L. R. A. 193 (1901), discriminating between a violation of the defendant's privilege against self-incrimination, by compelling him to testify, and the use of his voluntary testimony as a mere witness.

Compare State v. Young, 119 Mo. 495, 24 S. W. 1038 (1894) where certain admissions were obtained from the suspected party on his examination at the coroner's inquest.

State v. Blackburn, 273 Mo. 469, 201 S. W. 96 (1918).

or not; that the prosecutor replied he supposed he would, and in his opinion it would make no difference as to legal proceedings, and that it was considered honorable in all cases, if a person was guilty, to confess." The district attorney then proposed to prove the confessions of the defendant made immediately after, to which the defendant objected as incompetent, but they were admitted by the judge. To this admission the defendant, being convicted, alleged exceptions.

SHAW, C. J. The ground on which confessions made by a party accused, under promises of favor, or threats of injury, are excluded as incompetent, is, not because any wrong is done to the accused, in using them, but because he may be induced, by the pressure of hope or fear, to admit facts unfavorable to him, without regard to their truth, in order to obtain the promised relief, or avoid the threatened danger, and therefore admissions so obtained have no just and legitimate tendency to prove the facts admitted. The general rule is well expressed in the passage, cited in the argument, from the case of State v. Grant, 22 Me. 171. "To exclude the confession, there must appear to have been held out some fear of personal injury, or hope of personal benefit, of a temporal nature." Of course, such inducement must be held out to the accused by some one, who has, or who is supposed by the accused to have, some power or authority to assure to him the promised good, or cause or influence the threatened injury. Commonwealth v. Taylor, 5 Cush. 606. The general rule of law seems sufficiently plain and clear, but the great variety of facts and circumstances, attending particular cases, renders the application difficult, and each case must depend much on its own circumstances. In the present case, we think the decision was right, on the facts stated, and the confessions admissible.

Exceptions overruled.[18]

MILLER et al. v. PEOPLE.

(Supreme Court of Illinois, 1866. 39 Ill. 457.)

On writ of error to review the conviction of the defendants, Miller, Francis, and Barrett, on a charge of robbery.[14]

Mr. Justice BREESE. * * * The record shows the confession of Francis was extorted from him by a high-handed act of violence and

[18] Brown, J., in State v. Powell, 258 Mo. 239, 167 S. W. 559 [1914]: "* * * What is necessary to render a confession involuntary depends, to a large extent, upon the person from whom such confession is obtained. The age, sex, disposition and past experience of the party must necessarily be considered. 2 Wharton's Criminal Evidence (10th Ed.) p. 1320; 12 Cyc. 464; State v. Brockman, 46 Mo. 566 [1870]."

The tendency to treat the problem as purely a question of fact may account for the extreme decision in Com. v. Knapp, 10 Pick. 477, 20 Am. Dec. 534 (1830), where the confession was made after a promise of immunity for turning state's evidence, and was afterwards used against the prisoner when he refused to testify against the others.—*Ed.*

[14] Statement condensed and part of opinion omitted.

wrong, and under circumstances of unusual cruelty. At about midnight, he was taken from his home by a body of armed and disguised men to a neighboring wood, and there hung upon a tree by the neck, when, taken down almost senseless, he confessed that he, with the other prisoners charged, committed the robbery, and detailed the circumstances.

The rule has been long settled in our law that, whilst a free and voluntary confession of guilt is of the highest order of evidence, one extorted is never received. Unlike the laws of the polished and learned Roman, the cruel provisions of which allowed criminals and even witnesses in some cases, to be put to the torture, for the purpose of forcing a confession, ours, in most commendable contrast, are fashioned in a spirit more just and humane.

The confession of Francis, against objections, should not have gone to the jury. * * *

Judgment reversed.

STATE v. JONES.

(Supreme Court of Missouri, 1874. 54 Mo. 478.)

WAGNER, Judge, delivered the opinion of the court.

The only question at all important to be considered in this case is, whether the confession made by the defendant was properly admitted in evidence against him. From the record it appears, that the defendant, with several others, was indicted for killing one Hildebrand in Moniteau County.

A short time after the commission of the murderous act, the defendant was arrested in Miller County. He denied all knowledge of the crime, and the party, in whose possession he was, hung him twice by the neck, and extorted a statement from him in regard to the murder. He was then taken back to Moniteau County, and when he arrived in California, the county seat of that county, and whilst he was sitting on his horse, one Hickox went up to him and shook hands with him, and told him that he was sorry to see him in the fix that he was in. The prisoner said that he had done nothing. Hickox then told him that he was afraid he was in a very bad fix, because Blankenship (who was alleged to be a participator in the crime) had said, that the prisoner and two other men had come to his house, and forced him to pilot them through the prairie to Hildebrand's house, and therefore the prisoner must be the murderer. The prisoner then asked Hickox, did he say that? And Hickox replied, that he did, and that he, the prisoner, must know whether it was true or not. The parties then separated, and afterwards the prisoner sent for Hickox to come and see him

in the back room of a store-house, where he was confined. He then said to Hickox, that Blankenship had betrayed them, that he had made up his mind to tell the whole thing, and he then made a detailed confession of all the facts relating to the murder.

Before a confession can be received in evidence in a criminal case, it must be shown that it was voluntary. And a promise of benefit or favor, or threat of intimidation or disfavor, held out by the person having authority in the matter, will be sufficient to exclude a confession, made in consequence of such inducement, either of hope or fear. State v. Brockman, 46 Mo. 566.

In this case, Hickox, the person to whom the confession was made, was a private citizen, had no authority in the matter, nor does it appear that any threats or inducements were held out from any source to obtain the confession. It is true, that on the preceding day the prisoner had been brutally treated; but that had been done by a different party, and it is not shown, that any of them were present exerting any influence when the confession to Hickox was made.

Where a confession has once been obtained by means of hope or fear, confessions subsequently made are presumed to come from the same motive; and, if it is not shown that the original influences have ceased to operate, they are inadmissible. 1 Whart. Crim. Law, § 594; Roscoe Crim. Ev., 45; Peter v. State, 4 Smedes & M. (Miss.) 31; Com. v. Harman, 4 Pa. 269; Van Buren v. State, 24 Miss. 512.

The cases above cited show, that in each instance the prisoners were intimidated, and under the influence of threats made the confessions before the magistrate when they were being examined, and the subsequent confessions were made before the same magistrates upon the basis of the first ones. As the magistrates were persons in authority, and were regarded as having the prisoners in their power, it would be necessary to show, that the fear, under which the first confession was made, had ceased before the second one could be received. The presumption would be, that under all the surroundings it was not voluntarily made, and that presumption would have to be removed by evidence. I can find no authority, however, for the rejection of the confession in the case now under consideration. It was not made to any of the parties who had previously been guilty of inflicting the outrage on the prisoner. It was made without solicitation, and without any inducement being held out, after the prisoner had considered the matter and come to the determination to make a full disclosure. Hickox had no authority or power in the case, and was incapable of rendering any favor or relief by virtue of official position. Of all this the defendant was well aware, and nothing was said to him to produce a contrary belief. He was impressed with the idea, that Blankenship had betrayed him, and therefore he considered that he might as well tell the whole truth. Whether Blankenship had made the disclosure and exposed the crime, is of no importance.

Had it been a mere artifice,[15] the case would not be altered; as no objection can be taken because the confession was made under a mistaken supposition, that some of the defendant's accomplices were in custody, or that they had divulged the facts in relation to the crime, and this would be so, even though the suppositions were created by artifice, with a view to obtain the confession. 1 Whart. Crim. Law, § 691; Roscoe's Crim. Ev. 47; R. v. Burley, 2 Stark. Ev. 12n.; 1 Phil. Ev. 164; 2 Russ. Cr. 845.

Under every view that we have been able to take of the case, the confession seems to have been entirely voluntary. It was made without any threats, fears or hopes. Not only so, but it was made without solicitation emanating from any source. The prisoner sent for Hickox, asked for the interview, and said, that, after thinking over the matter, he had concluded to divulge the whole truth. There is here an utter absence of all the tests which would warrant the exclusion of the confession. I think it was properly admissible in evidence, and that the court did not err in permitting it to be received.

The prisoner was convicted of murder in the second degree, and sentenced to the penitentiary, and the judgment of the court below is affirmed. The other judges concur.

STATE v. BARRINGTON.

(Supreme Court of Missouri, in Banc, 1906. 198 Mo. 28, 95 S. W. 235.)

Fox, J.[16] * * * 15. It is insisted by appellant that the court committed error in the admission of the statements and admission of defendant while under arrest. Upon this proposition the record discloses that the jury was excluded and many witnesses heard by the court in laying the proper foundation for the introduction of such statements. The court heard this testimony, and determined that the statements were voluntary, hence, admitted them. With the exception of the testimony of the defendant the evidence tended strongly to show that there were no promises or threats made as an inducement to making the statements offered in evidence. The mere fact that the defendant was in charge of an officer does not render any statements that he may make inadmissible, if it appears that they were not induced by threats or promises of reward or the hope thereof, nor does the fact that the statements of the defendant were elicited by questions put to him by an officer or private persons render them inadmissible,

[15] The rule appears to be the same where the deception was practiced by those having the prisoner in charge, as in Com. v. Cressinger, 193 Pa. 326, 44 Atl. 433 (1899), where the defendant was made to believe that his knife had been found at the place where the crime had been committed. For a collection of the cases on this and related points, see note in 18 L. R. A. (N. S.) 840 (1902).

[16] Part of opinions omitted.

nor is it any sufficient ground of objection that the questions propounded to the defendant by those seeking a statement from him assumed his guilt, or that he was not warned that his statements would be used against him. Kelley's Crim. Law, pp. 180, 181; State v. Jones, 54 Mo. 478; State v. Phelps, 74 Mo. 128; State v. Northway, 164 Mo. 513, 65 S. W. 331; State v. McClain, 137 Mo. 307, 38 S. W. 906; State v. Rush, 95 Mo. 199, 8 S. W. 221; State v. Guy, 69 Mo. 430; State v. Shackelford, 148 Mo. 493, 50 S. W. 105. * * *

VALLIANT, J. (dissenting). * * * In the olden times to which I have already alluded when one suspected of a crime was arrested, he was put to the torture and broken piece by piece until the confession came: whether guilty or not guilty, the confession usually came. We have advanced many milestones from that station, we no longer break them on the wheel, we now only "sweat" them, and some of these days we will advance beyond that station. When this man was arrested he was taken to the office of the chief of detectives and from 9 o'clock in the evening until 2 o'clock in the morning he was subjected to what the witness for the state called "a course of sweating." According to testimony in his behalf all the technical skill and ingenuity of the most experienced experts, bore upon him to entrap him into saying something that would be evidence against himself. There was no threat, no promise, oh no, in fact the prisoner was expressly told that they would make no threat, they would make no promise, he was entirely free to answer or not as he might elect, yet free as he was, the sweating process went on until at length his nerves gave way, he broke down, and wept. What he said on that occasion was given in evidence by the state, and the court in its instruction to the jury on that point said: "What the defendant said against himself, if anything, the law presumes to be true because said against himself. What he said for himself you are not bound to believe because said in a statement or statements proved by the state, but you may believe it or disbelieve it as is shown to be true or false as shown by all the evidence in the case." I am not going now to contend that that testimony was illegal because although we have advanced beyond the rack and the wheel we still cling to the "sweating process." But I do contend that testimony so obtained should not be given to the jury with the stamp of the legal presumption of absolute truth upon it. The jury could not have understood the instruction to mean anything else than that what the prisoner said that might be construed as tending to incriminate himself was to be taken as gospel truth, while what he said which tends to exculpate him is to be received with caution, and believed or disbelieved as the other evidence in the case might warrant. Not only does the court by that instruction invade the province of the jury who alone are entitled to weigh the evidence and determine the credibility of the witness, whether he be the party in interest or not, but it fails to distinguish between what all the law writers on the subject call solemn

admissions that is admissions in judicio, or admissions extra judicium which have been made to influence the conduct of others, and, therefore, worked an estoppel, and mere verbal admissions. Those of the first class are presumed in law to be true. 1 Greenleaf on Ev. § 27, while those of the second class should be received with caution. Id. § 45. And in section 200 the author says: "With respect to all verbal admissions, it may be observed that they ought to be received with great caution." * * *

Judgment affirmed.[17]

AMMONS v. STATE.

(Supreme Court of Mississippi, 1902. 80 Miss. 592, 32 South. 9, 18 L. R. A. [N. S.] 768, 92 Am. St. Rep. 607.)

Ammons, appellant, was indicted, tried, and convicted of burglary. On the trial certain confessions of the defendant, obtained by the aid of a sweat box in the manner mentioned in the opinion of the court, were offered in evidence against defendant over his objection. Without the confessions there was not sufficient evidence to support the verdict. From the conviction the defendant appealed to the supreme court, assigning as error the admission of the confessions.

CALHOON, J. The chief of police testified that the accused made to him a "free and voluntary" statement. The circumstances under which he made it were these: There was what was known as a "sweat box" in the place of confinement. This was an apartment about five or six feet one way and about eight feet another. It was kept entirely dark. For fear that some stray ray of light or breath of air might enter without special invitation, the small cracks were carefully blanketed. The prisoner was allowed no communication whatever with human beings. Occasionally the officer, who had him put there, would appear, and interrogate him about the crime charged against him. To the credit of our advanced civilization and humanity it must be said that neither the thumbscrew nor the wooden boot was used to extort a confession. The efficacy of the sweat box was the sole reliance. This, with the hot weather of summer, and the fact that the prisoner was not provided with sole leather lungs, finally, after "several days" of obstinate denial, accomplished the purpose of eliciting a "free and voluntary" confession. The officer, to his credit, says he did not threaten his prisoner, that he held out no reward to him, and did not coerce him. Everything was "free and voluntary." He was perfectly honest and frank in his testimony, this officer was. He was intelligent, and well up in the law as applied to such cases, and nothing would have tempted him, we assume, to violate any technical requirement of a valid confession,—no threats, no hope of

[17] But see State v. Powell, 258 Mo. 239, 167 S. W. 559 (1914).

reward, no assurance that it would be better for the prisoner to confess. He did tell him, however, "that it would be best for him to do what was right," and that it "would be better for him to tell the truth." In fact, this was the general custom in the moral treatment of these sweat-box patients, since this officer says, "I always tell them it would be better for them to tell the truth, but never hold out any inducement to them." He says, in regard to the patient Ammons, "I went to see this boy every day, and talked to him about the case, and told him it would be better for him to tell the truth; tell everything he knew about the case." This sweat box seems to be a permanent institution, invented and used to gently persuade all accused persons to voluntarily tell the truth. Whenever they do tell the truth,—that is, confess guilt of the crime,—they are let out of the sweat box. Speaking of this apartment, and the habit as to prisoners generally, this officer says, "We put them in there [the sweat box] when they don't tell me what I think they ought to." This is refreshing. The confession was not competent to be received as evidence. 6 Am. & Eng. Enc. Law, p. 531, note 3; Id. p. 550, note 7; Hamilton v. State, 77 Miss. 675, 27 South. 606; Simon v. State, 37 Miss. 288. Defendant, unless demented, understood that the statement wanted was confession, and that this only meant release from this "black hole of Calcutta." Such proceedings as this record discloses cannot be too strongly denounced. They violate every principle of law, reason, humanity, and personal right. They restore the barbarity of ancient and medieval methods. They obstruct, instead of advance, the proper ascertainment of truth. It is far from the duty of an officer to extort confession by punishment. On the contrary, he should warn his prisoner that every statement he may choose to make may be used against him on his trial.

Reversed and remanded.[18]

STATE v. POWELL.

(Supreme Court of Missouri, Division No. 2, 1914. 258 Mo. 239, 167 S. W. 559.)

BROWN, J. * * *[19] It will be observed that the written confession implicates defendant's brothers Halsey and Cottrel Powell as participating in the robbery and murder committed at the Missouri Pacific freight office. According to that confession, Halsey Powell was present and told defendant just before the robbery to come over to his mother's house that night and get some of the money (which they were going to secure by the robbery). At the trial defendant attempted to prove by said Halsey Powell, and by three white employés of the Union Pacific Railroad Company, that said Halsey Powell was a mile

[18] Approved and rule applied in People v. Brockett, 195 Mich. 169, 161 N. W. 991 (1917), where similar methods were used to obtain a confession from a boy.

[19] Part of opinion omitted.

and a quarter distant from the scene of the robbery and murder just one minute before those crimes were committed delivering some waybills to the yardmaster and other employés of said Union Pacific Railroad Company, and therefore could not have been present at the commission of the crime, as recited in defendant's confession. Upon objection by the state, this proffered evidence was excluded, to which ruling defendant duly saved his exceptions. * * *

Regarding the exclusion of the evidence tending to prove that parts of the confession were untrue offered by defendant for the purpose of impeaching or throwing discredit upon said confession, we have not found, nor has the Attorney General cited us to, any law which sustains the ruling of the trial court.

In the case of Jaynes v. People, 44 Colo. 535, 99 Pac. 325, 16 Ann. Cas. 787, the authorities on this point are collated and reviewed at length; and in that case it was expressly held that a confession reciting that defendant procured poison at a certain establishment, with which he feloniously poisoned a horse, might be impeached by proof that the establishment where defendant claimed to have obtained the poison never kept or sold the same.

The case of People v. Fox, 50 Hun, 604, 3 N. Y. Supp. 359, was very much like the one at bar. In that case the defendant made an affidavit that he and four other parties committed a robbery, and, when this affidavit was introduced against him, he offered to impeach the same by evidence that the four other men named in the affidavit did not participate in the crime. In holding that this evidence was competent and should have been admitted, the Supreme Court of New York said: "Now it is quite correct to say that the confession may be false in every other particular, and yet it may be true that defendant participated in the robbery. But the question here is whether the defendant may not give evidence tending to disprove an alleged fact, of which the people have given proof against him. Certainly, when one side gives evidence tending to prove a fact, the other side may give evidence to the contrary. The people had given evidence tending to show that these five persons, together, had committed the alleged crime. Could not the defendant show that four of them were not there, and did not commit it, especially since the crime could not have been committed by one alone? If the defendant had made a confession that he alone went to Plank's, and tied him and his boy, and robbed the house, such a confession, under the other testimony, would have received no credit. But he makes a confession of a transaction not improbable on its face. And evidence is offered tending to show that statements in that confession are not true; and these are such statements, furthermore, that, if they are not true, then the truth of the confession becomes doubtful."

This decision was affirmed by the New York Court of Appeals, 121 N. Y. 449, 24 N. E. 923.

A similar result was reached by the Supreme Court of Pennsylvania in dealing with the same kind of an issue in Commonwealth v. Shaffer, 178 Pa. 409, loc. cit. 415, 35 Atl. 924.

The exclusion of evidence tending to prove that Halsey Powell was not at the Missouri Pacific freight office when the robbery and murder were committed, and therefore could not have participated therein, was very prejudicial to defendant. Defendant not only confessed that Halsey Powell was present as one of the active participants in that robbery, but that said Halsey Powell had, on that very occasion, requested defendant to come to the home of his mother and receive part of the proceeds of the robbery. This part of the confession was about the only evidence of motive on the part of defendant. Therefore proof that Halsey Powell was not present and could not have taken part in the crime would have tended to rebut the evidence of motive on the part of defendant, and would also have directly tended to prove that the confession was not voluntarily made, for if defendant did not want to incriminate his brother Halsey (as stated by the officers), and yet did incriminate him, when the latter was not guilty, this would furnish the highest kind of proof that the confession was not only involuntary, but also unworthy of belief.

For the error of the trial court in admitting the written confession of defendant, and in excluding evidence tending to impeach said confession after it was admitted, its judgment will be reversed, and the cause remanded for a new trial.

It is so ordered.

HEIM v. UNITED STATES.

(Court of Appeals for the District of Columbia, 1918. 46 Wash. Law Rep. 242.)

Mr. Justice VAN ORSDEL delivered the opinion of the Court:

Appellant, defendant below, was convicted in the Supreme Court of the District of Columbia of the crime of adultery.

It appears that, when arraigned, defendant entered a plea of not guilty. Thereafter, when the cause came on for trial, he appeared in court with counsel who had been representing him, but who had expressed a desire to withdraw from the case. The defendant asked the court for a continuance to enable him to secure other counsel. The request was denied, and defendant asked leave to withdraw his plea of not guilty and enter a plea of guilty, which was granted. Thereafter, defendant, through other counsel, moved the court to strike from the record the plea of guilty, which motion was granted, and defendant was put upon trial.

In the course of the trial, counsel for the Government offered to prove the plea of guilty by the introduction of the docket entry, and the clerk of the court was called for that purpose. Defendant objected

to its admission "on the ground that it was an involuntary confession." The court overruled the objection, and the clerk was permitted to read to the jury the minutes showing the plea of guilty. This furnishes the only assignment of error to which it will be necessary to give attention.

Confessions belong in two general classes—judicial and extra-judicial. Judicial confessions may be divided into two kinds—those made by way of plea of guilty, or otherwise, before a committing magistrate, and which form a part of the preliminary record upon which the case is sent to the grand jury for indictment; and those made by way of plea of guilty to an indictment or information when the accused is arraigned in the trial court. To the latter class the confession before us belongs. The objection here is that the plea of guilty was not voluntarily made. This objection goes to the admissibility of the confession. There is but a single question presented, Is such an admission of guilt ever made under such circumstances as to make it competent evidence upon a trial under a substituted plea of not guilty?

A plea of guilty to an indictment is made under conditions of duress which require the utmost discretion in receiving it. A defendant should only be permitted to enter such a plea after being admonished by the court as to its consequences. When thus made, he waives the right to trial by jury, and solemnly confesses the truth of the charge made in the indictment.

We are not here concerned with the rules which govern the admissibility of extra-judicial confessions or judicial confessions made before a committing magistrate, which stand upon an entirely different plane from the grade of judicial confessions we are here considering. The plea of guilty to an indictment amounts to a conviction. It is a conclusive confession of the truth of the charge, hence the admission of such a plea in the trial under a substituted plea of not guilty if the confession is to be given the legal inferences which render confessions as matter of law admissible, must logically be sufficient without corroboration to sustain a verdict of guilty. Matthews v. State, 55 Ala. 187; State v. German, 54 Mo. 526, 14 Am. Rep. 481.

Our attention has been called to but three instances in the jurisprudence of this country where a plea of guilty to an indictment has been used against a defendant in the trial on a substituted plea of not guilty to the same indictment. In State v. Meyers, 99 Mo. 107, 12 S. W. 516, the defendant, when the indictment charging him with murder was read to him, in open court, pleaded guilty. The court refused to receive the plea, which was not recorded, and set the case for trial. At a subsequent term of the court in the course of the trial the prosecution was permitted to prove by the clerk of the court and others the plea of guilty offered at the previous term of the court. Holding the evidence inadmissible, the appellate court said: "Such testimony should not have been admitted. The confession being what is termed 'a plenary judicial confession,' that is a confession made before a tribunal competent to try him, was sufficient whereon to found a conviction.

I Roscoe, Crim. Ev. (8th Ed.) 40. Consequently, the trial court might have proceeded at once to pass sentence upon the accused. * * * No one would contend that, if the plea of guilty had been entered of record, such plea could have been received in evidence against the defendant, and yet the same principle is involved whether the plea actually go upon record or not; in either case, it must, if received in evidence, be conclusive of the defendant's guilt. * * * By refusing to receive the plea and granting the defendant a trial, this, of necessity, meant a trial with the issues of fact to be determined by the jury, and not to be determined by the previous plea of the defendant, which admitted all that the State desired to prove. In short, the trial court could not refuse to receive the defendant's plea of guilty at one time and then use it against him at another."

In People v. Ryan, 82 Cal. 617, 23 Pac. 121, the defendant, under a statute of California granting the right, withdrew a former plea of guilty and entered a plea of not guilty. At the trial, the prosecution was permitted to introduce the record of the plea of guilty. The court, reversing the judgment of conviction, said: "The case stands thus, without the evidence of a withdrawn plea of guilty, for which, by authority of law and the court, a plea of not guilty was 'substituted', the defendant could not have been legally proven or found guilty. Can it be that a privilege thus conceded to a defendant of substituting one plea for another is to have the inevitable effect of defeating the whole object of the 'substituted' plea? We do not think that the legislature in passing the law under which the defendant was allowed to nullify and render functus officio his plea of guilty by substituting or putting in place of it a plea of not guilty, intended to say that, notwithstanding such substitution and doing away with the first plea, it may be given in evidence and sometimes serve as the only conclusive proof of a man's guilt under the plea of not guilty. Of what use practically would such a privilege to a defendant be, as that granted by section 1018 of the Penal Code, if its construction is to be such as that contended for by the respondent?"

The only case cited directly in point which holds that a former plea of guilty to an indictment is admissible against the defendant on trial upon a substituted plea of not guilty to the same indictment is State v. Carta, 90 Conn. 79, 96 Atl. 411, L. R. A. 1916E, 634, decided by the Supreme Court of Errors of State of Connecticut. Three judges announced the majority opinion, resting the decision upon the case of Commonwealth v. Ervine, 38 Ky. (8 Dana) 30, a case of remote analogy, as we shall observe later. Two judges joined in a dissenting opinion, not only conclusive in its reasoning, but in which an overwhelming array of authority is marshalled.

The text-writers seem to be unanimous in condemnation of the practice. Wharton, in his work on Criminal Evidence (10th Ed.) § 638, says: "Where a plea of guilty is withdrawn by the permission of the court, it is not binding as a confession, nor can it be used as evidence."

In 2 Encycl. Pl. & Pr. p. 779, the rule is announced as follows: "The effect of withdrawing a plea is to render it functus officio, and it cannot afterwards be given in evidence against the accused."

In 8 Ruling Case Law, p. 112, the subject is summarily dismissed with the suggestion that "it is hardly necessary to state that when a plea of guilty has been withdrawn and a plea of not guilty entered, the plea of guilty is not admissible in evidence against the accused."

In 12 Cyc. p. 426, the rule, as deduced from the authorities, is stated as follows: "A voluntary offer by the accused before trial to plead guilty on terms to the offence charged is competent as his admission, but a withdrawn plea of guilty in place of which a plea of not guilty has been substituted by leave of the court is not competent as an admission."

In Abbott's Criminal Trial Brief, p. 314, the author states as a rule of evidence that "a plea which has been held invalid, and superseded by the plea on which the accused is tried, cannot be read in evidence against him."

A number of cases have been cited by counsel for the Government where admissions of guilt made before a committing magistrate have been used against the accused in the trial court. As we have observed these are judicial confessions of a lower grade, and are insufficient, without corroboration, to support a judgment of conviction. As to the admissibility of such confessions we are not called upon to express an opinion in this case. In Commonwealth v. Ervine, supra, strongly relied upon by counsel for the Government, defendant pleaded guilty to an indictment charging a misdemeanor, upon which the court sentenced him to pay a fine. Appeal was taken; the judgment was reversed, and, in the second trial he pleaded not guilty. It was held that the record of the admission of guilt on the former trial could be used against him. But this was a complete record, which defendant had deliberately made against himself, and on which he elected to stand through an appeal to a higher court. When reversed, he elected to abandon his former position and avail himself of a new line of defense. While the Ervine Case stands alone and furnishes the sole support for the majority opinion in the Carta Case, we think it is only remotely analogous to the case at bar.

Nor can the error be cured by an instruction of the court to the jury attempting to place a limitation upon the weight to be given evidence of such a confession. Its admission under any circumstances is such an invasion of the right of one accused of crime to a fair and impartial trial that the error is incurable. It is so destructive of the rights of the accused that the court will not stop to examine into the technical accuracy of the objection made to its admission, but will, in the furtherance of justice take cognizance of the error and refuse to charge the defendant with any waiver of his rights through the oversight or neglect of his counsel to state with legal precision the grounds of his objection. Wiborg v. United States, 163 U. S. 632, 16 Sup.

Ct. 1127, 1197, 41 L. Ed. 289; Crawford v. United States, 212 U. S. 183, 194, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392; Miller v. United States, 38 App. D. C. 361, 364, 40 Wash. Law. Rep. 210, 40 L. R. A. (N. S.) 973.

But it is sought to distinguish the Ryan Case, in that the plea was withdrawn under a right conferred by statute, while here its withdrawal was permitted in the discretion of the court. Indeed, the presumptions in favor of the defendant are stronger here than in the Ryan Case. There, he could withdraw his plea under a right conferred by statute, irrespective of the circumstances which may have induced him to make it; but, here, the mere fact that the court permitted the withdrawal might well admit of the implication that the plea of guilty had been improperly received. The most charitable treatment which the contention deserves is to consider the situations, in point of law, analogous. Whether the plea of guilty is withdrawn in the exercise of a statutory privilege or by the permission of the court, the defendant stands for trial upon a plea of not guilty, and is entitled to all the safeguards and presumptions of innocence which the humanity of the law extends to one on trial where life or liberty is at stake. He stands upon a substituted plea of not guilty, and it matters not how the plea of guilty was set aside, whether by express or implied authority of law. The authority for the act, so long as it existed, fixed the status of the defendant. After the plea of guilty was withdrawn, the case was in precisely the same condition as if the plea of not guilty had been originally entered. The admission of guilt had disappeared from the case, because the court, in the exercise of its sound discretion, had determined that, in justice, it should go out of the case. When it was stricken out, its evidential effect as a confession disappeared. To reinstate it in the form of evidence against defendant is to deprive him of any advantage gained by the withdrawal of the plea of guilty, and restore him to a position where inevitable conviction awaited him at the hands of the jury. As was said in the dissenting opinion in the Carta Case: "Considerations of fairness would seem to forbid a court permitting for cause a plea to be withdrawn, and at the next moment allowing the fact of the plea having been made, with all its injurious consequences, to be admitted in evidence as an admission or confession of guilt by the accused. The withdrawal is permitted because the plea was originally improperly entered. No untoward judicial effect should result from the judicial rectification of a judicial wrong."

The judgment is reversed, and the cause remanded for a new trial. Reversed and remanded.[20]

[20] The dissenting opinion of Chief Justice Smith has been omitted.

IV. Entries and Statements against Interest

MANNING v. LECHMERE.

(Court of Chancery, 1737. 1 Atk. 453.)

Lord Chancellor. The rules as to evidence are the same in equity as at law, and if A. was not admitted as a witness at the trial there, because materially concerned in interest, the same objection will hold against reading his deposition here.

There are many cases where leases are granted to persons, in which possession upon that lease, and payment of rent, shall be a presumption of right in the lessor, till a better is shewn; but when two leases are set up, you cannot read one of them, till you have proved possession under that lease.

Receipts for rent are not a sufficient evidence of a title in the lessor, unless he proves actual payment, especially where the person who has signed the receipt is living,[21] for he ought to have been examined in the cause.

Where there are old rentals, and bailiffs have admitted money received by them, these rentals are evidence of the payment, because no other can be had.

WARREN v. GREENVILLE.

(Court of King's Bench, 1740. 2 Strange, 1129.)

Upon a trial at bar, the lessor of the plaintiff claimed under an old intail in a family settlement, by which part of the estate appeared to be in jointure to a widow at the time her son suffered a common recovery, which was in 1699. And the defendants not being able to shew a surrender of the mother's estate for life, it was insisted that there was no tenant to the præcipe for that part, and the remainder under which the lessor claimed was not barred.

To obviate this it was insisted by the defendant, that at this distance of time a surrender should be presumed; according to 1 Ven. 257, and what is laid down in Mr. Pigot's book of Common Recoveries:

[21] Lord Denman, in Phillips v. Cole, 10 Ad. & El. 106 (1839): "With regard to the first of these, it is clear that declarations of third persons alive, in the absence of any community of interest, are not to be received to affect the title or interests of other persons, merely because they are against the interest of those who make them. The general rule of law, that the living witness is to be examined on oath, is not subject to any exception so wide; and we are of opinion that the circumstance of fraud being acknowledged introduces no difference in principle; that acknowledgment would certainly make the evidence, if receivable, more weighty, but only upon the ground that it is more strongly against the interest of the party than any merely pecuniary consideration could make it. The ground of its admission would be the same in either case; and the same objection applies in both, the want of community of interest."

See, also, Hennings v. Robinson, ante, p. 499.

and to fortify this presumption they offered to produce the debt-book of Mr. Edwards an attorney at Bristol long since deceased, where he charges £32. for suffering the recovery, two articles of which are, for drawing a surrender of the mother 20s. and for ingrossing two parts thereof 20s. more, and that it appeared by the book the bill was paid.

And this being objected to as improper evidence, the court was of opinion to allow it, for it was a circumstance material upon the inquiry into the reasonableness of presuming a surrender, and could not be suspected to be done for this purpose; that if Edwards was living he might undoubtedly be examined to it, and this was now the next best evidence. And it was accordingly read. After which the court declared, that without this circumstance they would have presumed a surrender; and desired it might be taken notice of, that they did not require any evidence to fortify the presumption, after such a length of time.

DOE, Lessee of Reece et al., v. ROBSON et al.

(Court of King's Bench, 1812. 15 East, 32.)

In ejectment for a messuage in the parish of St. Leonard, Shoreditch, the question turned upon the validity of a lease granted under a power in a marriage settlement given to John Fotherby and Anne Colepepper, when in possession respectively, to grant leases for any term not exceeding ninety-nine years, to take effect in possession and not in reversion. The lease in question bore date the 31st of August, 1770, and was granted by John Fotherby to Stephen Robson, habendum from the 29th of September, now next ensuing, for the term of ninety-nine years. At the trial, before Lord Ellenborough, C. J., at Westminster, the lessors of the plaintiff, who were purchasers of the reversion, insisted upon the invalidity of this lease; it appearing from the date coupled with the habendum to be a lease in reversion and not in possession. The defendants who claimed under the lease, insisted that although it bore date on the 31st of August, 1770, yet it was not really executed and delivered until a period subsequent to that date. To prove this they produced and tendered in evidence the books of Mr. Strong, deceased, who was proved to have been Stephen Robson's attorney; the entries in which were all proved to be in the handwriting of Strong. The first was his day book, containing the following entry:

"Fotherby to Robson. Indentures of lease; Sept. 15." Then the journal journalizing from the day book with the following entries:

"1769, 1770. P. 30. Stephen Robson, Long-Alley, near Moorfields.

		s.	d.
Sept. 15.	Indentures of lease Fotherby to you	8	0
Oct. 6.	Parchment memorial do.	0	4
10.	Paid registering	7	0"

Also the bill-book or ledger: "1770, October. Drawing and engrossing lease from Mr. Fotherby to you, and counterpart, and drawing and engrossing memorial thereof, and paid registering, £3. 13s. 6d." It appeared, that the above charges were paid. These entries were tendered in evidence to show that the parchment materials upon which the lease was drawn were purchased, and the lease itself executed, subsequent to the 31st of August, the date of the lease. The evidence, though objected to, was admitted by Lord Ellenborough, C. J., and a verdict was thereupon found for the defendants.

Park now moved for a new trial, on the ground that the evidence was not admissible. He allowed that this question had been much considered in a late case of Higham v. Ridgway, 10 East, 109; but distinguished that case from the present, inasmuch as that was a question respecting the time of birth of a child, upon which evidence of reputation in the family is admissible; and, therefore, the books of the midwife, who must best know the fact, might be well received. But here the evidence was admitted upon a matter of which reputation is no evidence; namely, to show that the date expressed in a deed was not the true time of its execution. He admitted that the case of Warren d. Webb, v. Grenville, 2 Strange, 1129, had gone farther; for there the charges made in the attorney's book were admitted to show the surrender of a life estate, in order to support a subsequent recovery; and that that doctrine had been upheld by later decisions, as in Roe v. Rawlins, 7 East, 279. But he contended that the rule ought not to be relaxed too much.

LORD ELLENBOROUGH, C. J. The ground upon which this evidence has been received is, that there is a total absence of interest in the persons making the entries to pervert the fact, and at the same time a competency in them to know it. The impression on my mind is the same now as it was at the trial, that the evidence is admissible on the authority of the cases.

GROSE, J., concurred.

LE BLANC, J. The case of Roe v. Rawlins was not a question of reputation, but whether the ancient rent was reserved by the tenant for life.

BAYLEY, J. It has long been an established principle of evidence, that if a party who has knowledge of the fact [22] make an entry of it,

[22] Hayes, J., in Reg. v. Exeter, L. R. 4 Q. B. C. 341 (1869): "* * * It would be absurd to hold that a declaration was admissible, but to hold that it was no evidence as to one of the main facts which it imported.

"The principle, that a declaration against interest was evidence as to all that formed an essential part of it, was long since settled as to a declaration against pecuniary interest in Higham v. Ridgway, 10 East, 109 [1808], and the numerous cases that followed; and this principle was applied to declarations against proprietary interest in the case of Reg. v. Birmingham, 1 B. & S. 763 [1861]; as it had been in several earlier cases."

See, also, Knapp v. Trust Co., 199 Mo. 640, 98 S. W. 70 (1906), admitting the paid bill of a deceased physician to prove the disease for which the patient had been treated.

whereby he charges himself, or discharges another upon whom he would otherwise have a claim, such entry is admissible in evidence of the fact, because it is against his own interest.

Rule refused.[28]

IVAT v. FINCH et al.

(Court of Common Pleas, 1808. 1 Taunt. 141.)

This was an action of trespass, tried before Lord Ellenborough, C. J., at the last assizes for the county of Cambridge, for taking three mares, the property of the plaintiff, and converting them to the use of the defendants. The defendants justified under a heriot custom; and the only question between the parties was, Whether one Alice Watson, the tenant, was possessed of the said mares at the time of her death? It was admitted that they had formerly been her property, but it was contended that some time before her death she had transferred them, with the rest of her farming stock, to the plaintiff. For the purpose of proving this transfer, a witness was called to speak to a conversation, in which Mrs. Watson had stated that she had retired from business, and given up her farm and stock to her son-in-law, the plaintiff. The Chief Justice inquired whether these declarations were accompanied by any act relative to the management of the farm. This being answered in the negative, his Lordship was of opinion that the evidence could not be received. The jury gave their verdict for the defendants. A rule nisi having obtained on a former day for setting aside the verdict and granting a new trial.

Lens, Serjt., upon shewing cause, contended that the evidence was properly rejected. These declarations were not offered as explanatory of any act relative either to this property, or to the business and management of the farm. They were nothing but casual and idle conversation. Evidence of such a description was calculated rather to mislead than inform; and the admission of it in courts of justice would be attended with the most manifest inconvenience and danger.

Sellon, Serjt., contra, was stopped by the Court.

MANSFIELD, C. J. The evidence ought to have been received; though undoubtedly such declarations would be entitled to a greater or less degree of attention according to the circumstances by which they were accompanied. The admission, supposed to have been made by Mrs. Watson, was against her own interest. Had this been an action between Mrs. Watson and the present plaintiff, her acknowledgment that the property belonged to him might clearly have been given

[28] In the earlier case of Higham v. Ridgway, 10 East, 109 (1808), where the paid account of a deceased physician had been admitted to prove the date of a birth, the opinion seems to lay some stress on the fact that there was extrinsic evidence of the fact that the physician had attended the case.

in evidence. It ought, therefore, to have been received in the present instance; because the right of the lord of the manor depended upon her title.

PER CURIAM. Rule absolute.[24]

PEACEABLE v. WATSON.

(Court of Common Pleas, 1811. 4 Taunt. 16.)

This was an ejectment brought to recover possession of three houses at Wisbeach. Upon the trial at the Cambridge spring assizes, 1811, before Grose, J., the counsel for the plaintiff, whose lessor claimed the premises by descent from Robert Farthing, in order to show the seisin of Robert Farthing, asked a witness if he had known one Clarke, now deceased, and upon his saying yes, asked if he had ever heard Clarke say of whom he rented the houses which he occupied in Wisbeach. The counsel for the defendant objecting to this question, Grose, J., refused to permit it to be put, and the plaintiff, being unable to prove his title without this evidence, was nonsuited. Another objection was also raised by the defendant, that the term alleged to be demised to the plaintiff had expired before the trial, but that objection was overruled at the trial, and the rejection sanctioned by the court afterwards, who said it might be cured by amending.

Peckwell, Serjt., in Easter term had obtained a rule nisi to set aside the nonsuit and have a new trial, upon the ground that evidence of the declarations of a deceased tenant may be received to show who was his landlord.

MANSFIELD, C. J. The opinion of Grose, J., is unanswerable. The ground of the rejection is this. Possession is prima facie evidence of seisin in fee simple: the declaration of the possessor that he is tenant to another, makes most strongly, therefore, against his own interest, and consequently is admissible, but it must be first shown that he was in possession of the premises for which the ejectment is brought. The learned judge's report, however, seems to go further, and to intimate that he should have rejected the evidence of the declarations, whether there had or had not been other evidence to identify the premises which Clarke held, as those that were sued for.

LAWRENCE, J. The plaintiff must know, or ought to know, what premises he goes for, and he must first show, that the defendant is

[24] That an oral statement against pecuniary interest is equally admissible, see Mahaska County v. Ingalls, 16 Iowa, 81 (1864), where the cases are collected and reviewed. For the contrary view, limiting statements against pecuniary interest to book entries and similar writings, see Lawrence v. Kimball, 1 Metc. (Mass.) 527 (1840).

in possession of the premises sought to be recovered, and next, that the plaintiff has a better title. But since the learned judge was of opinion, that, after those facts were proved, the declaration still would not be evidence, there ought to be a new trial.

Rule absolute.

ADDAMS v. SEITZINGER.

(Supreme Court of Pennsylvania, 1841. 1 Watts & S. 243.)

This was an action of assumpsit on a note, to which the defendant pleaded non assumpsit infra sex annos.

The plaintiff gave in evidence the following note:

"On demand I promise to pay John Addams or order $600, without defalcation, for value received. Reading, Sept. 4, 1827.

"Jacob W. Seitzinger"

and proved that said John Addams died in November, 1832; that the following endorsements or entries on the back of said promissory note, are in the handwriting of said John Addams:

"Interest paid up, February 17, 1829. Jno. Addams."

"Received three hundred and fifty dollars on the within note at different times. January 31, 1829. Jno. Addams."

The plaintiffs then offered to read the said entries or endorsements in evidence, to take the case out of the statute of limitations; defendant objected to the evidence; the court sustained the objection, and overruled the testimony; to which decision of the court the plaintiffs excepted.

Error assigned:

The court erred in rejecting the entries or endorsements on the back of the note, and in deciding that the same did not take the case out of the statute of limitations.

The opinion of the Court was delivered by

GIBSON, C. J. Endorsements or memorandums of payments, as acknowledgment of debt to avoid the consequences of lapse of time, were never much encouraged by the English judges; and they have been finally prohibited, as regards the statute of limitations, by the 9 G. 4, c. 14, though they may still be used in the English courts, to rebut the presumption of payment which ordinarily arises from the lapse of twenty years. Yet the objection usually made to their competency, that they enable a party to make evidence for himself, is more specious than solid. If the statute had closed upon the right, or the foundation of the presumption were complete when the memorandum was made, an objection to it would be unanswerable; but it is impossible to conceive of a motive for fabricating such a memorandum while the right of action remained unimpaired. To suppose that a creditor would set about the commission of what is at least a

moral forgery, to obviate the anticipated consequences of his own apprehended supineness, when he might, by bringing immediate suit, prevent the occurrence of those consequences altogether, is absurd. The legal presumption is in favour of innocence where there is no violent probability of guilt. But the rule, guarded as it was in England, and as it still is here, allows not such a memorandum to go to the jury, unless it appear to have been made when the creditor had no motive to give a false credit, but when, on the contrary, he had the all-prevailing inducement of interest to avoid the appearance of it; that is, when the period necessary to give effect to the statute or to raise a presumption of payment had not elapsed, and consequently when to give a false credit would have been to throw so much away. With this qualification, such evidence cannot operate injuriously; for it is not to be supposed that a creditor could so far mistake his interest, as to sacrifice a part of his debt to save the residue, when no part of it was in danger. It is possible that a weak man might do so; but it is inconsistent with the ordinary course of human action. The rule is not only essentially a good one, but it is no more than an extension of the principle which allows entries or memorandums, which were prejudicial to the interest of the writer where his testimony cannot be had, to be evidence of a fact in a controversy between strangers; thus substituting for the sanction of a judicial oath, the more powerful sanction of a sacrifice of self-interest. In the case before us, it is certain that the credits were endorsed before the statute had run its course. The note was drawn in 1827; and the endorsements, both in the handwriting of the creditor, who died in 1832, are dated 1829; so that the period required by the statute had not run round even at his death. Such was the case which was offered to be proved; and the evidence of it ought to have been received.

Judgment reversed, and a venire de novo awarded.[25]

HOSFORD v. ROWE et al.

(Supreme Court of Minnesota, 1889. 41 Minn. 245, 42 N. W. 1018.)

DICKINSON, J.[26] The respondent, Carrie M. Hosford, is the widow of the deceased, John H. Hosford. Before her marriage to him she was a widow, and bore the name of Thompson. The appellants are his daughters by a former marriage. By an order of the probate court

[25] See Searle v. Barrington, 2 Strange, 826 (1729), affirmed by the House of Lords, 3 Brown, P. C. 593 (1730), where a similar entry was held admissible to rebut a presumption of payment; for an exhaustive review of this case, see Gleadow v. Atkin, 1 Cr. & M. 410 (1833).

[26] Part of opinion omitted.

for the distribution of the estate, the respondent, the widow, was allowed to take in accordance with the statute, as though her rights were not affected by the antenuptial contract hereafter to be referred to. The daughters of the deceased appealed to the district court. Upon trial of the cause in the latter court a jury was called, and three questions were submitted to them for decision, viz.: "First, whether about November 2, 1885, the antenuptial contract was executed;" to which the jury, by direction of the court, answered, "Yes;" "second, whether the deceased, subsequent to the marriage, and about September 13, 1886, destroyed that contract with the knowledge and consent of his wife;" to which the jury answered, "No;" and, "third, whether at or about the time last named he signed duplicate instruments presented in the case, and known as Exhibits C and D, purporting to annul the antenuptial contract;" to which the jury answered, "No." The widow, who claimed the more favorable provision made by law, rather than that made by the terms of the antenuptial agreement, moved for a new trial, upon the ground, among others, of newly-discovered evidence. The court granted a new trial upon that ground, and from that order this appeal was taken.

We are called upon to consider the alleged newly-discovered evidence, as it may bear upon the second and third of the questions presented to the jury. * * *

The newly-discovered evidence, which led the court to grant a new trial, is shown in the affidavit of one Abraham L. Jones, stating a conversation with Mr. Hosford between the 1st and 15th of October, 1886, —a short time after the alleged destruction of the antenuptial contract, —in which Mr. Hosford said: "I burned the papers we had written before our marriage. I propose to let my wife have the biggest part of my money." Proof of such a declaration would not be subject to the objections suggested by the appellants. It would be provable as evidence of the destruction and annulling of the antenuptial contract, for the reason that such a declaration by him would be against his interest in a pecuniary or proprietary point of view, and is therefore within the familiar exception to the rule relating to secondary evidence. 1 Greenl. Ev. §§ 147–149. By force of the antenuptial agreement the husband's power to dispose of his estate was greater than it would be if that contract should be annulled. By that contract the interest which his widow could enjoy in his estate, upon his death, was limited to one-seventh part, as against the one-third which our law gives when unaffected by such an agreement. It was for his interest to preserve the larger power of disposition with respect to his property, which the contract secured to him. He could still, of his own volition, bestow upon his wife while living, or by will upon his widow, a greater share of his estate than that specified in the agreement, and a will once made might be revoked or altered at his own election. He would be free, on the other hand, to make any other disposition he might desire of the six-

sevenths of the estate. This right of election on his part would at once cease upon the cancellation of that contract. Thereafter he could impose no restriction upon the larger statutory rights of his wife to share in his estate. As respected his interest in the property, it was not a matter of indifference whether the contract remained in force or not. Its annulment would diminish his power to control the disposition of his property; nor would it be in his own power to place himself again in his former advantageous position.

These considerations distinguish this case from a class of decisions relied upon by the appellants in respect to which it is to be observed that the declarations in question could not be said to be against the interest of the persons making them. Declarations by a person to show that he had executed a will, or that he had not executed a will, or that he had revoked his will, are examples of the cases referred to. These are not to be regarded, in general, as declarations against interest, for the acts to which the declarations relate, and the consequences of such acts, are wholly within the control of the person whose declaration is in question. It cannot be presumed that such acts are prejudicial to himself. If he has made a will, he can revoke it at pleasure, or alter it, or make another. And so his declaration that he has made a will is not against his interest. If he has not executed a will, that is not to his prejudice. He can do so whenever he may deem it best. If he has revoked a will, he can make another. Whether the declaration in question would be admissible in this case upon any other ground than that above specified, we do not decide.

The latter provision in the antenuptial agreement, to the effect that in the event of the husband surviving the wife, the heirs and next of kin of the latter should, upon his death, take the same interest in the property which the contract secured to her, does not qualify the conclusion that it was, in contemplation of law, against his interest to annul this agreement. Their ages were such that—no other fact appearing—it was probable that she would survive him, and hence that this last provision would never become operative. The law recognizes this probability based upon such a difference in ages, and it is not to be disregarded in considering whether the interest of Mr. Hosford was that the contract should remain in force or be annulled. The case as it then stood may be thus stated: If the contract should remain in force, the wife's inchoate interest in the estate, and the corresponding restriction upon the husband's power of disposition, would be confined to the one-seventh part. But this limitation of his power would be effectual, even though he should outlive her. On the other hand, if the contract were done away with, such charge and restriction would apply to one-third of the estate,—more than twice the former proportion,—if Mr. Hosford should die before his wife, as it was probable he would do. It so clearly appears from this that his interest was to preserve the contract in force, that, no other qualifying circumstance

being shown, it should be assumed that the declaration in question was against interest, and therefore it would be competent evidence against the appellants. * * *

Order affirmed.[27]

SMITH v. BLAKEY.

(Court of Queen's Bench, 1867. L. R. 2 Q. B. Cas. 326.)

Declaration for money lent, money paid, work done and commission, money had and received, interest, and on accounts stated.

Plea, never indebted.

Issue thereon.

At the trial before Mellor, J., at the sittings in Middlesex after Easter Term, 1866, it appeared that the action was brought to recover £97. 18s. 3d., the balance, with interest, due, as was alleged, on an advance by the plaintiffs to the defendant, on a consignment of boots and shoes. The plaintiffs in 1864 were general merchants, having a house in London, Liverpool, and Calcutta. The plaintiff Smith managed the business in London, and the business in Liverpool was carried on by a confidential clerk, named Barker, whose duty and practice it was to keep his principals constantly advised of all the business he transacted for them. The defendant was a boot and shoe manufacturer in Liverpool. Barker died in August, 1864; and, in order to prove the alleged transaction between the plaintiffs and the defendant, a letter written by Barker to the plaintiff Smith on the 5th of April, 1864, was tendered in evidence, and admitted, after objection. The letter was as follows:

"April 5, 1864.

"James Smith, Esq., London—Dear Sir: I enclose four private letters, also two drafts of Cuming Brothers. * * * Draft of John Blakey [the defendant] which he sent to-day, with three huge cases, to the office. I enclose his invoices for your perusal. He leaves shipment of his goods to your judgment. He will renew; he banks with the North and South Wales Bank here. I think the goods are remarkably cheap, and I consider him a perfectly safe man, should there be any reclamation. He draws for 75 per cent., and will pay me the £20. he owes you, which it was arranged you should take out in ponies; this I stipulated for. I have a sample pair of each de-

[27] In Reg. v. Inhabitants of Worth, 4 Q. B. 132 (1843), it was held that an entry showing a contract of employment was not against the interest of the employer.

In Gunn v. Thruston, 130 Mo. 339, 32 S. W. 654 (1895), on a question of bringing advancements into hotchpot, it was thought that statements by the deceased parent, that certain transfers were absolute gifts, were against his interest, but not statements that other transfers were advancements.

scription here, which we can send out by first ship, and keep the goods for the Lady Palmerston, which vessel arrived yesterday from Glasgow. * * * Yours, &c., Geo. C. Barker."

The invoices inclosed were one to each case of boots and shoes, and were on lithographed forms of the defendant, headed "Mr. ——— Bought of J. Blakey," no name being inserted as buyer; and the list of boots and shoes, with prices, was made out in the handwriting of one of the defendant's clerks.

The draft was a bill of exchange, dated April 5, 1864, at six months drawn by the defendant to his own order on the plaintiffs, for £252. 7s. 5d., "value received," this amount being about £75. per cent. on the aggregate invoice prices.

The plaintiffs accepted this bill, and returned it to the defendant, and paid it at maturity.

Two of the cases were consigned for sale to the plaintiffs' house at Calcutta, and one to their agents at Columbo, in Ceylon; and on the account sales returned to the plaintiffs by their correspondents, and which were put in evidence, the net proceeds of the sale of the three cases showed a deficit below the sum advanced by the plaintiffs, which deficit, with interest, made up the sum claimed.

[The jury found a verdict for the amount claimed.

A rule was obtained to enter a nonsuit, on the ground that there was no evidence to go to the jury; or for a new trial, on the ground that Barker's letter ought not to have been admitted in evidence.]

BLACKBURN, J.[28] The first question is, was the letter of the 5th of April, 1864, written by Barker to the plaintiffs admissible in evidence against the defendant? Mr. Barker was employed by the plaintiffs as confidential agent in Liverpool to carry on their business there; and part of his duty, part of what he was employed to do, was to keep his principals advised of the business transacted by him, and he did keep them so advised. Of course, as long as Barker lived this letter would not have been evidence, and he must have been himself called as a witness; but Barker is dead, and it was sought to make the letter admissible, as coming within the class of cases in which statements, whereby a deceased person has charged himself with or discharged another from the payment of money, have been admitted. And no doubt when entries are against the pecuniary interest of the person making them, and never could be made available for the person himself, there is such a probability of their truth that such statements have been admitted after the death of the person making them, as evidence against third persons, not merely of the precise fact which is against interest, but of all matters involved in or knit up with the statement; as in Higham v. Ridgway, 10 East, 109, where the entry of man midwife that he had delivered the wife of a certain man of a

[28] Part of opinion omitted.

son on a particular day, coupled with the charges which were marked as paid, was held admissible to prove the date of the birth of a person who had suffered a recovery, showing that he was not of age at the time. The present statement is contained in a letter which acknowledges the receipt of "three huge cases," and if this acknowledgment is receivable in evidence as against interest, then the rest of the letter explanatory of the transaction under which the cases were received would also be evidence. But the authorities show, as was said in the Sussex Peerage Case, 11 Cl. & F. 85, that the declaration must be against pecuniary interest, or, what is much the same thing, against proprietary interest, as when a deceased occupier of land admitted that he held as tenant of another, thus cutting down his prima facie title in fee. In the present case all the admission by Barker that can be said to be against interest amounts to no more than an admission that he has the care of the three chests which have arrived at the office, and the possibility that this statement might make him liable in the case of their being lost is an interest of too remote a nature to make the statement admissible in evidence. * * *

Rule absolute for a new trial.

DONNELLY v. UNITED STATES.

(Supreme Court of the United States, 1913. 228 U. S. 243, 33 Sup. Ct. 449, 57 L. Ed. 820, Ann. Cas. 1913E, 710.)

Mr. Justice PITNEY [29] delivered the opinion of the court:

Plaintiff in error was convicted in the circuit court of the United States for the northern district of California, upon an indictment for murder; and, having been sentenced to life imprisonment, sues out this writ of error. The indictment charged him with the murder of one Chickasaw, an Indian, within the limits of an Indian reservation known as the Extension of the Hoopa Valley Reservation, in the county of Humboldt, in the state and northern district of California. * * *

The only remaining question arises out of the exclusion by the trial judge of testimony offered by the plaintiff in error for the purpose of showing that one Joe Dick, an Indian, since deceased, had confessed that it was he who had shot Chickasaw. Since the circumstances of the crime, as detailed in the evidence for the government, strongly tended to exclude the theory that more than one person participated in the shooting, the Dick confession, if admissible, would have directly tended to exculpate the plaintiff in error. By way of foundation for the offer, plaintiff in error showed at the trial that Dick was dead, thereby accounting for his not being called as a witness,

[29] Parts of opinion omitted.

and showed in addition certain circumstances that, it was claimed, pointed to him as the guilty man, viz., that he lived in the vicinity and therefore presumably knew the habits of Chickasaw; that the human tracks upon a sand bar at the scene of the crime led in the direction of an acorn camp where Dick was stopping at the time, rather than in the direction of the home of the plaintiff in error; and that beside the track there was at one point an impression as of a person sitting down, indicating, as claimed, a stop caused by shortness of breath, which would be natural to Dick, who was shown to have been a sufferer from consumption.

Hearsay evidence, with a few well-recognized exceptions, is excluded by courts that adhere to the principles of the common law. The chief grounds of its exclusion are, that the reported declaration (if in fact made) is made without the sanction of an oath, with no responsibility on the part of the declarant for error or falsification, without opportunity for the court, jury, or parties to observe the demeanor and temperament of the witness, and to search his motives and test his accuracy and veracity by cross-examination, these being most important safeguards of the truth where a witness testifies in person, and as of his own knowledge; and, moreover, he who swears in court to the extrajudicial declaration does so (especially where the alleged declarant is dead) free from the embarrassment of present contradiction, and with little or no danger of successful prosecution for perjury. It is commonly recognized that this double relaxation of the ordinary safeguards must very greatly multiply the probabilities of error, and that hearsay evidence is an unsafe reliance in a court of justice.

One of the exceptions to the rule excluding it is that which permits the reception, under certain circumstances and for limited purposes, of declarations of third parties, made contrary to their own interest; but it is almost universally held that this must be an interest of a pecuniary character; and the fact that the declaration alleged to have been thus extrajudicially made would probably subject the declarant to a criminal liability is held not to be sufficient to constitute it an exception to the rule against hearsay evidence. So it was held in two notable cases in the House of Lords,—Berkeley Peerage Case (1811) 4 Campb. 401; Sussex Peerage Case (1844) 11 Clark & F. 85, 103, 109, 8 Jur. 793, recognized as of controlling authority in the courts of England.

In this country there is a great and practically unanimous weight of authority in the state courts against admitting evidence of confessions of third parties, made out of court, and tending to exonerate the accused. Some of the cases are cited in the margin.[30] A few of them (West v. State, 76 Ala. 98; Davis v. Com., 95 Ky. 19, 44 Am. St. Rep.

[30] An extensive list of cases is collected in the note to this case in the original report.

201, 23 S. W. 585; and People v. Hall, 94 Cal. 595, 599, 30 Pac. 7), are precisely in point with the present case, in that the alleged declarant was shown to be deceased at the time of the trial. * * *

"The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well-established rule, the value of which is felt and acknowledged by all. If the circumstance that the eyewitnesses of any fact be dead should justify the introduction of testimony to establish that fact from hearsay, no man could feel safe in any property, a claim to which might be supported by proof so easily obtained. * * * This court is not inclined to extend the exceptions further than they have already been carried."

This decision [Queen v. Hepburn (1813) 7 Cranch, 290, 295, 3 L. Ed. 348, 349, per Marshall, C. J.] was adhered to in Davis v. Wood (1816) 1 Wheat. 6, 8, 4 L. Ed. 22, 23; Scott v. Ratliffe (1831) 5 Pet. 81, 86, 8 L. Ed. 54, 55; Ellicott v. Pearl (1836) 10 Pet. 412, 436, 437, 9 L. Ed. 475, 485, 486; Wilson v. Simpson (1850) 9 How. 109, 121, 13 L. Ed. 66, 71; Hopt v. Utah (1884) 110 U. S. 574, 581, 28 L. Ed. 262, 265, 4 Sup. Ct. 202, 4 Am. Crim. Rep. 417. And see United States v. Mulholland (D. C.) 50 Fed. 413, 419.

The evidence of the Dick confession was properly excluded.

No error appearing in the record, the judgment is affirmed.

Mr. Justice VAN DEVANTER concurs in the result.

Mr. Justice HOLMES, dissenting:

The confession of Joe Dick, since deceased, that he committed the murder for which the plaintiff in error was tried, coupled with circumstances pointing to its truth, would have a very strong tendency to make anyone outside of a court of justice believe that Donnelly did not commit the crime. I say this, of course, on the supposition that it should be proved that the confession really was made, and that there was no ground for connecting Donnelly with Dick. The rules of evidence in the main are based on experience, logic, and common sense, less hampered by history than some parts of the substantive law. There is no decision by this court against the admissibility of such a confession; the English cases since the separation of the two countries do not bind us; the exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder; it is far more calculated to convince than dying declarations, which would be let in to hang a man (Mattox v. United States, 146 U. S. 140, 36 L. Ed. 917, 13 Sup. Ct. 50); and when we surround the accused with so many safeguards, some of which seem to me excessive; I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight. The history of the law and the arguments against the English doctrine are so well and fully stated by Mr. Wig-

more that there is no need to set them forth at greater length. 2 Wigmore, Ev. §§ 1476, 1477.

Mr. Justice LURTON and Mr. Justice HUGHES concur in this dissent.[31]

V. ENTRIES IN THE REGULAR COURSE OF BUSINESS

STATUTE OF 7 JAMES I, c. 12 (1609).[32]

An Act to Avoid the Double Payment of Debts.

Whereas divers men of trades, and handicraftsmen keeping shop-books, do demand debts of their customers upon their shop-books long time after the same hath been due, and when as they have supposed the particulars and certainty of the wares delivered to be forgotten, then either they themselves or their servants have inserted into their said shop-books divers other wares supposed to be delivered to the same parties, or their use, which in truth never were delivered, and this of purpose to increase by such undue means the said debt: (2) and whereas divers of the said tradesmen and handicraftsmen, having received all the just debt due upon their said shop-books, do oftentimes leave the same books uncrossed, or any way discharged, so as the debtors, their executors or administrators, are often by suit of law enforced to pay the same debts again to the party that trusted said wares, or to his executors or administrators, unless he or they can produce sufficient proof by writing or witnesses, of the said payment, that may countervail the credit of the said shop-books, which few or none can do in any long time after the said payment: (3) be it therefore enacted by the authority of this present parliament, That no tradesman or handicraftsman keeping a shop-book as is aforesaid, his or their executors or administrators, shall after the feast of St. Michael the archangel next coming, be allowed, admitted or received to give his shop-book in evidence in any action for any money due for wares hereafter to be delivered, or for work hereafter to be done,

[31] See, also, Brown v. State, 99 Miss. 719, 55 South. 961, 37 L. R. A. (N. S.) 345, annotated (1911) excluding the confession of a third person who was absent from the jurisdiction.

[32] 1 Taylor on Evidence (10th Am. Ed.) p. 502: "This act is no doubt, in practice, always treated by our courts of law as a dead letter. Yet it, in truth, is still unrepealed, and was in fact recognized and made perpetual by the Statute Law Revision Act 1863, which repealed a few words in it which had originally made it only temporary. It is therefore necessary that the original act should be inserted in this place. The reason for this no doubt largely is that, while the statute is never noticed, tradesmen's books may, by the common law, be referred to, to what is technically called 'refresh the memory.' They thus, in effect, and for practical purposes, become evidence, though not technically so called, and not being technically 'evidence,' the prohibition against those which are more than twelve months old does not attach to them."

above one year [33] before the same action brought, except he or they, their executors or administrators, shall have obtained or gotten a bill of debt or obligation of the debtor for the said debt, or shall have brought or pursued against the said debtor, his executors or administrators, some action for the said debt, wares, or work done, within one year next after the same wares delivered, money due for wares delivered, or work done.

II. Provided always, That this act, or anything therein contained, shall not extend to any intercourse of traffick, merchandising, buying, selling, or other trading or dealing for wares delivered or to be delivered, money due, or work done or to be done, between merchant and merchant, merchant and tradesman, or between tradesman and tradesman, for anything directly falling within the circuit or compass of their mutual trades and merchandise, but that for such things only, they and every of them shall be in case as if this act had never been made; anything herein contained to the contrary thereof notwithstanding.

III. This act to continue to the end of the first session of the next parliament and no longer. 3 Car. I, c. 4. Continued until the end of the first session of the next parliament, and farther continued by 16 Car. I, c. 4.

LEFEBURE v. WORDEN.

(Court of Chancery, 1750. 2 Ves. Sr. 54.)

On exceptions by defendants to the Master's report, a question of fact by whom two several mortgages were paid off; whether with the money of Gabriel Armiger, whose representatives were the defendants, or of Judick Armiger, his mother, to whom the plaintiffs were representatives: the Master having reported the payment to be by the mother and with her money. * * *

An entry by Gabriel in his book of accounts was offered as evidence for defendants; for which he cited Wilkinson v. Hern, 18 January, 1744; but the reading it was objected to.[34]

LORD CHANCELLOR [35] said, it was common experience, that though what is sworn by an answer positively, cannot be read in evidence, yet

[33] Pitman v. Maddox, 1 Ld. Raymond, 732 (1698): "In indebitatus assumpsit upon a taylor's bill, upon non assumpsit pleaded, and trial before Holt, Chief Justice, at the sittings for Middlesex, 14 Feb., 11 Will. III, the plaintiff produced in evidence his shop-book written by one of his servants, who was dead. And upon proof of the death of the servant, and that he used to make such entries of debts, etc. It was allowed by Holt, chief justice, to be good evidence, without proof of the delivery of the goods, etc. And he said, this was as good proof, as the proof of a witness's hand (who was dead) subscribed to a bond, etc. And (by him) notwithstanding the statute of 7 Jac. I, c. 12, says, that a shop-book shall not be evidence after the year, yet he did not hold such book to be good evidence within the year alone."

[34] Statement condensed and part of opinion omitted.

[35] Lord Hardwicke.

the court allows weight to that answer, so far as to take notice of it as a foundation for an inquiry. If then an answer, unsupported by proof, might have that weight, an entry in books of account of testator seems a proper ground for the court to let in and give attention to it, so far as to be a foundation for an inquiry. It was now open, whether this was proper to be read as evidence; and he was doubtful about it. He inclined not to read it at present; but to go through the cause, hear all the other evidence on both sides, and see how it bore connection with the several facts, and judge whether there was occasion for it or not.

After hearing the evidence, he was of opinion, on the best consideration, that this entry ought, under circumstances of the present case (which is a case of inquiry), to be read; and it was desirable to let in all lights in so dark a case: the court would judge of its weight afterward. It must be admitted, that, by the rules of evidence, no entry in a man's own books by himself can be evidence for himself to prove his demand.[36] So far the courts of justice have gone (and that was going a good way, and perhaps broke in upon the original strict rules of evidence), that where there was such evidence by a servant known in transacting the business, as in a goldsmith's shop by a cashier or book-keeper, such entry supported on the oath of that servant (2 Ves. sen. 193), that he used to make entries from time to time, and that he made them truly, has been read.[37] Farther, where that servant, agent,

[36] In such a case the party would, of course, be disqualified as a witness on the ground of interest at common law; and whatever the earlier practice may have been, the courts soon recognized that an entry by a person in his own favor was objectionable for the same reason.

Abbott, C. J., in Marriage v. Lawrence, 3 B. & Ald. 142 (1819): "It seems to me that this evidence was rightly rejected. It was no more than a minute made by a party in his own memorandum book, and it was, in fact, making evidence for himself."

Bagley, J. (in the same case): "This falls within the rule which prohibits a party from making evidence for himself. * * * For if the entry apply to a private transaction alone it will fall within the rule applicable to private books which cannot be given in evidence for the party to whom they belong."

[37] Where the bookkeeper was a competent witness, as he might be in actions between third persons, or where he was a mere employé, keeping the books of an employer, he could, of course, refer to the book to recall the facts to his memory, or adopt the entry as one known to him to be correct at the time it was made. Maugham v. Hubbard, ante, p. 330.

In the latter case it was necessary to produce the original entry in court, Doe v. Perkins, ante, p. 329. And the witness in fact probably read it as a part of his testimony; but it seems that the entry itself was not technically admitted in evidence under the English practice.

Patteson, J., in Rex v. St. Martin's, 2 Ad. & El. 210 (1834): "* * * In Tanner v. Taylor, cited in Doe dem. Church v. Perkins, a witness was not permitted to use an account which had been extracted from a book not in court: he not being able to swear to the facts further than as finding them in the book. The writing is not made evidence by its having been used for the purpose of refreshing the memory; but still the other side ought to see it."

See, also, Hawkins v. Taylor, 1 McCord (S. C.) 164 (1821): "The private memorandum of an individual is of itself no evidence; when produced, it requires to be supported by an oath. It is considered as aiding the recollection

or book-keeper has been dead, if there is proof that he was the servant or agent usually employed in such business, was intrusted to make such entries by his master, that it was the course of trade; on proof that he was dead, and that it was his hand-writing, such entry has been read (which was Sir Biby Lake's Case [cited ante, 43]), and that was going a great way; for there it might be objected, that such entry was the same as if made by the master himself: yet by reason of the difficulty of making proof in cases of this kind, the court has gone so far. There is no case, where an entry by the party himself has been admitted to be read, because it was merely his own declaration, unless Wilkinson v. Hern; of which he could not find he had taken any note; which might be from its being heard on exceptions, on which seldom anything arose as matter of precedent; but it was read there on a different ground, viz. as evidence to shew the discharge or application of the money by the person making the payment; for it was a general payment, and the fact of payment not disputed. But whether there was such an authority or not, it is a reasonable distinction, that though an entry in a man's own books may not be evidence originally to prove a right or the demand in question, yet where the sum is clearly made out to be paid out of his property, it may be evidence to prove the application of it, according to the rule, that whoever pays money, it must be received according to the direction and mode the payer imposes on it. That was certainly going a considerable way, but does not come up to the present; because there the payment was clearly admitted, and the question was only concerning the application: here the payment is not admitted, but drawn by inference from another fact, that on that day the mother sold the bank stock she received the money arising from the sale thereof, which is argued to be arising from the sale of the bank stock of the son, because the original transfer proceeded from him, and that it was his money received by her: so that the payment made here is proved by deduction from other circumstances. But the ground that must be gone upon in this case is, that this is an inquiry before the master; on which it is directed by the court that all papers, writings, &c., should be produced before him; and the intent was, that all kinds of circumstances should be produced; and therefore this paper is not to be considered as offered to prove originally the demand of the defendants; but to corroborate the other evidence offered for the defendants, and to rebut the plaintiff's evidence. * * *

of the witness, but not of the foundation of his knowledge. Thus the clerk who is called to prove a merchant's sum, and introduces the book of original entries to refresh his memory."

FURNESS v. COPE.

(Court of Common Pleas, 1828. 5 Bing. 114.)

This was an action of assumpsit to recover money alleged to have been paid by Alexander Cope to the defendant under a fraudulent preference.

In order to show the state of the affairs of the bankrupt and his partners just before their bankruptcy, the plaintiff at the trial, before Best, C. J., London sittings after Easter term, produced the ledger of the bankers with whom the bankrupt firm kept cash. The entries in this book were made by various persons. One of the bankers' clerks stated that that was the book to which all the clerks of the house referred, to see whether they should pay the checks of their customers when presented; and it appeared from that ledger that at the time of A. Cope's bankruptcy, his firm had nothing remaining in the banker's hands. It was objected that this book was not evidence, at all events, as against the defendant, and that the clerks who made the several entries ought to have been called. The objection, however, was overruled, and a verdict found for the plaintiff.

Upon this ground, and also on the ground that the verdict was contrary to evidence, and did not sustain the promises as laid in the declaration,

Wilde, Serjt., moved for a new trial; against which

Merewether, Serjt., showed cause.

It appearing that the evidence was not very clear, the Court pronounced no decision on the objection to the declaration, but granted a new trial, in order that the question might be more distinctly raised. Upon the subject of the banker's ledger, however,

BEST, C. J., said, that it was properly received in evidence, and that great mischief would ensue if the Court were to hold otherwise. The inconvenience of calling all the clerks of the house would be seriously felt, and without the book it would be impossible to prove that the party had no money in the house. To prove the negative, therefore, the book, to which all referred, was sufficient, although it might not be admissible to prove the affirmative.

BANK OF MONROE v. CULVER et al.

(Supreme Court of New York, 1842. 2 Hill, 531.)

Assumpsit on a promissory note for $766.57. The defense was usury on the theory that this note was a renewal in part of a note for $2,000.00 claimed to have been discounted by the bank. The evidence of one Prentiss tended to establish this claim.

To rebut this evidence, the plaintiffs called J. T. Talman, the cashier of the bank, and offered to prove from memoranda and entries in

the hand-writing of the witness, made at the time the transactions to which they refer occurred, and while he was cashier and had charge of the books and correspondence of the bank—which memoranda and entries the witness would swear he believed were truly and correctly made—the manner in which the $2,000 note came into the bank, and in which the same was paid; although independent of such memoranda and entries the witness had no recollection of the facts, and even after having his memory refreshed by their examination, he could not testify to the facts independent of the entries and memoranda. To this evidence the defendants objected; but the objection was overruled, and the defendants excepted.[38]

BRONSON, J. The defendants attempted to prove that the two thousand dollar note had been discounted by the plaintiffs. In answer to this evidence, the plaintiffs proposed to show when, how and for what purpose the note came into the bank; and that they had no connection with it beyond that of collecting and remitting the money. If the proof which they offered was admissible, their case was fully made out. The testimony of Cashier Talman, taken in connection with the letter of Johnson, the endorsement made upon it at the time it was received, and the entries then made by the witness in the plaintiffs' book, showed, or, at the least, tended to show, that the note came into the bank on a particular day through the post office, and in the usual course of business—that it was received for collection on account of the Ontario Branch Bank, and that the money was collected and remitted to that bank. This testimony went far to prove that Prentiss, the defendants' witness, was mistaken in supposing the note was discounted by the plaintiffs. And in addition to this, it was proved that it did not appear by the plaintiffs' books that they had ever discounted such a note.

But the question whether the plaintiffs were entitled to a verdict, does not arise upon this bill of exceptions. The only questions made by the bill are, whether the proofs offered by the plaintiffs were in their own nature admissible, and whether they had a legal tendency to make out the plaintiffs' case.

This brings us to the enquiry whether the original entries and memoranda were properly received in evidence. The defendants insist that they could only be used for the purpose of refreshing the recollection of the witness, and not as evidence to the jury. I may here remark, that the entries and memoranda were made in the usual course of business, and are verified in the most ample manner by the witness who made, and whose duty it was to make them. The proof could not well have been more satisfactory than it is. But the witness was unable to call to mind the original transaction; and the question is, whether memoranda and entries thus verified, should be allowed to speak for themselves. I think they should. Although it was not then

[38] Statement condensed.

absolutely necessary to pass upon the question, it was fully considered in Merrill v. Ithaca & Owego R. R. Co., 16 Wend. 586, 30 Am. Dec. 130, and we came to the conclusion that evidence of this character was admissible. Lawrence v. Barker, 5 Wend. 301, does not lay down a different rule. The memorandum in that case was not made in the usual course of business, but only for the convenience of the witness. But here the memoranda and entries were made in the usual course of business, and as a part of the proper employment of the witness. I do not see how it is possible to doubt that such evidence ought to be received. There are a multitude of transactions occurring every day in banks, the offices of insurance companies, merchants' stores, and other places, which, after the lapse of a very brief period, cannot be proved in any other way. It is not to be supposed that officers and clerks in large trading and other business establishments, can call to mind all that has been done in the course of their employment; and when their original entries and memoranda have been duly authenticated, and there is nothing to excite suspicion, there can be no great danger in allowing them to be laid before the jury.

The objection to the letter of Johnson seems to have been made on the ground that the witness had no present recollection of having received it, but was obliged to depend upon his endorsement on the letter, and his entries made the same day in the books of the bank. If that was the only ground of objection, the question has been already sufficiently considered. If the defendants intended to go further, and insist that the declarations of Johnson were not evidence in this action, they should have said so at the time. But if they had made the point on the trial, it would have been unavailing. The letter contained nothing beyond a statement that the note was sent for collection and credit. That statement, in connection with the other evidence, went to show for what purpose the note was sent by the one bank and received by the other. It constituted a part of the transaction, and as such was clearly admissible evidence. If Johnson had called in person and delivered the note, saying he left it for collection, his declaration would have been admissible as part of the res gestæ; and his written declaration accompanying the note stands on the same principle.

If the two thousand dollar note had been discounted by the plaintiffs, that fact would, in the ordinary course of business, have appeared upon the books of the bank. The fact that there was no such entry in the books was, I think, proper evidence for the consideration of the jury.

New trial denied.[89]

[89] And so in Shove v. Wiley, 18 Pick. (Mass.) 558 (1836); Humphreys v. Spear, 15 Ill. 275 (1853); Smith v. Beattie, 57 Mo. 281 (1874).

For the use of casual memoranda, see Haven v. Wendell, ante, p. 332; Peck v. Valentine, ante, p. 338.

MOORE v. MEACHAM.

(Court of Appeals of New York, 1851. 10 N. Y. 207.)

This was an action of trespass for obtaining from the plaintiff a quantity of sheathing copper under the alleged false and fraudulent representations that the defendant was the agent of the ship Thomas Williams, and her owners, and authorized to charge her and them with the price, whereby the plaintiff was induced to sell and deliver the copper, and subsequently to sue one of the owners for the price; in which action the plaintiff was defeated by the defendant's testimony that he had no such authority, in consequence of which the plaintiff lost the expenses of that suit in addition to the value of the copper. There was in addition a count de bonis asportatis, for taking and carrying away the copper, and a count in trover for its conversion.

On the trial in the Superior Court of New York city, certain exceptions were taken to the rulings of the court, which are stated in the opinion. The jury found a verdict for the defendant, and the judgment entered thereon was affirmed by the Supreme Court, whereupon the plaintiff brought this appeal.

GRAY, J.[40] The first question presented is upon the exception taken by the plaintiff's counsel to the decision of the judge, in refusing to permit an entry made in the plaintiff's books to be read as evidence of the fact that the copper there charged had been sold to the ship Thomas Williams and owners. This entry was not made by the plaintiff, but by his clerk, who testified that the bargain was made between the plaintiff and defendant in his presence. In such case the party is not entitled to the benefit of his books as evidence. He had a clerk who heard the bargain and made the entry. Whether the entry was justified by the facts must depend upon the clerk's recollection and other evidence of the bargain. The question before the jury was, whether or not the bargain made warranted the entry. But it was claimed as a part of the res gestæ, and as such was permitted to be read to the jury as evidence of the mere fact that such an entry was made. Of this ruling the plaintiff had no reason to complain. The entry was neither the act nor the declaration of the plaintiff made at the time, but that of his clerk, who was upon the stand to assign the reasons why the entry was thus made. * * *

[40] Part of opinion omitted.

DOE dem. PATTESHALL v. TURFORD.

(Court of King's Bench, 1832. 3 Barn. & Adol. 890.)

Ejectment. At the trial before Littledale, J., at the Hereford assizes, 1832, it appeared that the defendant was tenant from year to year to the lessor of the plaintiff; that on the 18th of July, the lessor of the plaintiff had instructed Mr. Bellamy, who was then in partnership with Mr. William Patteshall, to give the defendant notice to quit at the following Candlemas; that Bellamy, on the 19th of July, told his partner, William Patteshall, who usually managed the business of the lessor of the plaintiff, of the instructions which he had received; that the latter prepared three notices to quit (two of them being to be served on other persons), and as many duplicates; that he went out, and returned in the evening, and delivered to Mr. Bellamy three duplicate notices (one of which was a duplicate of the notice to the defendant) endorsed by him, Patteshall. It was proved that the other notices to quit had been delivered by Patteshall to the tenants for whom they were intended. The defendant, after the 19th of July, requested Mr. Bellamy that he might not be compelled to quit. It was proved by Mr. Bellamy to have been the invariable practice for their clerks, who usually served the notices to quit, to endorse on a duplicate of such notice a memorandum of the fact and time of service. The duplicate in question was so endorsed. Mr. Patteshall himself had never, to the knowledge of Mr. Bellamy, served any other notices than these three. Mr. Patteshall died on the 26th of February, 1832. It was objected, that the endorsement on the copy of the notice to quit in the handwriting of Patteshall was not, after his death, admissible evidence of the delivery of the notice to the defendant. The learned Judge received the evidence, but reserved liberty to the defendant to move to enter a nonsuit if the court should be of opinion that it ought not to have been admitted. A rule nisi having been obtained for that purpose.

PARKE, J.[41] I am also of opinion that this rule ought to be discharged. The only question in the case is, whether the entry made by Mr. Patteshall was admissible in evidence, and I think it was, not on the ground that it was an entry against his own interest, but because the fact of such an entry was made at the time of his return from his journey, was one of the chain of facts (there are many others) from which the delivery of the notice to quit might lawfully be inferred. That the delivery might be proved by direct evidence, as by the testimony of the person who made it, or saw it made; it might be proved also by circumstantial evidence, as many facts ordinarily are which are of much greater importance to the interests of mankind, and followed by much more serious consequences. In this point of view,

[41] Opinions of Lord Tenterden, C. J., and Littledale, J., omitted.

it is not the matter contained in the written entry simply which is admissible, but the fact that an entry containing such matter was made at the time it purports to bear date, and when in the ordinary course of business such an entry would be made if the principal fact to be proved had really taken place. The making of that written contemporaneous memorandum is one circumstance; the request by the lessor of the plaintiff to Mr. Bellamy to give the notice to quit, the subsequent communication by Bellamy to Patteshall, his departure and return, when the entry was made, the actual delivery of other notices to quit to other tenants taken out at the same time, the defendant's request that he might not be obliged to quit, are other circumstances, which, coupled with the proof of the practice in the office, lead to an inference, beyond all reasonable doubt, that the notice in question was delivered at the time stated in the memorandum. The learned counsel for the defendant has contended that an entry is to be received in two cases only; first, where it is an admission against the interest of a deceased party who makes it, and secondly, where it is one of a chain or combination of facts, and the proof of one raises a presumption that another has taken place; but it is contended that the facts here do not fall within the latter branch of the rule, because Mr. Patteshall, who served the notice, was not shown to have been in the habit of serving notices. I agree in the rule as laid down, but I think that, in the second case, a necessary and invariable connexion of facts is not required; it is enough if one fact is ordinarily and usually connected with the other: and it appears to me that the present case is not, in its circumstances, an exception to that part of the rule. It was proved to be the ordinary course of this office that when notices to quit were served, endorsements like that in question were made; and it is to be presumed that Mr. Patteshall, one of the principals, observed the rule of the office as well as the clerks. It is to be observed, that in the case of an entry falling under the first head of the rule, as being an admission against interest, proof of the handwriting of the party, and his death, is enough to authorize its reception; at whatever time it was made it is admissible; but in the other case it is essential to prove that it was made at the time it purports to bear date; it must be a contemporaneous entry. It is on the ground above stated, as I conceive, that similar evidence was received, in Lord Torrington's case, 1 Salk. 285; 2 Ld. Raym. 873; Pritt v. Fairclough, 3 Campb. 305; Hagedorn v. Reid, 3 Campb. 379; Champneys v. Peck, 1 Stark. N. P. C. 404, and Pitman v. Maddox, 2 Salk. 690, and others of the same nature.

TAUNTON, J. I am of the same opinion. A minute in writing like the present, made at the time when the fact it records took place, by a person since deceased, in the ordinary course of his business, corroborated by other circumstances which render it probable that that fact occurred, is admissible in evidence. Those corroborating circumstances must be proved; and here many such circumstances did appear. The principle is established by Price v. Lord Torrington, 1

Salk, 285, 2 Ld. Raym. 873,[42] and the other cases which have been referred to. It may be said that these were mere nisi prius decisions; but in Evans v. Lake, Bull, N. P. 282, which was a trial at bar, the question was, whether eight parcels of Hudson's Bay stock were bought in the name of Mr. Lake on his own account, or in trust for Sir Stephen Evans. To prove the latter of these positions, the assignees of Sir Stephen Evans, who were the plaintiffs, first showed that there was no entry in the books of Mr. Lake relating to this transaction; they then produced receipts in the possession of Sir S. Evans for the payment of part of the stock, and on the back of the receipts there was a reference in the handwriting of Sir Stephen's book-keeper, since deceased, to a certain shop-book of Sir Stephen. Upon this, the question was, whether the book so referred to, in which was an entry of the payment of money for the whole of the stock, should be read. And the Court of King's Bench, upon the trial, admitted the entry, not only as to the part mentioned in the receipts, but also as to the remainder of the stock in the hands of Mr. Lake's son.

Rule discharged.

NORTH BANK v. ABBOT.

(Supreme Judicial Court of Massachusetts, 1833. 13 Pick. 465, 25 Am. Dec. 334.)

Assumpsit upon a promissory note for $1187, dated February 7, 1828, signed by Willis Barnabee, payable to the defendant or his order, in sixty days from date, at either of the banks in Boston, and indorsed by the defendant to the plaintiffs.[43]

SHAW, C. J. * * * It was further contended, that due notice to the defendant as indorser, was not given and proved, as required by law, to charge him.

It was in evidence, that the messenger of the bank, whose duty it was to give notices, had absconded before the trial; that diligent in-

[42] This case is reported as follows in 1 Salkeld, 285 (1703): "The plaintiff being a brewer, brought an action against the Earl of Torrington for beer sold and delivered; and the evidence given to charge the defendant was, that the usual way of the plaintiff's dealing was, that the drayman came every night to the clerk of the brewhouse, and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen set their hands; and that the drayman was dead, but that this was his hand set to the book: And this was held good evidence of a delivery; otherwise of the shop-book itself singly, without more."

It does not appear from any report of the case that any circumstances except the regular practice was proved. In Poole v. Dicas, 1 Bingham N. C. 649 (1835), some of the opinions lay stress on the fact that additional corroborating circumstances appeared. And so in the similar case of Welsh v. Barrett, 15 Mass. 380 (1819). On this point compare Nicholls v. Webb, 8 Wheat. 326, 5 L. Ed. 628 (1823).

[43] Statement condensed and part of opinion omitted.

quiries had been made with a view to obtain his testimony, which had proved wholly unavailing; whereupon evidence was offered of a minute book kept by him, with the testimony of the cashier, explaining the manner of keeping and the purposes for which the book was kept. This was objected to and admitted.

No case is precisely in point; but upon the authority of analogous cases, and the reason of the principle, we think this evidence was rightly admitted.

In Welsh v. Barrett, 15 Mass. 380, it was held, that such a book kept by the messenger of a bank, after his decease, is admissible to establish demands and notices. The ground is, that they are memoranda, made by an officer in the ordinary course of his business, and before any controversy or question has arisen.

In Nichols v. Webb, 8 Wheat. 326, 5 L. Ed. 628, it was decided, that the minute book of a deceased notary might be received in evidence for the like purpose.

In the case of Union Bank v. Knapp, 3 Pick. 96, 15 Am. Dec. 181, it was decided by this Court, that the books of a bank, which had been kept by a clerk who had become insane, were admissible, upon proof of his handwriting and that the books were kept by him in the regular course of his business.

The only distinction between these cases and the case at bar is, that here, for aught that appears, the witness is still living. But it was satisfactorily proved, not merely that the witness was out of the jurisdiction of the Court, but that it had become impossible to procure his testimony. We cannot distinguish this, in principle, from the case of death, or alienation of mind. The ground is, the impossibility of obtaining the testimony; and the cause of such impossibility seems immaterial.

It was alleged, but not strongly urged, that the book did not prove notice to the indorser. This was rightly left to the jury with the explanation given by the cashier. The entry in the book was a short memorandum stating the amount of the note, the day it fell due and the names of the promisor and indorser, with a mark against them which, it was testified by the cashier, indicated that they had been notified. This was competent evidence. Such a memorandum is not like a contract or other written instrument; it is more like a writing in cypher, or a foreign language, which may need an interpreter. With the testimony of the cashier, as to the meaning and effect of the entry, it was competent evidence, from which the jury might infer the fact of notice. * * *

Judgment on the verdict.[44]

[44] In the earlier cases the mere absence of the witness from the jurisdiction was not regarded as a sufficient ground for admitting the book without his testimony. Cooper v. Marsden, 1 Esp. 1 (1793); Brewster v. Doane, 2 Hill (N. Y.) 537 (1842). But see Foster v. Sinkler, 1 Bay (S. C.) 40 (1786).

EASTMAN v. MOULTON.

(Superior Court of Judicature of New Hampshire, 1825. 3 N. H. 156.)

Assumpsit. The defendant pleaded the general issue, and filed, by way of set-off, an account, one item of which was a charge of 1109 yards of cloth, and another item a charge of 187 yards of cloth.

The cause was tried here at February term, 1824.

To prove his set-off, the defendant offered in evidence his book of accounts, accompanied with his own oath, that the book offered contained the original entries of the articles mentioned in his set-off; that the entries were made at the times they purported to be made, and at or near the time when the respective articles were delivered. He was then cross-examined by the plaintiff's counsel in the same manner, that witnesses in chief are cross-examined; upon which the defendant's counsel proposed to examine him as a witness in chief; and this was permitted by the court. In the course of his examination he stated, that the said parcels of cloth, mentioned in the set-off, were delivered not to the plaintiff, but to the servants of the plaintiff. After the arguments of counsel to the jury, on both sides, were closed, the plaintiff's counsel objected, that the book of accounts could not go to the jury, as evidence of the delivery of the cloth, because it appeared, that it was in the power of the defendant to produce better evidence, the testimony of those to whom it was delivered. But the court overruled the objection, as made too late.

The jury having returned a verdict in favor of the defendant, the plaintiff moved the court to grant a new trial, on the ground, that the defendant had been improperly admitted to testify in his own cause, as a witness in chief, and that the book of the defendant had been improperly submitted to the jury, as evidence of the delivery of the cloth.

RICHARDSON, C. J., delivered the opinion of the court.

It has long been the settled practice in this state, to permit the account books of a party, supported by his supplementary oath,[45] to go to the jury, as evidence of the delivery of articles sold, and of the performance of work and labor. But as this is in truth the admission of a party to be a witness in his own cause, the practice is confined to

[45] Duncan, J., in Curren v. Crawford, 4 Serg. & R. (Pa.) 3 (1818): "Books of original entries, verified by the oath of the party, and that the entries were made by him, have always been received in evidence in Pennsylvania, from necessity, as business is very often carried on by the principal, and many of our tradesmen do not keep clerks. In the country there would be a stagnation of all credit, if this were not the case. It is superfluous to cite authorities to prove a course of proceeding, so notorious to all conversant in courts of justice. The same necessity has introduced the same rule in other states. In South Carolina, Foster v. Sinkler, 1 Bay, 40 [1786]; Spence v. Sanders, 1 Bay, 119 [1790]. In Massachusetts, 2 Mass. 221 [3 Am. Dec. 45 (1806)], Cogswell v. Dolliver. In New York, Vosburgh v. Thayer, 12 Johns. 461 (1816)."

cases, where it may be presumed there is no better evidence, and has many limitations.

In the first place, it must appear, that the charges are in the handwriting of the party, who is sworn; because, if the charges are in the handwriting of a third person, such third person is presumed to know the facts, and may be a witness; so that there is no necessity of admitting the party to testify in his own cause. The book is, therefore, in such a case, rejected.

The charges in the handwriting of the party must appear in such a state, that they may be presumed to have been his daily [46] minutes of his transactions and business. For if it appear in any way, that many charges, purporting to be made at different dates, were in fact made at the same time, the book is not evidence. The charges must appear to be the original or first entries of the party, made at or near the time of the transactions to be proved; and if the contrary appear, the book cannot be admitted as evidence.

There must be no fraudulent appearances upon the book, such as

[46] Shaw, C. J., in Mathes v. Robinson, 8 Metc. 269, 41 Am. Dec. 505 (1844): "So long as the rule of law is allowed to prevail, that the account books of a plaintiff, verified by his oath, may be admitted to prove charges for services done and goods sold, much must depend upon the appearance and character of the book offered as evidence, and the view taken of it by the judge who tries the cause. It is true that the question, whether a book is competent to go to the jury, is a question of law; but as the law had prescribed no mode in which a book shall be kept, to make it evidence, the question of competency must be determined by the appearance and character of the book, and all the circumstances of the case, indicating that it has been kept honestly, and with reasonable care and accuracy, or the reverse. In the present case, the court can perceive no conclusive objection to the admission of the book called a time book. It is a book kept in a tabular form, in which the days of the month are placed at the head of the column, and the name of the workman on the side; and at the end of each day, or near it, a figure is put down at the place of intersection, say 1, ½ or ¼; indicating thereby, that the person has worked the whole or a fraction of that day. It cannot be objected that the time is put down in figures for that is the case in all modes; nor that it was not an original entry, because that fact must depend, as in other cases, on the oath of the party, to prove that it was made at or about the time it purports to be made, and by the proper party. It appears to us to be intelligible, and not more liable to fraudulent fabrication or alteration than entries kept in ledger form, which have been held to be good. Faxon v. Hollis, 13 Mass. 427 [1816]; Rodman v. Hoop, 1 Dall. 85, 1 L. Ed. 47 [1784]. The objection to the book, so far as it tended to prove services of the apprentice, because the apprentice might have been called as a witness, seems to us untenable, and founded on a mistaken view of the nature of this species of evidence. The use of one's own books, verified by his oath, is not secondary evidence, nor is it necessary to its admission first to show the loss of other evidence. It is original, but feeble and unsatisfactory evidence. When such evidence is offered, and it is apparent from the case that the party producing it could probably furnish better evidence, and he fails so to do, or to account for its absence, it must greatly diminish the credit due to the feeble evidence. But this is a consideration which goes to its credit, and not to its competency, and is for the jury, and not for the court. Holmes v. Marden, 12 Pick. [Mass.] 169 [1831]."

See, also, Post v. Kennerson, 72 Vt. 341, 47 Atl. 1072, 52 L. R. A. 552, 82 Am. St. Rep. 948 (1900), annotated, where a large number of the cases are collected.

gross alterations. And where it appears by post marks, or otherwise, that the account has been transferred to another book, such other book must be produced.

If it appear by the book itself, or by the examination of the party, that there is better evidence, the book cannot go to the jury as evidence. Thus, if an article be charged in the book as delivered by or to a third person, or if the party on his examination admit that to be the fact, the book is not evidence of the delivery of such article.

The party, when called, is in the first instance permitted to state only, that the book produced is his book of original entries; that the charges are in his handwriting; that they were made at the times they purport to have been made, and at or near the time of the delivery of the articles, or of the performance of the services. He may however be cross-examined by the other party; in which case his answers become evidence, and he is entitled to give a full explanation of any matter, in relation to which an inquiry is made on the cross-examination. It is reasonable and proper, that he should be made a witness as far as the opposite side chooses to make him one; and that as far as he is made a witness he should be at liberty to give a full explanation. But, in our opinion, a cross-examination does not entitle him to go beyond this. It does not entitle him to testify as to independent facts, not necessary to the explanation of the facts, respecting which he may have been questioned upon the cross-examination. It does not make him a witness in chief in the cause.

Such, in our opinion, is the law on this subject, (2 Mass. 221, 3 Am. Dec. 45, Cogswell v. Dolliver; 2 Mass. 569, Prince v. Swett; 13 Mass. 427, Faxon v. Hollis; 4 Mass. 457, Prince v. Smith,) and it is very easily applied to the case now before us.

As soon as it appeared, that the cloth was delivered to a third person, the book became incompetent evidence to prove the delivery of that article; and the jury ought to have been so instructed. It was no waiver of the objection, that it was not taken until the arguments were closed. It was enough that the attention of the court was called to the subject before the jury retired. The objection, in its nature, amounted to nothing more than a request to the court to give the jury proper directions in a matter of law, arising in the cause; and the refusal of such a request is clearly a good cause for a new trial. We think also, that the defendant was not entitled to testify as a witness in chief.

New trial granted.[47]

[47] In President, etc., of Union Bank v. Knapp, 3 Pick. 96, 15 Am. Dec. 181 (1825), Putnam, J., after holding that a bank book kept by a clerk was properly admitted, observed: "It will be perceived, that this decision does not touch or enlarge the doctrine of the admissibility of the books of a merchant or other person, who makes the entries himself, and who is permitted, according to the practice in Massachusetts and in most, if not all, of the New England States, to make his suppletory oath respecting the charges. In regard to cash, the sums to be proved in that manner have been limited in this State

PELZER v. CRANSTON.

(Constitutional Court of South Carolina, 1823. 2 McCord, 328.)

Mr. Justice COLCOCK delivered the opinion of the court:

The only question in this case is, whether the books of the plaintiff, who is a schoolmaster, were competent evidence to prove his account on their appearing to have been regularly kept? The recorder was of opinion that "the case of a schoolmaster came within the principle of the authorities in this state, which decided that the original entries in books were prima facie evidence," and he therefore decreed for the plaintiff.

A motion is now made for a new trial, on the ground that the books were not evidence. It is certain the decisions have gone so far as to permit the books of others than merchants and mechanics to be given in evidence, but the court have always kept in view the necessity of the evidence. Now, there are few persons in business who are furnished with as many witnesses as a schoolmaster may command, and there is no necessity for admitting his books to be produced in evidence. The decisions have gone far enough on this subject, and the court are not disposed to extend the principle. They are unanimously of opinion that the books were improperly admitted, and that therefore a new trial must be granted.

Justices RICHARDSON, JOHNSON, HUGER, and NOTT, concurred.[48]

NOLLEY v. HOLMES.

(Supreme Court of Alabama, 1842. 3 Ala. 642.)

The plaintiff in error declared against the defendant in the Circuit Court of Baldwin, for goods, wares and merchandise, sold and delivered.

On the trial, the plaintiff proved that he was a merchant, and that he had no clerk, but sold goods himself. He then produced his day book and ledger, kept by himself, in which the defendant appeared to be charged with merchandise sold by the plaintiff, to the amount of one hundred and sixty-nine dollars. It was proved that the charges were reasonable and proper; and persons who had dealt with the plaintiff testified, that he kept correct books, and his accounts were fair.

to 40 shillings, or 6 dollars 66 cents. But this decision proceeds upon the ground before stated, warranted by the authorities of the common law, and independently of our local usage, which admits the party in certain cases to verify his books of account by his own oath."

[48] For the same reason it has been held that the account book of a deceased person is not admissible to prove the payment of money to a third person who would be competent as a witness. Faunce v. Gray, 21 Pick. (Mass.) 243 (1838).

The defendant moved the Court to exclude the plaintiff's books from the jury as inadmissible evidence, which motion was sustained; and thereupon the plaintiff excepted.

A verdict and judgment being rendered in favor of the plaintiff (?) he has prosecuted a writ of error to this Court.

COLLIER, C. J. In Moore v. Andrews & Brothers, 5 Port. 107, it was held, that the admissibility of books of account as evidence, was not provided for in this State by Statute, and consequently depended upon the common law. This being the case, it may be safely affirmed, that entries made by a tradesman himself, stating the delivery of goods, are not evidence in his favor. 1 Phil. Ev. 266; 2 ibid. C. & H.'s notes, 691. The law cannot be admitted to be otherwise, without disregarding a very salutary maxim, "nemo debet esse testis in propria causa"; and this too, when the departure from a general rule, is not demanded by the necessity of the case. If a party has a good cause of action, he may call upon his adversary for a discovery, if he has no other means of establishing it; but he cannot entitle himself to a judgment, by the proof of his own admissions, made either orally or in writing. That such would have been the effect of the admission of the evidence that was rejected, it requires no reasoning to show.

We are aware, that in most of the States, the party's books of original entries may be adduced as evidence; but this right is given by statutes which determine their influence, and prescribe what suppletory proof is necessary. 2 Phil. Ev. C. & H.'s notes, 682. No such statute being in force here, it follows from what we have said, that the judgment of the Circuit Court must be affirmed.[49]

BOYER v. SWEET.

(Supreme Court of Illinois, 1841. 3 Scam. 120.)

BREESE, Justice, delivered the opinion of the court:

It appears by the record in this case, that the plaintiff in error brought an action of assumpsit, in the Cook Circuit Court, against the defendant in error, for work and labor done, and for goods, wares, and merchandise, sold and delivered by him to the defendant, at his special instance and request accompanying his declaration with a bill of particulars, consisting of lime and stone, sold and delivered in May, June, July, August, and November, 1835.

The general issue was pleaded, with notice of set off. On the trial, as appears from the bill of exceptions taken in the cause, the plaintiff proved the delivery of stone and lime to the defendant, at different times in 1835, and then produced in court an account

[49] And so in Hissrick v. McPherson, 20 Mo. 310 (1855), where it was sought to use a similar book supported by the plaintiff's oath that the account was correct.

book containing charges for those articles, against the defendant made in that year, and proposed to ask a witness the following questions:

First. Did the plaintiff keep a clerk in 1835?

Second. Is the book now in court, the plaintiff's book of accounts, and are the entries therein, in his handwriting?

Third. Is his book fair and correct, and have you settled with him on that book, and found it correct?

Fourth. Were any part of the stone and lime in said book delivered?

To the evidence sought to be produced by these questions, the defendant objected, and the objection was sustained by the court and an exception taken. A verdict and judgment were rendered for the defendant, and the cause brought here by a writ of error. The principal error assigned is, in this rejection of the evidence offered by the plaintiff. No objection is made to the form of the questions, or any other point contested, except this. What is the rule of evidence in cases of running accounts, composed of many items, where no clerk is employed, and where the delivery of all the articles charged cannot be positively proved?

On the argument here by the counsel for the defendant in error it is insisted, that inasmuch as we have adopted the common law of England, we have adopted, likewise, all its rules; and that resort must be had to the decisions of the British courts to ascertain what is the rule in any given case, wherein the legislature has not provided one. It is true, we have, like most other States in the Union, adopted the common law, by legislative act; but it must be understood only in cases where that law is applicable to the habits and condition of our society, and in harmony with the genius, spirit, and objects of our institutions. Penny v. Little, 3 Scam. 304; Stuart v. People, 3 Scam. 404; Seeley v. Peters, 5 Gilman, 141, and note.

Generally, too, the decisions of those courts furnish strong evidence of what the common law is; but it is equally true, that they have made many innovations upon its original principles, and refining upon the adjudications of one another, many of them have become very much modified, or wholly changed. The courts of the several States have also taken advantage of its pliant nature, in which consists one of its greatest excellencies, and adopted it to the evervarying exigencies of the country, and to the everchanging condition of society. This results from necessity; and in our further progressive improvement, other and more extensive modifications will be effected. Some rules of the common law suited to a highly refined and luxurious people, where every description of business is reduced to a system, and a minute division of labor exists, may be very ill adapted to a community differently situated. There are some great leading

principles, some fundamental rules which are never departed from, being founded in the common reason of every man, and which no change of his condition can alter. In regard to evidence, one of them is, that the best of which the nature of the case is susceptible, and in the power of the party to produce must, in all cases, be produced. This is all that is demanded of suitors in courts, and it is upon this principle, that the rule in England, declaring that books of a tradesman not to be evidence, unless supported by the oath of the clerk who made the entries, or by proof of his handwriting, if he is dead, is based. It has never been decided there, that if this evidence is not in the power of the party, where he kept no clerk, that secondary evidence shall not be resorted to. The rule would be the same here, if the party employed a clerk, the best evidence would be his entries, or proof of the actual delivery to, or admission by the party charged, if such existed.

In the case, then, of open accounts, composed of many items, where the entries are made by the party himself, no clerk being employed, where some of the articles are proved to have been delivered to the party charged, and no admission made by him, and no receipt taken from him, what other evidence in the power of the party to produce could be offered, than the books themselves, fortified by the testimony of disinterested persons, that they have settled their accounts by them, and that they are fairly and honestly kept?

From the nature of such dealings, no other evidence could be adduced, and we see no danger to be apprehended in admitting it. It is safe in practice, and tends to promote the ends of justice.

If all men were equally honest, such accounts would be admitted when presented, and proof of such admission would be the best evidence. But they are not so; they will not make honest admissions, when charged, and no recovery could be had against them, because the party trusting him did not employ a clerk or a standing witness to testify to all the items.

There being no clerk, no witness to the transactions, and no admissions of the party charged, to offer to the jury, the next best evidence would be the proof of circumstances from which the jury might infer the fairness and honesty of the whole account. These circumstances would be proof of the delivery of some of the articles charged, at or about the time the entries purport to have been made; that he kept no clerk at the time; that the book produced is his book of accounts; that the entries are in his handwriting, and that they are made honestly and fairly, and this, by the testimony of those who have dealt with him, and settled by that book. Such facts would furnish strong presumptive evidence of fairness, and subject to be rebutted by proof from the other side could not work injustice, or mislead a jury. No rule of law is violated by permitting such facts to go to the jury for their consideration, and in a great majority of cases, they are the only facts that can be offered.

This rule would not apply to an account for money lent, as that is not usually the subject matter of account, notes being generally taken, nor to an account containing a single charge only, as that would show no regular dealings between the parties.

In many of the States, books of accounts are admitted in evidence, after being fortified by the oath of the party. In other States, the books, with the suppletory evidence proposed to be given in the case under consideration, are admitted, as circumstances from which the jury may or may not, in their discretion, infer that the whole of the articles charged were in fact delivered. We think, then, that the circuit court in rejecting the evidence offered, erred, and accordingly reverse the judgment with costs, and remand the cause with instructions to award a venire de novo, and to admit the testimony offered by the plaintiff.

Judgment reversed.[50]

MONTAGUE v. DOUGAN.

(Supreme Court of Michigan, 1888. 68 Mich. 98, 35 N. W. 840.)

SHERWOOD, J.[51] This case is an action of assumpsit, originally brought before a justice of the peace in the city of Niles. The plaintiff declared under the common counts, adding thereto a bill of particulars of his demand. The defendant pleaded the general issue, with notice of set-off, and of money tendered and deposited with the court, the amount tendered being $16.32; costs $1.75. The plaintiff recovered judgment before the justice for $93.75, and on appeal by the defendant to the circuit court for the county of Berrien, the plaintiff recovered $101.78. * * *

Some stress is laid upon the fact that the plaintiff's books were allowed to be put in evidence, without proof by other persons that they had settled accounts with the plaintiff upon the books, and that he kept correct books. Such proof is unnecessary, since the statute allows parties to testify, generally, in the case. They can testify as well to

[50] See same rule approved in Vosburgh v. Thayer, 12 Johns. (N. Y.) 461 (1815); Jackson v. Evans, 8 Mich. 476 (1860).

For later legislation introducing the supplementary oath in Illinois, see Hurd's Rev. St. 1917, c. 51, § 3: "Where in any civil action, suit or proceeding, the claim or defense is founded on a book account, any party or interested person may testify to his account book, and the items therein contained; that the same is a book of original entries, and that the entries therein were made by himself, and are true and just; or that the same were made by a deceased person, or by a disinterested person, a nonresident of the state at the time of the trial, and were made by such deceased or non-resident person in the usual course of trade, and of his duty or employment to the party so testifying; and thereupon the said account book and entries shall be admitted as evidence in the cause."

For similar legislation in Missouri, see Rev. St. Mo. 1909, § 6354.

[51] Part of opinion omitted.

the keeping of their accounts, and the correctness of their books, as to any other facts. Brown v. Weightman, 62 Mich. 557, 29 N. W. 98.

The question of the agency of a Mr. Brown, who purchased, and gave directions for the charging of, a large number of articles, was strongly challenged upon the trial; but, so long as there were facts upon the subject of ratification of his agency to be found by the court, it is of little account what was the extent of his original authority. Webster v. Wray, 17 Neb. 579, 24 N. W. 207, 208. The plaintiff's books were offered to show to whom goods were charged, and to whom the credit was given; for this purpose, under the facts stated in the record, the proof was properly received. Winslow v. Lumber Co., 32 Minn. 237, 20 N. W. 145; Larson v. Jensen, 53 Mich. 427, 19 N. W. 130.

The record fails to disclose any error prejudicial to the defendant, and the judgment at the circuit must be affirmed.[52]

SMITH v. SMITH.

(Court of Appeals of New York, 1900. 163 N. Y. 168, 57 N. E. 300, 52 L. R. A. 545.)

GRAY, J. The plaintiff sought to recover a balance due for coal sold and delivered by him to the defendant. He recovered judgment upon a trial before a referee, and that judgment has been unanimously affirmed by the appellate division. Upon his appeal to this court the defendant assigns as error a ruling of the referee under which the plaintiff's books of account were admitted in evidence. Upon the trial the plaintiff testified to having had business transactions with the defendant, in the sale of coal to him, for some time past; that his books of account contained a correct statement of the coal sold and delivered within the dates in question, and that he personally delivered nearly all the coal covered by the account. He testified that his wife kept his books, and made the entries therein from memoranda furnished by him as made after the delivery of the coal. She also testified to making the entries in that manner, and that they were correctly made. There was evidence on his part, also, to the effect that a copy of the account in the books had been acknowledged by the defendant, with an offer to settle upon some rectification being made. A witness for the plaintiff

[52] Black, J., in Anchor Milling Co. v. Walsh, 108 Mo. 277, 18 S. W. 904, 32 Am. St. Rep. 600 (1891): "Since a party may testify in his own favor, it must be conceded that he, as well as his clerk or bookkeeper, may refresh his memory from entries made by him or under his eye, and then testify as to the fact with his memory thus refreshed. Now, in cases of an account composed of many items, all this means nothing more than reading the book in evidence. This we all know from daily experience in the trial courts. It is out of all reason to say that a merchant or his clerks can recall each item of the account, and a fair-minded witness will generally decline the attempt."

testified that he had settled with him by his books for eight or ten years, and had always found the books correct. Being cross-examined as to that he said: "I knew the accounts were correct simply because I had confidence in him, and paid what he asked. That is all the reason I had for saying they were correct,—because I had confidence in him. * * * I relied on his honesty, and not on my recollection as to the amount of coal I ordered." Another witness testified for the plaintiff that he was a bookkeeper for a firm that purchased coal from the plaintiff on credit, and that he had "settled with him according to his books and according to our own four or five times," and "always found them to be correct." Upon this evidence the books of account were offered by the plaintiff, and the objection to their admission was placed "on the ground that they are incompetent, a proper foundation not having been laid for their being admitted as evidence." The objection was overruled, and the defendant excepted.

The question is thus presented whether, in the evidence which preceded, a foundation had been laid for the admission of the books according to the requirements of a rule of evidence, which should be regarded as established since its formulation in the case of Vosburgh v. Thayer, 12 Johns. 461. It was held in that case that books of account ought not to be admitted in evidence "unless a foundation is first laid for their admission by proving that the party had no clerk, that some of the articles charged have been delivered, that the books produced are the account books of the party, and that he keeps fair and honest accounts; and this by those who have dealt and settled with him." The rule, as thus laid down, has been since accepted as correct. McGoldrick v. Traphagen, 88 N. Y. 334; Tomlinson v. Borst, 30 Barb. 42; Dooley v. Moan, 57 Hun, 535, 11 N. Y. Supp. 239. Under these restrictions account books become evidence for the consideration of the tribunal with which the determination of the issues rests. As evidence which is manufactured by the party, they should be received with caution; but that is an objection which goes to the weight of the evidence, and not to its admissibility, which is to be determined solely with reference to the foundation which has been laid for it. Their admission in evidence is, of course, not authoritative as to their contents; for the conclusion as to their credit will depend upon their appearance, the manner of their keeping, and the character of him who offers them. Although the rule under discussion was established at a time when parties to an action were not allowed to be witnesses, the subsequent legislation, which removed that disqualification, and authorized parties to testify in their own behalf, has not deprived them of the right to introduce their books of account in evidence. Tomlinson v. Borst, supra; Stroud v. Tilton, *42 N. Y. 139. The rule may still be an important one in the administration of justice in cases where the party kept no clerk able to testify to the truth of the entries in his books, and where, unless they are admitted, great inconvenience and a denial of justice may follow.

The conditions precedent to the admissibility of the plaintiff's books of account were sufficiently complied with within the requirements of the rule in Vosburgh's Case. The plaintiff had sworn that he had personally delivered nearly all the coal charged, and that the books which were produced contained his accounts. That he had no clerk was manifest from his testimony. In fact, the appellant does not claim that the plaintiff did have a clerk, and, of course, the plaintiff's wife cannot be claimed to be a clerk, within the meaning of the rule. The clerk so intended means one who had something to do with, and had knowledge generally of, the business of his employer, and who would be enabled to testify upon the subject of the goods sold. McGoldrick v. Traphagen, supra. The plaintiff had affirmatively shown, not only that his wife kept his books for him, but that it was he who either delivered the coal or superintended its delivery. The evidence was sufficient to negative the idea that he kept a clerk who could testify, by reason of his employment, to the correctness of the account of goods sold and delivered. The remaining requirement that proof should be made that the plaintiff kept fair and honest books by those who had dealt with him, and who had settled with him on the books, was sufficiently met in the evidence of the two witnesses, which has been mentioned. The evidence went to establish not only the character of the plaintiff for honesty, but that in a course of business extending over several years the witnesses had always found his books to be correct. In the one case the witness paid his bills relying upon the plaintiff's honesty, and not upon his recollection as to the amount of coal ordered; in the other case the witness had settled the plaintiff's bill against his employers according to his books and according to their own books, and had always found the plaintiff's books to be correct. Such evidence should be and is quite sufficient to discharge the burden resting upon the plaintiff with respect to that item of proof required by the rule. The judgment should be affirmed, with costs.[53]

PARKER, C. J., and O'BRIEN, HAIGHT, LANDON, and WERNER, JJ., concur. CULLEN, J., not sitting.

Judgment affirmed.

WILCOX v. DOWNING et al.

(Supreme Court of Errors of Connecticut, 1914. 88 Conn. 368, 91 Atl. 262.)

RORABACK, J.[54] * * * The rejection of Calvin Wilcox's memorandum book was not erroneous. In support of her claim that Calvin Wilcox, the plaintiff's assignor, had sold and delivered the articles of

[53] See same rule applied in House v. Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307 (1892), where the entries had been made by a member of the firm from memoranda furnished by various employés.

[54] Statement and part of opinion omitted.

merchandise to the defendants as alleged in the second count of the plaintiff's complaint, Mr. Wilcox produced a book containing memoranda relating to the sale and delivery of these articles which the defendants claimed were never sold to them.

Calvin Wilcox was called as a witness, and testified that it was an account book of his own; that all the daily transactions were entered in this book; and that this was the only account book kept by him.

Upon this question the trial court found that the book in question was a memorandum book about ten inches long, eight inches wide and three-eighths of an inch thick, from which many pages had been torn. It contained memoranda of some accounts and other matters, but not in regular chronological order. The book itself did not indicate that it was a book in which were regularly kept accounts of the witness or that it was kept in the regular course of his business.

It is for the presiding judge to say, in the first instance, whether entries in an account book are of such a character as to render it admissible, and his decision will not be interfered with, unless clearly wrong. Riley v. Boehm, 167 Mass. 183, 187, 45 N. E. 84.

As a general rule, when a book of accounts shows that it is not properly kept within the requirements of the rule, it is within the power of the court to reject it. Pratt v. White, 132 Mass. 477, 478. To a certain extent the basis of a ruling of the trial judge as to the admission of an account book may consist of facts gained by his personal examination. Riley v. Boehm, 167 Mass. 183, 186, 187, 45 N. E. 84.

The trial court may exclude an account book where either its condition or appearance or the evidence reasonably creates a suspicion that it is not a true record of what it purports to be. It must appear to have been honestly kept, and not intentionally erased or altered, and to have been an account of the daily business of the party, and made for the purpose of establishing a charge against another. Pratt v. White, 132 Mass. 478; McNulty's Appeal, 135 Pa. 210, 19 Atl. 936.

Mutilation of a portion of a book, material to the inquiry, may prevent its admissibility, unless satisfactorily explained. Crane v. Brewer, 73 N. J. Eq. 558, 68 Atl. 78; Chamberlayne on Evidence, vol. 4, §§ 3051 to 3149, inclusive.

We cannot say that the court below was not justified in the rejection of the book. * * *

Affirmed.

JUNIATA BANK OF PENNSYLVANIA v. BROWN.

(Supreme Court of Pennsylvania, 1819. 5 Serg. & R. 226.)

Assumpsit on a promissory note made by the defendant, payable to Joseph Martin, and endorsed by him and by Joseph McCoy. In order to prove that Joseph Martin was a member of the firm of Francis

McCoy & Co., plaintiff introduced the deposition of John Cook, a member of the late firm of Cook & Cresson, who stated his belief that such was the fact from an entry in the day book of that firm, headed "Francis McCoy and Joseph Martin, trading under the firm of Francis McCoy & Co.[55]

TILGHMAN, C. J. By ancient custom in Pennsylvania, the books of original entry of a merchant, or shopkeeper, are received as evidence of the sale and delivery of goods. This rule was founded on convenience. In early times, many traders could not afford to keep clerks; they were forced to give credit on sales of their goods, and it was supposed there would be no great danger in permitting their own entries to be prima facie evidence, provided they were made at the time the sales took place. But they never were admitted as evidence, of the payment of money: there was no necessity for this, as it is the business of a man who pays money, to take a receipt for it. Neither could there be the least reason for their being admitted as evidence of a collateral matter in which a third person was concerned, as for instance, in a case like the present, where the books of Cook & Cresson are offered, not to prove a sale and delivery of goods by them to F. McCoy & Co., but to prove, merely for the benefit of William Brown jun., that Joseph Martin was a partner of F. McCoy. Besides, if the book was evidence, it should have been produced; an extract could not be evidence. But the defendant's counsel say, that although neither the book nor the extract in themselves might be evidence, yet the deponent might refresh his memory, by the use of this extract. Certainly he might have refreshed his memory, and then swear with a memory refreshed; but he had no right to introduce into his deposition, the matter which he had made use of to refresh his memory. A witness examined at the bar, may look at his notes for the purpose of refreshing his memory, and then, if he can with a safe conscience, he may swear from his own recollection; but he would not be permitted to read his notes to the jury. Now, in the present instance, it is endeavoured, in a side way, to get before the jury, a writing, which in itself was not evidence. But this must not be permitted, because it might have an influence on the jury. If Mr. Cook, after examining his books, could have taken on himself to swear, that Joseph Martin, was a partner of Francis McCoy, it would have been all very well. But if not, that fact must not be made out from the books. I am of opinion therefore, that the evidence ought not to have been admitted. * * *

Judgment reversed.

[55] Statement condensed and parts of the opinion on other points omitted.

DODGE v. MORSE.

(Superior Court of Judicature of New Hampshire, 1825. 3 N. H. 232.)

Assumpsit for goods sold and delivered to the defendant by plaintiff's intestate.

The cause was tried here, at November term, 1824. The plaintiff, among other evidence, produced a book of accounts, and, being sworn to make true answers, stated, that the book came to him as administrator, and that the charges in it against the defendant, which were the same as the charges mentioned in the declaration, were in the handwriting of Isaac Dodge, his intestate. Whereupon, the book was permitted to go to the jury, as evidence in the cause.[56]

BY THE COURT. * * * It is further objected, that the book of the deceased, supported only by the supplementary oath of his administrator, was improperly permitted to go to the jury. It has lately been decided in this court, that the book of a party, supported by his oath, that it is his book of original entries, and that the charges are in his own handwriting, may go to a jury as evidence. Eastman v. Moulton, 3 N. H. 156.

And it is believed, it will be difficult to shew a good reason, why the book of the intestate, supported by the supplementary oath of his administrator, should not be considered as good evidence, as if supported by the oath of Isaac Dodge himself. And we are of opinion, that this objection must be overruled.

Judgment on the verdict.[57]

THE QUEEN v. INHABITANTS OF WORTH.

(Court of Queen's Bench, 1843. 4 Q. B. 132.)

On appeal against an order of justices removing William Worsell and his wife and children from the parish of Worth in Sussex to the parish of Horne in Surrey, the sessions quashed the order subject to the opinion of this court upon the following case.

The respondents had removed the pauper and his family upon a settlement obtained in the appellant parish by hiring and service for a year with one Thomas Booker in 1821. The appellants admitted the settlement upon the hearing of the appeal, and relied upon a subsequent settlement, alleged in the grounds of appeal to have been gained in the respondent parish by hiring and service for a year with one Thomas Stone in or about 1824. For the purpose of establishing this settlement the appellants called the pauper and his father, who both

[56] Statement condensed and part of opinion omitted.

[57] See, also, Prince, Adm'r, v. Smith, 4 Mass. 455 (1808), recognizing the same practice for books of deceased tradesmen, but rejecting the particular account, because it appeared to be a copy, instead of the original entries.

deposed to the contract of service having been for a year, though neither could recollect at what wages. The pauper further stated in evidence that he worked for Mr. Stone under the contract for six months at Gibsaven Farm in the parish of Worth; that he then went away at his master's request for about three weeks, during which time he worked for his father he received remuneration from him, his boxes and clothes remaining all the time at Mr. Stone's; that he afterwards returned and completed his year's service with Mr. Stone; and that he received his whole year's wages in one sum from Mr. Stone at the end of the year. For the purpose of rebutting this evidence, and showing that no such contract of hiring and service for a year in fact took place, the respondents called Mrs. Amelia Creasy, daughter of Mr. Stone, who proved that her father died in 1827; that he carried on the business of a farmer at the farm in question for upwards of twenty years; that in the course of his business he was in the habit of hiring farm servants; and that his practice was, when he did so, to make an entry of the time and terms of such hiring in a memorandum book kept by him for that purpose, which memorandum book was returned with the present case. This book, which had been in the custody of Mrs. A. Creasy from the time of her father's decease, was then produced and tendered in evidence by the respondents, but objected to on the part of the appellants. It contained, amongst numerous minutes of the time and terms of hiring of farm servants, many such being for the year, and of payments made to them in respect of their services, the following entries with reference to the hiring and service of the pauper, proved to be in the hand-writing of Mr. Stone; but the witness was not present when the entries were made.

"April 4th, 1824. W. Worsell came; and to have for the half year 40*s*.

"September 29th. Paid this £2.

"October 27th. Ditto came again; and to have 1*s*. per week; to March 25th, 1825, is 21 weeks two days: £1 1*s*. 6*d*. 25th. Paid this."

The sessions rejected this evidence, and quashed the order of removal, subject to the opinion of the court upon the question, whether the memorandum book containing the above entries was admissible for the respondents or not.

LORD DENMAN, C. J.[58] I have always a great disposition to admit any evidence that can reasonably be tendered: but there must be some limits. In a case of this kind the entry must be against the interest of the party who writes it, or made in the discharge of some duty for which he is responsible. The book here does not show any entry operating against the interest of the party. The memorandum could only fix upon him a liability on proof that the services referred to had been performed: and whether, on dispute, a jury would have found him liable for the sum entered, or more or less, we cannot say. Nor was this

[58] Opinions of Patteson and Wightman, JJ., are omitted.

an entry made in the course of duty, as in Doe dem. Patteshall v. Turford, 3 B. & Ad. 890. The act there was performed by a principal in the firm, and not by a clerk; but it was done by a person acting under the same responsibility; therefore no distinction favourable to the respondents arises from that part of the case.

COLERIDGE, J. This was not an entry against the party's interest, unless the mere making of a contract be so: and, if that were the case, the existence of a contract would be against the interest of both parties, to it. It was argued that we might inquire whether a reasonable probability appeared that the entries were true, and that for this purpose we might go into the contents of the book beyond the particular entry. But the question is, not what may be inferred from other entries, but whether the particular entry, at the time when it was made, imported something contrary to the maker's interest. As to the other point: it cannot be contended that Stone made these entries in the course of any duty. In Doe dem. Patteshall v. Turford, 3 B. & Ad. 890, the person who did the act relied upon was a partner in the firm of attorneys: but both attorneys were equally the agents of the client; and it was the duty of each to serve the notices by himself or by his clerk. It was usually done by a clerk: but on the particular occasion the attorney himself did it; and, while so doing, he was actually in the discharge of a duty to another person. This is an entirely different case.

Order confirmed.[59]

LASSONE v. BOSTON & L. R. R.

(Supreme Court of New Hampshire, 1890. 66 N. H. 345, 24 Atl. 902, 17 L. R. A. 525.)

Case, for injuries to the plaintiff from the negligent management of the defendant's locomotive on a highway grade crossing.

June 8, 1887, the plaintiff, with one Benton, while passing over the defendant's crossing in the village of Lancaster in a wagon drawn by a horse, was thrown out and injured. One of the rear wheels of the wagon was broken, and it was a question whether it was done by collision with the defendant's locomotive, or by the plaintiff's cramping the wagon and throwing himself and Benton out after passing over the crossing. On this question the character and extent of the injury to the wheel became material. One Woodward, who repaired the woodwork of the wheel, died before the trial. The plaintiff called his administrator, who testified that he had Woodward's account book,

[59] For the use of a book entry of a deceased person when against interest, see Higham v. Ridgway, 10 East, 109 (1808); Doe v. Robson, 15 East, 32 (1812).

Compare Nicholls v. Webb, 8 Wheat. 326, 5 L. Ed. 628 (1820).

In Whitnash v. George, 8 B. & C. 556 (1828), an action on a bond against a surety for the default of a deceased employé, book entries by the latter were admitted and one of the reasons given was that by the terms of the bond it was the duty of the deceased to keep the books. It seems probable that in this way the duty element became overemphasized.—*Ed.*

kept by Woodward in his lifetime, on which he found the following charge to Benton, (the owner of the wagon,) which the plaintiff elected to have read to the jury, subject to the defendant's exception: "June 8, 1887. To sixteen spokes, twenty cents apiece, $3.20." Before calling the administrator, the plaintiff introduced evidence tending to show that several spokes were broken, the tire badly crippled, and the axletree sprung, and that the injury appeared to have been caused by a blow.[60]

SMITH, J. The book of account of Woodward, supported by the suppletory oath of his administrator, would be competent evidence against Benton, in a suit by the administrator against him to recover for the repairs of the wheel. Dodge v. Morse, 3 N. H. 232. Is the book evidence against third parties? Account books of a party are not evidence where the dealing between the debtor and creditor is, as to the parties to the suit, a mere collateral matter. Woodes v. Dennett, 12 N. H. 510; Little v. Wyatt, 14 N. H. 23; Batchelder v. Sanborn, 22 N. H. 325; Leighton v. Sargent, 31 N. H. 119, 64 Am. Dec. 323; Woods v. Allen, 18 N. H. 28; Harris v. Burley, 10 N. H. 171; Putnam v. Goodall, 31 N. H. 419; Brown v. George, 17 N. H. 128. These decisions were prior to the act of 1857 (Laws 1857, c. 1952, Gen. Laws, c. 228, § 13,) enabling parties to testify as witnesses in chief. But account books are still admissible, notwithstanding the party may testify as a witness in chief. Swain v. Cheney, 41 N. H. 232; Bailey v. Harvey, 60 N. H. 152; Sheehan v. Hennessey, 65 N. H. 101, 18 Atl. 652. Written entries by persons deceased may, under some circumstances, be shown in evidence against third persons.

There is a class of cases which holds that where a person has peculiar means of knowing a fact, and makes a written entry of the fact against his interest at the time, it is evidence of the fact as against third persons after his death, if he could have been examined as to it in his lifetime. Higham v. Ridgway, 10 East, 109, is a leading case of this character. The midwife's book of account was received for the purpose of showing the date of the birth of a person, which became important upon the question whether he was 21 years of age when he suffered a recovery to bar an estate tail. The entry made in the daybook under date of April 22, 1768, and marked "Paid" in the ledger October 25, 1768, was held admissible upon the ground that the party had peculiar means of knowing the fact, and that the entry was against his interest at the time it was made. "Here it appears distinctly from other evidence," said Lord Ellenborough, "that there was the work done for which the charge was made, * * * and the discharge in the book, in his own handwriting, repels the claim which he would otherwise have had against the father from the rest of the evidence, as it now appears. Therefore the entry made by the party was to his own immediate prejudice, when he had not only no inter-

[60] Statement condensed and part of opinion omitted.

est to make it if it were not true, but he had an interest the other way not to discharge a claim which it appears from other evidence that he had." Warren v. Greenville, 2 Strange, 1129, is a similar case.

To fortify the presumption that a surrender of a portion of the estate in question should be presumed from lapse of time, the debt book of a deceased attorney was produced, in which he made charges for suffering the recovery, and other charges for drawing and engrossing the surrender. The charges appeared by the book to have been paid. This was held to be good evidence after the death of the attorney, who, if living, might have been examined to the fact. See, also, Spiers v. Morris, 9 Bing. 687; Marks v. Lahee, 3 Bing. N. C. 408; Whitnash v. George, 8 Barn. & C. 556; Goss v. Watlington, 3 Brod. & B. 132; and Stead v. Heaton, 4 Term R. 669. In Middleton v. Melton, 10 Barn. & C. 317, the entry made by a deceased collector of taxes in a private book kept by him for his own convenience, in which he charged himself with the receipt of sums of money, was held to be evidence of the fact of the receipt of the money in an action against a surety on his official bond, although the parties by whom the money had been paid were alive, and might have been called as witnesses. The decision went upon the ground that the entry was to the prejudice of the party who made it. To the same effect is Doe d. Smith v. Cartwright, 1 Car. & P. 218, where the books of a collector of taxes, charging himself with the receipt of money, also the books of an insurance company, charging itself with receiving money, were admitted as tending to show an occupancy of certain premises by a party, in an action between third parties.

There is another class of cases in which entries have been received in evidence against third persons, if the entries were made by a person having knowledge of the fact entered, contemporaneously therewith, and in a course of business. Price v. Earl of Torrington, 1 Salk. 285, is a leading case of this character. The book kept by a clerk, in which was set down at night an account of the beer delivered out by the draymen during the day, and to which they set their names, according to the usual way of the plaintiff's dealing, was held good evidence of a delivery to the defendant, the drayman who delivered the beer sued for being dead. The cases are numerous where evidence of this kind has been received upon the ground that the persons who made the entries "had no interest to misstate what occurred." In Doe d. Patteshall v. Turford, 3 Barn. & Adol. 890, a memorandum of the fact and time of service, indorsed by one P. on a duplicate notice to quit, was, after the death of P., held admissible as being a minute in writing, made at the time when the fact it records took place by a person since deceased, in the ordinary course of his business, corroborated by other circumstances which render it probable that the fact occurred. In Nicholls v. Webb, 8 Wheat. 326, 5 L. Ed. 628, the record book of a deceased notary was held admissible. The entry in the margin was: "Indorser duly notified 19th (17th) July, 1819;

the last day of grace being Sunday, the 18th." It was objected that the evidence was in the nature of hearsay. "But the answer is," said Judge Story, "that it is the best evidence the nature of the case admits of. If the party is dead, we cannot have his personal examination on oath, and the question then arises whether there shall be a total failure of justice, or secondary evidence shall be admitted to prove facts, where ordinary prudence cannot guard against the effects of human mortality?"

[After reviewing Nourse v. McCay, 2 Rawle (Pa.) 70, Poole v. Dicas, 1 Bingham, N. C. 649, Doe v. Robinson, 15 East, 32, and Welsh v. Barrett, 15 Mass. 380, the opinion continues:]

The case at bar does not fall within either of these classes. The entry was made in Woodward's usual course of business, but was not against his interest, nor can it be said that he had no interest to misrepresent. Was the evidence for these reasons inadmissible? We think it was admissible both on principle and authority.

[Then after reviewing State v. Phair, 48 Vt. 366, Augusta v. Windsor, 19 Me. 317, and Leland v. Cameron, 31 N. Y. 115:]

Whether the entry, to be admissible, should appear to be against the interest of the deceased person who made it, is discussed by Mr. Starkie in his treatise upon Evidence, and his reasons for concluding that this circumstance does not afford a sufficient test for the admission of such entries and the rejection of all others, is very satisfactory. * * * It has been considered in several of the states that neither the best administration of justice nor any well-established rule required the adoption of the limitation that the entry must appear to have been made against the interest of the person making it; and the decisions in this country are more in accordance with those of Warren v. Greenville and Doe d. Patteshall v. Turford than with the most of the English cases. This court is not satisfied with the reasoning upon which that limitation was introduced, and does not feel obliged to adopt it." See, also, 1 Starkie, Ev. (Metc. Ed.) 299–301; 1 Phil. Ev. (Cow. & H. and Edw. Notes) 347. * * *

The rule which governs the admissibility of entries made by private parties in the ordinary course of their business, with some exceptions, "requires, for the admissibility of the entries, not merely that they shall be contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts, and be corroborated by their testimony, if living and accessible, or by proof of their handwriting, if dead, or insane, or beyond the reach of the process or commission of the court. The testimony of living witnesses personally cognizant of the facts of which they speak, given under the sanction of an oath in open court, where they may be subjected to cross-examination, affords the greatest security for truth. Their declarations, verbal or written, must, however, sometimes be admitted when they themselves cannot be called, in order to prevent a failure of justice. The admissibility of the declarations is in such cases limited

by the necessity upon which it is founded." Chaffee v. U. S., 18 Wall. 516, 541, (21 L. Ed. 908). "Entries made at the time acts took place, by one whose duty it was to keep a record of such acts, or by the tradesman whose habit it was, in the course of his business dealings, to preserve a minute of them himself, ought equally to be received as evidence of those acts. The mere fact that the accounts in the latter case may be to the interest of the party making them should not of itself cause their rejection. In the former case it is uniformly urged in support of the admissibility of the book of items that it will be presumed that he who was in duty bound to keep a faithful transcript of events has performed his duty. The presumption, drawn from honesty of purpose, appears to be just as strong in the latter case, where the merchant writes up his own books of debts and credits, and at least should not be overthrown by the mere appearance of a balance in his favor." Bank v. Knapp, 15 Am. Dec. 192, note and cases cited. The person who made the entry if he is alive, and a competent witness, and within the jurisdiction, is called to verify his writing. If dead, or beyond reach, or incompetent, his testimony is dispensed with ex necessitate. Bartholomew v. Farwell, 41 Conn. 107, 109; New Haven; etc., Co. v. Goodwin, 42 Conn. 230, 231. * * *

There is a distinction between entries made in the usual and regular course of business and a private memorandum. The latter is mere hearsay, and inadmissible in evidence after the death of the person who made it. Entries made in the regular and usual course of business stand differently. When shop books are kept, and the entries are made contemporaneously with the delivery of goods or performance of labor by a person whose duty it was to make them, they are admissible, unless the nature of the subject is such as to render better evidence attainable. Mr. Greenleaf says the remark that this evidence is admitted contrary to the rules of the common law is incorrect; that "in general its admission will be found in perfect harmony with those rules, the entry being admitted only when it was evidently contemporaneous with the fact, and part of the res gestæ." 1 Greenl. Ev. §§ 117, 118. * * *

If book entries made by deceased persons in the regular course of business are admissible to show identity, (State v. Phair,) dates, (Augusta v. Windsor, and Higham v. Ridgway,) the surrender of an estate, (Warren v. Greenville,) in an action against a surety that his principal had received money, (Middleton v. Melton,) the delivery of goods, (Price v. Earl of Torrington,) the service of a notice to quit, (Doe d. Patteshall v. Turford,) notice to an indorser, (Nicholls v. Webb,) and that a deed was a forgery, (Nourse v. McCay,) we think the entry on Woodward's book of accounts, made in the usual course of his business, and which it was his duty to make, was admissible, he being dead, to show the character and extent of the injury to the wheel, which tended to show that the wheel was broken by a collision. We cannot see that it makes any difference as regards the ques-

tion of the admissibility of the evidence, whether the purpose was to show the date when the injury occurred, or to identify the wheel, or to show the extent of the injury. Our conclusion is that there was no error in the ruling admitting the book. The instructions requested were properly denied. State v. Railroad, 58 N. H. 408.

Exceptions overruled.[61]

BINGHAM, J., did not sit. CARPENTER, J., dissented on the competency of the shop book. The others concurred in the opinion.

INGRAHAM v. BOCKIUS et al.

(Supreme Court of Pennsylvania, 1823. 9 Serg. & R. 285, 11 Am. Dec. 730.)

Error to the Common Pleas of Philadelphia county.

This suit was brought by Peter Bockius and Rudolph Bockius, plaintiffs below, against Francis Ingraham, to recover the value of a certain quantity of meat, alleged to have been sold and delivered to the defendant by the plaintiffs.

On the trial, the plaintiffs produced John Vasey, a witness who swore "that he was employed by the plaintiffs, during the years 1816, 1817, 1818, 1819, to do business as a butcher for them, according to the course of their business, that of butchers, which was to kill one day, and carry the meat around the next day to customers, who lived at some distance from the plaintiffs' residence. That the defendant was a customer, and took meat. That the said John Vasey kept memoranda with a pencil, for his own use, of the meat he sold, and of the persons he sold to; two books, in which the same were made, being produced, and part of another; but that the same were, in general, destroyed, those being the only memoranda to be found—and the same night or the next day, the same were entered in their books, and that he, Vasey, stood by, and the same were called over twice, to see if they were correct." The plaintiffs then offered the entries in the plaintiffs' books (made from the said memoranda), as evidence of the sale and delivery of the meat to the defendant, the plaintiffs having previously sworn, that the books into which the memoranda were so as aforesaid copied, were their books of original entry, and the entries made in their handwriting. The defendant objected to the reading of the entries in the said last-mentioned books, contending that the same were not original entries, nor the said books, books of original entry, and prayed the court not to admit the same to be read, as evidence to the jury, to charge the defendant. The court, however, did permit the same to be read to the jury. The defendant then objected, that the said last-mentioned books and entries, were not evidence of the sale

[61] And so in Town of Bridgewater v. Town of Roxbury, 54 Conn. 213, 6 Atl. 415 (1886) book of a physician, who had become insane, to prove rendition of services to a pauper; Sharp v. Blanton, 194 Ala. 460, 69 South. 889 (1915) book of a deceased physician to show date of birth.

and delivery of goods to the defendant, and requested the court to charge the jury, that the same were not evidence of the sale and delivery of goods to the defendant; but the court charged the jury, that the same were evidence of the sale and delivery of goods by the plaintiffs to the defendant. To the admission of which said evidence and charge, the defendant excepted.[62]

The opinion of the court was delivered by

GIBSON, J. Nothing appears to show that the book admitted to go to the jury, was not a book of original entries. Vasey, the witness, acted in the capacity of a servant, to deliver meat to the customers, and not in that book-keeper; and his memoranda, made with a pencil, he swore were only for his own use, to enable him to render a true account to the plaintiffs, of the meat sold. His memoranda, therefore, are not to be viewed in the light of the original entries of the plaintiffs who did not direct them to be made; or at least, for any other purpose than to obtain an accurate account of the sales to his customers. It is clear, these memoranda[63] were not considered as evidence, to charge the customers, either by the plaintiffs or Vasey; or as anything else than brief notes of the transactions occurring in the course of the

[62] Statement condensed.

[63] And so where the entries were made on a slate and then transferred to a book. Faxon v. Hollis, 13 Mass. 427 (1816).

Per Curiam in Forsyth v. Norcross, 5 Watts (Pa.) 432, 30 Am. Dec. 334 (1836): "An entry on a card or a slate, is but a memorandum preparatory to permanent evidence of the transaction, which must be perfected at or near the time, and in the routine of the business. But the routine must be a reasonable one; for there is nothing in the condition of a craftsman to call for indulgence till his slate be full, or till it be convenient for him to dispose of the contents of it. In Ingraham v. Bockius, 9 Serg. & R. (Pa.) 285 [11 Am. Dec. 730 (1823)], and Patton v. Ryan, 4 Rawle (Pa.) 410 [1834], the entries were transferred the same evening or the next morning; and they ought in every instance to be so in the course of the succeeding day. In Vicary v. Moore, 2 Watts (Pa.) 458 [27 Am. Dec. 323 (1834)], entries transferred from scraps of paper carried about in the pocket during one or more days, were held to be inadmissible; and on this principle, the book was, in the present instance, incompetent."

Compare Bigelow, J., in Barker v. Haskell, 9 Cush. (Mass.) 218 (1852), where it appeared that in some instances two or three days elapsed before the entries on the slate were transferred to the book: "2. The next objection is, that the entries were not seasonably made on the book. The evidence, as reported, fails to sustain this objection; the fair inference being, that they were copied from the slate daily. But if it were not so, it by no means follows that the books would be inadmissible to prove the charges. Although the rule is well settled, that the entries, to be competent, must have been made at or near the time the charges were incurred, it does not fix any precise time within which they must be made. There is no inflexible rule requiring them to be made on the same day. Morris v. Briggs, 3 Cush. (Mass.) 342 [1849]. In this particular, every case must be made to depend very much upon its own peculiar circumstances, having regard to the situation of the parties, the kind of business, the mode of conducting it, and the time and manner of making the entries. Upon questions of this sort, much must be left to the judgment and discretion of the judge who presides at the trial; because, having the books before him, and understanding all the circumstances of the case, he is better able to decide upon all questions involving the fairness and regularity of the entries sought to be proved."

business, and made at the time, with a view to be used when the regular entries came to be made in the books. These entries, the witness swore, were made on the night of the day of delivery, or the next morning, while the witness stood by, and the memoranda were called over twice, to see whether everything was right. This case is very like Curren v. Crawford, 4 Serg. & R. 3, except that it is stronger; the person who delivered the articles charged, being produced, and the original memoranda either produced, or their loss proved. What more could possibly be done? The entries were made in a course of dealing between the parties, at or about the time of the respective transactions, and in the usual course of the plaintiffs' business; this was, in all reason, sufficient to entitle them to be read.

Judgment affirmed.[64]

KENT v. GARVIN.

(Supreme Judicial Court of Massachusetts, 1854. 1 Gray, 148.)

Assumpsit for thirty barrels of ale sold and delivered to the defendant. The case was referred to an auditor, whose report the plaintiff offered in evidence at the trial in the court of common pleas.

From this report it appeared that at the hearing before the auditor, the plaintiff, to prove his account, offered his book of original entries, and called as a witness the clerk who kept the books, who testified, that the book produced was the plaintiff's book of original entries; that he made the entries; that he took them from the delivery book of the drayman every Saturday night; that the drayman stood by his side, and read off the entries, and he copied them into the plaintiff's book; and then the drayman read them off from the delivery book, and compared them, and if they were right, the witnesses checked them in the plaintiff's book; that this was done in the present case; and that the drayman was now in California. It also appeared by the auditor's report that most of the barrels were delivered on Monday.

The defendant objected to the admission of the auditor's report for the following reasons: (1) The drayman's book, and not the book produced by the clerk, was the plaintiff's book of original entry. (2) The drayman's book, if not the book of original entry, contained the original memoranda from which the plaintiff's clerk made the entries sworn to by him. As the drayman is not produced, his unsupported declarations to the clerk are the only evidence to show by whom or when such

[64] In Burton v. Plummer, 2 Ad. & El. 341 (1843), where a clerk had made the entries in a "waste" book from which they had been transferred to a ledger by the master, and checked by the clerk at the time, Taunton, J., observed: "The witness proved that these entries, like all the others, were shown to him, and that he checked the entries himself. The entries so made by the master stand upon the same footing as if they had been made by the witness himself."

memoranda were made. (3) If the drayman's memoranda are proved by his declaration to the clerk, as the drayman read off to the clerk on Saturday night the deliveries of the whole week and as most of the barrels were delivered on Monday, six days elapsed, in most instances, between the delivery and the charge. Declarations made more than one day after a transaction cannot be considered as of the res gestæ.

But Perkins, J., overruled these objections, and admitted the report in evidence. Whereupon the jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

BIGELOW, J. It has long been the settled law of this commonwealth, that it is not a valid objection to the competency of a party's book, supported by his suppletory oath, that the entries therein were transcribed from a slate or memorandum-book in which they were first entered for a temporary purpose, although the entries on the slate or memorandum were made by a person other than the party who copied them on to the book. In such cases, the entry of the charges in the regular day-book of the party is deemed to be the first and original entry, and as such, competent proof, with the oath of the party, of the charges therein made. Faxon v. Hollis, 13 Mass. 427; Smith v. Sandford, 12 Pick. 139, 22 Am. Dec. 415; Ball v. Gates, 12 Metc. 491; Morris v. Briggs, 3 Cush. 342. But in all these cases it will be found, that in addition to the oath of the party who made the entries in the day-book, the testimony of the person who made the entries on the slate or memorandum-book was adduced, to prove that articles were delivered or work performed of a character similar to those charged on the day-book, at or about the time of the entries therein. The charges in the book, supported by the oath of the party making the entries, are often the only evidence of dates, items and amounts, which individuals cannot well retain in their memories.

The case at bar goes beyond any adjudged case in this commonwealth. The attempt is here made to put in evidence the book of a party, supported by the oath of his clerk who made the entries, for the purpose of proving the sale and delivery of articles made by a third person in the employment of the plaintiff, whose evidence is not produced in support of the charges; nor is any evidence offered from any source other than from the book, to show that at the time the charges were made, any articles, similar in character to those charged, were delivered by the plaintiff to the defendant. It is manifest that here an important link in the chain of evidence is wanting. The clerk who made the entries had no knowledge of the correctness of any charge on the book. All he can say is, that the drayman, who delivered the articles for the plaintiff, gave to him from his memorandum-book the items which were entered on the book. The case therefore rests on the mere unsupported statement of a third person, whose fidelity and accuracy there are no means of ascertaining and testing. It is in its nature mere hearsay testimony. To permit the books of a party to be competent proof under such circumstances, would be extending the

rule applicable to this anomalous and dangerous species of evidence quite too far.

The book in the present case is also liable to the further objection, that the entries were not made, in many instances, until six days after the date of the alleged delivery of the articles to the defendant. Of itself this objection would not perhaps be fatal to the competency of the book, but taken in connection with the absence of the testimony of the person who delivered the articles and made the original memorandum, it renders the book entirely inadmissible. Kessler v. McConachy, 1 Rawle (Pa.) 441; McCoy v. Lightner, 2 Watts (Pa.) 350, 351.

For these reasons we think that the court below erred in permitting the auditor's report, founded on the charges in the book, to be read to the jury in support of the plaintiff's claim.

Exceptions sustained.[65]

CHISHOLM et al. v. BEAMAN MACHINE CO.

SAME v. KUTSCHE.

(Supreme Court of Illinois, 1896. 160 Ill. 101, 43 N. E. 796.)

MAGRUDER, J.[66] * * * Upon the trial below the plaintiffs were permitted to introduce in evidence the books of account of the Beaman Machine Company, over the objection of the defendants, to which ruling exception was duly taken. The evidence shows the following mode of keeping account of the time spent in work upon the machines: Each workman, at the end of each day, made out a time check or slip in his own handwriting, stating therein the number of the piece he had worked upon, and the number of hours he had worked thereon during the day. At the close of the day he dropped this time

[65] Compare Price v. Torrington, ante, p. 581.

Lathrop, J., in Gould v. Hartley, 187 Mass. 561, 73 N. E. 656 (1905): "While the plaintiff, to prove some of the items of the account, put in evidence memoranda with the defendant's signature attached, as to the other items the only offer of proof was a book alleged to have been kept by the plaintiff in the usual course of his business. This book was kept by a clerk in the office of the hotel, who had no personal knowledge of the items of goods sold by the cigar department and the bar department of the plaintiff's hotel, and whose only knowledge was derived from slips sent to his office from these departments by a bell boy. The original slips were not produced, and neither of the employés who had charge of the bar or the cigar department was called to testify. Under these circumstances, we are of opinion that the judge erred in admitting the book in evidence. This was decided in Kent v. Garvin, 1 Gray, 148 [1854], and the rule there laid down has been recognized ever since to be the law. Harwood v. Mulry, 8 Gray, 250, 252 [1857]; Miller v. Shay, 145 Mass. 162, 13 N. E. 468, 1 Am. St. Rep. 449 [1887]; Donovan v. Boston & Maine R. R., 158 Mass. 450, 453, 33 N. E. 583 [1893]. The books of a bank stand on a different footing. Produce Exchange Trust Co. v. Bieberbach, 176 Mass. 577, 587, 58 N. E. 162 [1900].

Exceptions sustained.

[66] Statement and part of opinion omitted.

slip into a locked box, arranged like a letter box, in the tool room of the shop. The next morning the foreman of the shop took these time slips out of the box, checked them over, went to see the workman who made the slip if anything was wrong about it, marked the slips "Approved" which were found to be correct, and then turned them over to the bookkeeper in the usual way. The bookkeeper, on the same day or the following day, made a transcript of these tickets or time slips into a book called the "time book"; the entries therein showing the number of the piece of machinery worked upon, the name of the workman, and the amount of the time. During the time when the work was done upon these brick machines, from the early part of May, 1890, to the early part of December, 1890, the entries in the time book were made by two bookkeepers. When the books were introduced, these bookkeepers were placed upon the stand and swore that the entries in the time book were correct; that such entries were a correct transcript of the tickets, and for the work done in the shop, as shown by the tickets; that the entries were made from the tickets made out by the men in the shop, and generally handed to the bookkeeper by the foreman the next morning; that the tickets were examined by the bookkeepers, and when any errors were found, they were corrected by the foreman and the bookkeeper before the entries were made in the book. The foremen who had charge of the workmen during the progress of the work upon the machines, and who examined and approved of the tickets or time slips, were also put upon the stand, and swore to their signatures upon the time slips; that they had looked them over, and had superintended the men, and had had charge of their work; that the tickets, turned in for the work, as signed and approved by them, were correct, and correctly represented the time; and that the work specified on the tickets was done. Some 5,000 of these original tickets were brought into court during the trial of the cases below, and it sufficiently appears that they were considered as being introduced in evidence. One of the foremen testified that he had examined them all carefully on the morning of the day on which he testified. Before the trial they were carefully examined by the bookkeeper of appellants in the presence of the bookkeeper of appellees; and, a short time before the trial, Kutsche, the president of the machine company, and Molliter, one of its bookkeepers, checked over the entries in the time book from the tickets, and found only about 10 entries, out of some 5,000, for which there were not corresponding tickets. It appears, from the evidence, that the foremen or superintendents employed by the machine company not only superintended the workmen, but actually worked with them upon the machines during their construction, thus having an opportunity to see what work was done. * * *

We think that the books were properly admitted in evidence in connection with proof of the facts and circumstances already detailed. Their mere admission was not a determination of the weight to which

they were entitled as evidence, and it was the privilege of the appellants to attack their reliability by any legitimate testimony tending to show their incorrectness. It is claimed by the appellants that the workmen who did the work on the machines, and made out the time slips, should have been produced, and asked whether they actually worked as many hours as were indicated upon the slips. This, certainly, would have been the best evidence upon the subject; but it is easy to see that, upon the trial of a case like this occurring long after the transactions denoted by the entries, it might not be possible to find the men who made the slips. The books themselves were accompanied by the testimony of the bookkeepers who made the entries that such entries were correctly made from the time slips, and by the testimony of the foremen, who superintended the work as done, and did a part of it themselves, that the time slips were correct, and that the work represented thereby was actually done.

The entries in the account book, or book of original entries, may be proved by the clerk who made them, if he is alive, and can be produced. In order to make the book admissible, it is necessary that the entries therein should have been made in the ordinary course of business, by a person whose duty it was to make them, and that they should have been made contemporaneously with the doing of the work for which the charges are made, so as to form a part of the res gestæ. House v. Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307. The time slips were made on the day the work was done so far as they were made by the workmen, and on the morning after the work was done so far as they bore the signatures and marks of approval of the foremen, and they were transcribed into the time book, as a general thing, on the day after the work was done. Whether, therefore, the time book or the time slips be regarded as containing the original entries, they were made so near the time of the actual performance of the work as to be justly regarded as forming a part of the res gestæ. It must be remembered that the time slips were examined and compared by the foremen, and were marked "Approved" by them, and contained their signatures, and to that extent were made as much by them as by the workmen. The time slips not only contained memoranda made by the workmen, but also memoranda made by the foremen. Hence, there was testimony by the parties making the time slips as well as by the parties making the entries in the time book. Where the clerk who makes the entries has no knowledge of their correctness, but makes them as the items are furnished by another, it is essential that the party furnishing the items should testify to their correctness, or that satisfactory proof thereof,—such as the transactions are reasonably susceptible of,—from other sources, should be produced. House v. Beak, supra. Here the foremen, who furnished the items to the bookkeepers, testified to their correctness. If their knowledge of the work done was not as full and complete as the knowledge

of the workmen themselves, yet, as they superintended the doing of the work, and participated in its performance, their testimony was such satisfactory proof of the correctness of the items as the transactions were reasonably susceptible of. * * *

Judgment affirmed.[67]

SQUIRES v. O'CONNELL et al.

(Supreme Court of Vermont, 1916. 91 Vt. 35, 99 Atl. 268.)

MUNSON, C. J.[68] The plaintiff claims to recover a balance due him for cutting, sawing, and sticking up lumber under a contract with the defendants. The amount of the lumber is the only thing in dispute.

The plaintiff testified that he sublet the cutting and drawing to one party, and the drawing out and sticking up to another; that he was not personally on the job, except that he went to the mill about once in two weeks; that he employed a sawyer and a man to measure the lumber; that Rowland was the measurer until the job was nearly completed, and that Carruth then took his place; that the measurement was kept on tally boards in the mill, and that when he went there he took figures from the tally board and examined the markings on the lumber and the measurement of it; that he received figures from Rowland and Carruth as to the lumber measured and set them down correctly at the time in a book kept at his house; that he had no other account of the lumber, the tally boards and the memoranda obtained from the measurers having been destroyed. The book was received in evidence in connection with the testimony of the plaintiff, against the defendants' objection and exception. The objection was general, but the grounds of objection were manifest from the detailed explanation of the manner in which the business was done and the account kept; and the book was doubtless received when it was in the expectation that Rowland and Carruth would be called to authenticate the account. The plaintiff was then allowed to testify that the book represented the correct amount of lumber as reported to him by Rowland and Carruth, and to give from it the total amount of lumber sawed on the job. The statement of the amount was objected to as hearsay. Rowland was a witness later, and testified that he was experienced in measuring lumber, and that he measured and marked this lumber correctly, and correctly reported the account to the plaintiff from time to time when he was at the mill. This verified as much of the account as was based on Rowland's reports, but the statement

[67] For a similar situation, see Mayor, etc., of New York City v. Second Ave. Ry. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839 (1886).

[68] Part of opinion, as well as dissenting opinion of Munson, C. J., are omitted.

of the total amount of lumber sawed remained hearsay, unless the production of Carruth's evidence was legally dispensed with.

The defendants claim that the book received in evidence was not a book of original entry, but that the original entries were those on the tally boards kept by the measures and the memoranda taken by the plaintiff when on the lot. This position is not well taken. See Gifford v. Thomas, 62 Vt. 34, 19 Atl. 1088. It may be stated generally that the first regular and collected record is the original book, although made up from casual or scattered memoranda. 2 Wig. Ev. § 1558. It may be the party's original book of accounts, even if made wholly from the memoranda and reports of the employés doing his business, and evidencing nothing of which he or his bookkeeper had personal knowledge. Note 138 Am. St. Rep. 456. The fact that the memoranda and reports have been lost, or intentionally destroyed as unimportant, will not make the book inadmissible. Mahoney v. Hartford, etc., Corp., 82 Conn. 280, 73 Atl. 766.

The total given from the book covered the lumber measured and reported by Carruth. Carruth was not a witness; and the exceptions show that this was because he was absent from the state, and show further that it did not appear but that the plaintiff knew where he was, so that he could have taken his deposition. There are authorities which hold that the mere fact of absence from the state is sufficient to justify the court in dispensing with evidence of this character, but we know of no decision in this state which goes to this length. It seems to be well settled, however, that the various inferior employés of a large business, whose memoranda of time, material, receipts, deliveries, and the like are the bases of the account, need not be called as witnesses. But the ordinary protection of the other part of the business world seems to require that the supervising employés, under whose management and observation this work goes on, and who receive, consolidate, and transmit this data to those who make up the permanent account, should be called if reasonably accessible. If this is not required, the matter will rest entirely upon the fact that it is something done in the regular course of the business, and not at all upon the oath of any one having personal knowledge of it.

Mr. Wigmore, in treating of regular entries as an exception to the hearsay rule, formulates the rule that where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by another in the regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry, provided the practical inconvenience of producing as witnesses the persons thus concerned would in the particular case outweigh the probable utility of doing so. 2 Wig. Ev. § 1530, p. 1895. The application of this rule manifestly involves a determination by the trial court of a preliminary question, regarding which much must necessarily be left to its sound discretion. 2 Wig. Ev. § 1530. The showing that Carruth was out of the state at the time of

the trial supports the court's ruling admitting the book as offered. The controlling principle is that of practical necessity, and Carruth's unavailability as a witness was a sufficient ground for dispensing with his testimony in corroboration of the entries made on his reports. Griffin v. Boston & M. R. Co., 87 Vt. 278, 292, 89 Atl. 220; Osborne v. Grand T. Ry. Co., 87 Vt. 104, 88 Atl. 512, Ann. Cas. 1916C, 74; 2 Wig. Ev. §§ 1521, 1530. In the circumstances we must presume in support of the ruling that the trial court was justified in finding the necessity established. * * *

Judgment affirmed.[69]

GIVENS v. PIERSON'S ADM'X.

(Court of Appeals of Kentucky, 1916. 167 Ky. 574, 181 S. W. 324, Ann. Cas. 1917C, 956.)

CARROLL, J.[70] The principal question in this case grows out of the alleged insufficiency of the petition and evidence to support a claim for $258.46 asserted by the administratrix of W. W. Pierson against the appellant, T. K. Givens.

W. W. Pierson died in February, 1912, and thereafter his administratrix brought suit to recover a balance of $224.27 alleged to be due her intestate on an open account. The first item on the ledger account introduced as evidence reads, "March 1, 1909; balance transferred, $258.46;" and this item is followed by other items of indebtedness running from March 4, 1909, to March, 1911, during which time the account was credited by various items, leaving due, according to the face of the account, the balance stated. * * *

On the trial of the case Givens was not offered as a witness, and the only witness introduced by the administratrix was Walter E. Mark, who was the office manager and bookkeeper for Pierson from 1895 until shortly before the death of Pierson in 1912. In reference to the matter of this $258.46, his testimony, in substance, was that Pierson conducted a large mercantile establishment employing a number of clerks, among them being Givens, who also was assistant manager. He said he was bookkeeper during the whole time that Givens' account was being made, and that when Givens purchased goods on credit in the store, an entry would be made of the purchase on a ticket such as was in general use in the store by the clerk making the sale, and that the ticket would be given to him the next day when an entry showing the transaction as it appeared on the ticket would be made by him on a billbook. That when Givens drew money from the store, as he often

[69] See, also, West Virginia Architects & Builders v. Stewart, 68 W. Va. 506, 70 S. E. 113, 36 L. R. A. (N. S.) 899 (1911), annotated, where the person reporting to the bookkeeper had become disqualified by the death of the adverse party.

[70] Part of opinion omitted.

did, in payment or part payment of his salary, a ticket showing the amount that he received would be made out by the cashier, and on the next day he would enter the transaction shown by the ticket on a cashbook and soon afterwards, in due course of business, the entries on the billbook and the cashbook would be transferred by him to the account of Givens kept in the ledger, also made up by him. That this was the method pursued with all customers of the store during the time he was bookkeeper, and at the end of each month he would present Givens a statement of his account taken from the ledger, showing the items purchased and the amounts charged therefor, as well as the amount of cash received.

He further testified that the account of Givens on the ledger introduced on the trial was transferred to that ledger by him from another ledger also kept by him that had been filled up. It also appeared from his testimony that the tickets made out by the clerks and cashier as well as the billbooks and cashbooks, and all the ledgers except the one introduced on the trial, had been destroyed in a fire. The witness said he did not have any personal knowledge of the merchandise account or cash account of Givens except as it appeared on the tickets given to him and from which he made the original entries in the billbook and the cashbook, which were afterwards transferred by him to the ledger. Whether the entries on these tickets were correct or not, he did not know. But he did know the method of business and that the entries of the transactions had with Givens were kept on the tickets and in the books in the usual and customary manner, and that the billbooks and cashbooks showed correctly the state of his account as exhibited on the tickets made out when the merchandise was purchased or the cash advanced, and also knew that the ledger accounts were correctly kept and the entries therein correctly transcribed by him from the billbooks and cashbooks and correctly carried over by him from one ledger to another.

It will thus be seen that the ledger produced in court, and which showed in the first entry on the account of Givens that there had been transferred from another ledger a balance due by him of $258.46, was not a book of original entry. The first original entry, strictly speaking, was the entry made by the cashier who advanced the money or the clerk who sold the goods, and the next entry was the entry made by this bookkeeper on the daybook and the cashbook; and the next entries were those made by this bookkeeper in transferring the items from the billbook and the cashbook to the ledger. So that the witness was only able to state from personal knowledge that the entries made on the billbook and cashbook were correct copies of the entries made on the tickets, and that the entries on the billbook and cashbook were correctly transferred to the ledger, and when the first ledger on which the account appeared was filled, it was correctly transferred from that ledger to the one introduced on the trial.

The question, therefore, is: Should the book that was produced be

treated, under the circumstances, as a book of original entry and entitled to the same weight as the billbook or cashbook in which the entry was first made or the ledger to which the account was first transferred from the billbook and cashbook? It is manifest that unless the entries on this ledger should be so treated, the administratrix totally failed to make out her case, because if the entry on the ledger introduced, showing the state of Givens' account on March 1, 1909, taken in connection with the testimony of the bookkeeper, should not be treated as substantive evidence of the existence of this indebtedness of Givens, there was no evidence offered tending in any manner to establish his indebtedness in the sum of $258.46.

There appears to be some conflict in the authorities on the question of the admissibility of book entries such as were relied on in the trial of this case to establish the indebtedness of Givens. Indeed an investigation of the cases will disclose that some courts have made what seem to be refined and apparently unsubstantial distinctions in determining what are and what are not original entries in the sense that they may be received as substantive evidence. The general rule, however, on the subject of the admissibility of book entries as substantive evidence of the fact that the transaction disclosed by the entry actually took place is usually stated by the authorities in substantially the same form. But in the practical application of the rule to the different facts and circumstances arising in the trial of cases, it has been found necessary, in order that the rule should be of any value, to introduce many exceptions. * * *

But we may say at the outset that the authorities are very generally agreed that the entries on tickets or stubs or slips of paper made out by clerks in stores in the regular course of business and at the time the transaction actually happens, are not the original entries in the meaning of the rule. The original entry is the entry first made in the regular course of business in a permanent book, as, for example, in this case in the billbook or cashbook. Entries first made on tickets or stubs or slips of paper by clerks or others are treated as mere memoranda, admissible as evidence for the purpose of refreshing the memory of the party who made them, if he is introduced as a witness, but not as independent or substantive evidence of the fact that the transaction took place. Chamberlayne on Evidence, vol. 4, §§ 3085–3089; Elliott on Evidence, vol. 2, § 460.

There is also some authority to the effect that if entries are made on books such as billbooks or cashbooks, or even ledgers, from tickets or stubs or slips of paper made out by clerks or cashiers at the time the transaction occurred, they are not admissible as substantive, independent evidence of the transaction unless the person making the entry on the billbook or cashbook or ledger has some personal knowledge of the transaction, or the clerk or cashier who made out the original ticket or slip can testify as to the correctness of the entry. See cases cited in note to Smith v. Smith, 52 L. R. A. 545.

But there is much authority for the rule, which we think the better one, that where the entry is made in the usual and regular course of business on a permanent book, whether it be a daybook or billbook or cashbook or ledger, from memoranda or tickets or stubs or slips made out in the usual way by clerks when the transaction occurred, these book entries are admissible as original and substantive evidence of the transaction whether the person who made the entries be living or dead at the time of the trial, and without reference to whether the original tickets or stubs or slips are available or the clerk who made the memoranda on them can be produced. If the person who made the first book entries be dead, the entries are admissible, if proven to be in his handwriting and in the regular course of business. If he is living and his evidence as a witness can be secured, it will of course be competent to show by him the fact that he made the entries and the circumstances under which they were made.

In Wigmore on Evidence, vol. 2, § 1530, the reasons for this enlargement of the rule are thus stated, following a discussion of the grounds on which they rest:

"The conclusion is, then, that where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by one or more other persons in the regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry under the present exception, provided the practical inconvenience of producing on the stand the numerous persons thus concerned would in the particular case outweigh the probable utility of doing so. Why should not this conclusion be accepted by the courts? Such entries are dealt with in that way in the most important undertakings of mercantile and industrial life. They are the ultimate basis of calculation, investment, and general confidence in every business enterprise; nor does the practical impossibility of obtaining constantly and permanently the verification of every employé affect the trust that is given to such books. It would seem that expedients which the entire commercial world recognizes as safe could be sanctioned, and not discredited, by courts of justice. When it is a mere question of whether provisional confidence can be placed in a certain class of statements, there cannot profitably and sensibly be one rule for the business world and another for the courtroom. The merchant and the manufacturer must not be turned away remediless because methods in which the entire community places a just confidence are a little difficult to reconcile with technical judicial scruples on the part of the same persons who, as attorneys, have already employed and relied upon the same methods. In short, courts must here cease to be pedantic and endeavor to be practical." * * *

It is also true that this character of evidence may sometimes give to the merchant an advantage and make it difficult for the person charged to disprove the correctness of the entry. But the rule admitting this species of evidence has been so sufficiently tested by the experience of

the years it has been in effect and so generally approved as to show that little, if any, injustice has been perpetrated under it. And if it was not admissible to prove accounts in this way, it would many times happen that the merchant would be unable to enforce the collection of a just claim, if the debtor was disposed to question all book entries that could not be otherwise proven on account of the absence or death of the persons who sold the articles or made the entries and the loss of books.

It will be noticed that the bookkeeper testified that some of the items going to make up this balance consisted of cash advanced, but, under the circumstances of this case, we see no sound reason for making any distinction between the items of cash and the items of merchandise. The advancements of cash were made in the regular course of business and in the manner employed for the payment of his salary, and the tickets containing these cash items, and the books themselves on which these items of cash were entered, were as much a part of the regular course of business as were the entries made with respect to the merchandise purchased by him. Having this view of the matter, the court should have directed a verdict for the administratrix, at the conclusion of the evidence, in place of submitting the matter to a jury. * * *

Judgment affirmed.[71]

[71] Marshall, J., in F. Dohmen Co. v. Niagara Fire Ins. Co., 96 Wis. 38, 71 N. W. 69 (1897): "* * * From the very nature of the case, the only evidence of a definite character that could be produced was such as could be given by aid of the books. The stock of goods that existed, according to the inventory of February, 1891, had been added to in the regular course of business for over a year and a half, and the whole had been reduced by daily sales during that time. The multitude of transactions during such period, of goods taken in and sent out, could not be established by evidence from the mouths of witnesses. The only evidence that existed was locked up in the books. Such being the case, upon such books being reasonably verified as correct records of the daily transactions in the business as such transactions were regularly reported to the office to be recorded in such books, with proof that the books were relied upon by plaintiff solely as a repository of the facts in regard to the business, and that they were uniformly found to be correctly kept, a witness who had occasion to refer to them from time to time, and had thereby, and through a general knowledge of the business, been convinced of their correctness, might properly testify, by their aid, to their contents as facts, without having personal knowledge of such facts independent of the books, and without ever having had any other knowledge of all the individual transactions than such as one might be reasonably expected to have by generally overseeing a business. Such evidence would not be conclusive by any means, but would constitute evidence bearing on the question in suit proper to be submitted to the jury with all the other evidence in the case."

See much the same rule applied to a train dispatcher's book made up from telegraphic reports from various stations. Firemen's Ins. Co. v. Seaboard Air Line R. Co., 138 N. C. 42, 50 S. E. 452, 107 Am. St. Rep. 517 (1905); Louisville & N. R. Co. v. Daniel, 122 Ky. 256, 91 S. W. 691, 3 L. R. A. (N. S.) 1190 (1906); Donovan v. Boston & M. R. R., 158 Mass. 450, 33 N. E. 583 (1893).

VI. Official Registers and Reports

BIRT v. BARLOW.

(Court of King's Bench, 1779. 1 Doug. 171.)

This was an action of trespass and assault, for criminal conversation with the plaintiff's wife. It was tried before Blackstone, Justice, at the last Assizes for Kent, when, by the direction of the Judge, the plaintiff was nonsuited.

On Monday, the 26th of April, Rous moved for a rule to shew cause, why the nonsuit should not be set aside, and a new trial granted.

This day BULLER, Justice, read the Judge's report, which was as follows:

The first witness called by the plaintiff was Thomas Sharpe, who proved a copy of the register of the parish of St. Alfred, Canterbury, in hæc verba—"1767, No. 106. John Birt, Esq; of the parish of St. Margaret, Rochester, Co. Kent, and Harriot Champneys of this parish, married by banns 15 December 1767, by John Lynch, minister. Witnesses, Robert Lynch, Francis Champneys, Anne Lynch, Elizabeth Lynch." Another witness, (Susanna ———) was next called, to prove the fact of adultery. I was of opinion, that this was not sufficient evidence of the marriage, but that the identity of the parties must be proved, else it might possibly be a register of the marriage, not of the plaintiff and his supposed wife, but of some other persons of the same name.

The counsel for the plaintiff then said, that, in the course of their examination to prove the adulterous intercourse, it would come out from the mouths of the witnesses, that the plaintiff's reputed wife was of the name and family of Champneys, and that they have long cohabited together, and were esteemed to be man and wife by all their friends and relations. I still thought that the evidence, so opened, would be insufficient, holding, in conformity to the case of Morris v. Miller, reported in 4 Bur. 3057, (and of which I also had a manuscript note of my own,) that this was the only civil case in which proof of an actual marriage was requisite, as contradistinguished from acknowledgment by the parties, cohabitation, reputation, &c. That the best proof that could be given of an actual marriage, was by some person personally present at the solemnity, which, in my small experience, I had never seen an instance of not producing. If it did not appear that there were persons present besides the minister, and he was dead, perhaps other collateral proof might be admitted, which might render probable the identity of the plaintiff and his wife, and the persons whose marriage was so registered. But that, in the present case, there appeared to have been no less than five witnesses present at the marriage thus registered, which was only eleven years ago. That the marriage act had directed the witnesses to subscribe their names to the

register, in order to facilitate the investigation of the legal evidence of marriages. And that till these five witnesses and the minister were accounted for, as by shewing them all dead, or the like, I could not admit less proof than that of some person present to demonstrate the identity of the parties.

I accordingly nonsuited the plaintiff. After which a proctor from the ecclesiastical court, then present, declared openly that he had been subpœnaed by the plaintiff to prove, and could prove the taking out of a licence for the marriage of the plaintiff and his reputed wife. I mention this circumstance, though it could be no ground of my determination, as it shews something more than a bare possibility that the plaintiff and his wife were not the identical persons so registered as marrying by banns.[72]

LORD MANSFIELD. From the report, it appears, that the ground of the nonsuit was an idea, that the identity must be proved by the minister, or some of the attesting witnesses, unless their not being produced is accounted for, in the same manner, as is required in the case of subscribing witnesses to a deed. The counsel for the plaintiff stated other evidence of the identity; whether such as would have been sufficient when produced (as that might, or might not be, according to the differences arising from the manner of stating it,) I give no opinion. But the judge decided, that it was necessary to produce some of the subscribing witnesses. The clauses in the marriage act relative to registers are of infinite utility to the kingdom. They were meant, as well to prevent false entries, as to guard against illegal marriages without licence, or the publication of banns. The registers are directed to be kept as public books, and accompanied with every means of authenticity. But, besides facilitating and ascertaining the evidence of marriages, they were intended for other wise purposes. They are of great assistance in the proof of pedigrees, which has become so much more difficult since inquisitions post mortem have been disused, that it is easier to establish one for 500 years back, before the time of Charles II. than for 100 years since his reign. But this advantage would be lost, and it would be very prejudicial, if the act were so construed as to render the proof of marriages more difficult than formerly. I take it for granted, that the law stands as it did before in that respect.

Registers are in the nature of records, and need not be produced, nor proved by subscribing witnesses. A copy is sufficient, and is proof of a marriage in fact between two parties describing themselves by such and such names and places of abode, though it does not prove the identity. An action for criminal conversation is the only civil case where it is necessary to prove an actual marriage. In other cases, cohabitation, reputation, &c. are equally sufficient since the marriage act as before. But an action for criminal conversation has a mixture of penal pros-

[72] Statement condensed and opinion of Buller, J., omitted.

ecution; for which reason, and because it might be turned to bad purposes by persons giving the name and character of wife to women to whom they are not married, it struck me, in the case of Morris v. Miller, that, in such an action, a marriage in fact must be proved. I say, a marriage in fact, because marriages are not always registered. There are marriages among particular sorts of dissenters, where the proof by a register would be impossible, and Dennison, Justice, in a case of that kind which came before him, admitted other proof of an actual marriage. But, as to the proof of identity, whatever is sufficient to satisfy a jury, is good evidence. If neither the minister, nor the clerk, nor any of the subscribing witnesses, were acquainted with the married couple, in such a case, none of them might be able to prove the identity. But it may be proved in a thousand other ways. Suppose the bellringers were called, and proved that they rung the bells, and came immediately after the marriage, and were paid by the parties; suppose the hand-writing of the parties were proved; suppose persons called who were present at the wedding dinner, &c. &c.

Rule absolute.

SALTE et al. v. THOMAS.

(Court of Common Pleas, 1802. 3 Bos. & P. 188.)

This was an action by the Plaintiffs, as assignees, upon two bills of exchange drawn by the bankrupt, and accepted by the Defendant. The cause was tried before Chambre, J., at the Guildhall Sittings in this Term, when the Plaintiffs, in order to prove that the bankrupt had committed an act of bankruptcy by lying two months in prison for debt, produced the books of the Fleet and King's Bench prisons to establish that fact. These books contained entries of the dates of the commitments and discharges of all the prisoners, together with particulars of the causes of each commitment extracted from the original warrants. From these books it appeared, that the bankrupt had been committed to the Fleet for debt, and had been removed from thence to the King's Bench prison, charged as well with the action in the Common Pleas as with several other actions in the King's Bench, and that he had altogether lain in prison above two months. On the part of the Defendant, it was objected, that though the prison-books were admissible in evidence to prove the period of the commitment and discharge, yet they were not admissible to prove the cause of the commitment, but that the original warrants should have been produced. The learned Judge admitted the evidence, reserving the point, and a verdict was found for the Plaintiffs.

The opinion of the Court was now delivered by

LORD ALVANLEY, C. J. The question in this case is, Whether the evidence produced was sufficient to prove a fact necessary to consti-

tute the act of bankruptcy, viz. that the bankrupt had lain two months in prison on civil process for debt. For this purpose the prison books were produced, from which it appeared that the bankrupt had lain the necessary time in prison; but it was objected, that though the books were evidence of the time of the bankrupt's imprisonment, they were not evidence of the cause of the commitment, and that they were not equivalent to the committitur itself, which was admitted to be in existence. To establish the sufficiency of the evidence, the case of The King v. Aickles [Leach, C. C. 435] was cited, by which it appeared that in a criminal case, where it was material to prove the particular time of a prisoner's discharge, the book of Newgate was held to be sufficient for that purpose. That was a book kept by a public officer for the purpose of entering the transactions of the prison, the names of the prisoners, and the times of their discharge, which entries were sometimes made from the information of the turnkeys, and sometimes from their indorsements on the warrants. The book was a complete history of the transactions of the prison, and as such it was held to be evidence of the day on which the prisoner was discharged. But the material distinction between that case and the present is, that there was no document of the fact which was proved by the book of Newgate but the book itself, and no other evidence could have been resorted to, except the parol testimony of the turnkey who might happen to be in the prison at the time of the prisoner's discharge. But in the present case, the committitur from which the entry was inserted in the book is in existence, and the question is, Whether that be not better evidence than the book itself? I am of opinion, and my Brothers concur with me in thinking, that it was better evidence, and that the books therefore ought not to have been admitted. It has been said, that these were in the nature of public books; but it was not contended, that they were that sort of public document, a copy of which might be given in evidence, like a parish register made under public authority. The two documents do not, therefore, appear to me of a similar nature; for the gaoler is not required by law to keep these prison books, but they are only kept for his own information and security. We do not, therefore, think this case governed by the case of The King v. Aickles; but we are of opinion, that the committitur ought to have been produced to establish the cause of the commitment, and consequently that there must be a new trial.

Rule absolute.[73]

[73] Mr. Justice Peckham, in White v. United States, 164 U. S. 100, 17 Sup. Ct. 38, 41 L. Ed. 365 (1896): "We think no error was committed by the trial court in thus ruling. It was not necessary that a statute of Alabama should provide for the keeping of such a book. A jailor of a county jail is a public officer, and the book kept by him was one kept by him in his capacity as such officer and because he was required so to do. Whether such duty was enjoined upon him by statute or by his superior officer in the performance of his official duty, is not material. So long as he was discharging his public and official duty in keeping the book, it was sufficient. The nature of the

WALDRON et al. v. COOMBE.

(Court of Common Pleas, 1810. 3 Taunt. 162.)

This was an action brought to recover the loss sustained by the plaintiff, by the deterioration of some kerseymeres on board the Earl Percy, insured by a policy subscribed by the defendant, "at and from London to Rio Janeiro." The plaintiff averred a loss by perils of the sea. The defendant pleaded non assumpsit, and paid into court £50 per cent. Upon the trial, at Guildhall, at the sittings in this term, before Mansfield, C. J., the plaintiff proved, that, if the goods had not been damaged, the market would have afforded a profit of £15 per cent.; that the goods were damaged, apparently by seawater, to a considerable degree; the witness would not have given £30 per cent. for them; but the plaintiff gave no other evidence of the manner in which the damage was occasioned. To prove the amount of the loss, a witness produced a certificate from the British vice-consul there, of the amount for which the goods were there sold, being £9 15s. per cent. only, of the sum insured; and the same witness swore, that, by the law of the Brazils, and other parts of South America, the vice-consul is constituted general agent for all absent owners of goods, and that the same law authorizes and compels the vice-consul to make sale of all the damaged goods of all absentees, with the assistance of two British merchants as assessors. Mansfield, C. J., admitted this evidence, although Best, Serjt., for the defendant, objected to it, but reserving to him liberty to move.[74]

MANSFIELD, C. J. I thought at the trial it was very difficult to bring this within any head of evidence. It was somewhat analogous to the proceedings of courts and other public functionaries: but I know no instances of such as this being received. I dare say it would be evidence in any other country. It came nearest to the case of judgments in foreign courts. But we receive judgments under the seals of the courts. The vice-consul is no judicial officer. He acts under a wise regulation to prevent the improper disposition of damaged goods. They are put into warehouses appropriated to them by government. The vice-consul must preside at the auction. There is no rule in the English law which makes his certificate evidence. He has been supposed to be an agent, and he is, to some purposes. So is an auctioneer in this country; nevertheless his certificate is not evidence in a court of justice, but what was done at the auction must be proved. The business of the vice-consul is to see a fair sale. It is going much further to say that his certificate shall bind the parties. Any body

office would seem to require it. In that case the entries are competent evidence. 1 Greenl. Ev. §§ 483, 484."

And so in the case of the United States weather record, Evanston v. Gunn, 99 U. S. 660, 25 L. Ed. 306 (1878).

[74] Statement condensed.

present might have proved the facts. The chirograph of fines here proves itself, but the endorsement of the proclamation of the fine must be proved by a compared copy of the record.

Rule absolute to reduce the damages to £70 per cent.[75]

WIHEN v. LAW.

(Court of King's Bench, 1821. 3 Starkie, 63.)

The question was as to the age of the defendant. On the part of the defendant, to prove his infancy at a particular time, the register of his christening was produced, from which it appeared that he was christened in the year 1807; but the entry also stated that he was born in the year 1799.

BAYLEY, J., was of opinion, that the entry relating to the time of his birth was not evidence of the fact; it did not appear upon whose information the entry had been made, and the clergyman who made the entry had no authority to make inquiry concerning the time of birth, or to make any entry concerning it in the register.

The jury found for the plaintiff; and in the ensuing term, Marryatt moved for a new trial, contending that at all events, the entry was evidence to confirm the statement of the mother, who had been examined as a witness for the defendant at the trial.

But THE COURT were of opinion, that the entry was not evidence to prove the age of the party; it was nothing more than something told to the clergyman at the time of the christening, concerning which he had not power by law to make an entry in the register. He had neither the authority nor the means of making an entry. If it had appeared that the entry had been made by the direction of the mother, it might, perhaps, if required, have been read in evidence, for the purpose of confirming her testimony; but even then it would have amounted to nothing more than a mere declaration by her as to the age of her son, made at a time when there was no motive on her part to misrepresent his age.

Rule refused.[76]

[75] Official certificates are provided for by statute in quite a number of cases; e. g., certificates of the acknowledgment of deeds, certificates of the registry of deeds, certificates of the performance of the marriage ceremony, and of various other official acts.—*Ed.*

[76] Mr. Justice Paxson, in Sitler v. Gehr, 105 Pa. 577, 51 Am. Rep. 207 (1884): "The learned judge held that the book in question was a church registry for marriages, deaths, and burials, that it was intended to be kept, and possibly was kept, according to the requirements of the Act of 1800; that it would be evidence to show the deaths of Mary Eva Zimmerman and Hannah Bast, but that for the other purposes offered it was incompetent. Without discussing the character of the book, we are of opinion it was properly rejected. It was not alleged that the time of the death of these ladies was material to the issue, on the contrary, the manifest object of the offer was to

RICHARDSON v. MELLISH.

(Court of Common Pleas, 1824. 2 Bing. 229.)

This was an action brought to recover damages for the breach of an agreement. The plaintiff was formerly captain of the ship Minerva, which had been chartered by the East India Company for six voyages to India. When the vessel had performed two of these voyages, the defendant purchased twelve-sixteenths of her, and having a nephew (Captain Mills) whom he wished to serve, he proposed that the plaintiff should give up the command of the Minerva to Captain Mills. In order to provide the plaintiff a compensation for this sacrifice, an agreement was entered into, by which it was stipulated, that the plaintiff should resign the command of the Minerva to Captain Mills, and should receive in exchange the command of the Marquess of Ely, another vessel belonging to the defendant, and then chartered for one voyage by the East India Company.

The proof given at the trial of the value of one of these voyages consisted in the testimony of several captains, who described it as being worth from £4000 to £8000, and in the production of a book containing a list of passengers, made by the captain, and deposited in the India-house, pursuant to the act of 53 G. 3, passed for the better regulation of passengers by India vessels. This book was objected to at the trial, but was admitted in evidence by the learned judge.[77]

BEST, C. J. * * * I come now to the next question, that is, as to the admissibility of evidence. For the purpose of proving the damage, the plaintiff put in a list returned by a captain under the authority of the 53 G. 3, c. 155, s. 15, 16. It is contended, that that paper was not evidence against third parties. I am decidedly of opinion that there is no foundation for that objection. This is a public paper made out by a public officer, under a sanction and responsibility which impel him to make that paper out accurately; and that being the case, it is admissible in evidence on the principle on which the sailing instructions, the list of convoy, and the list of the crew of a ship are admissible. But it may be said, Ay, but those are papers which come from government officers: I go on,—but the books of the bank of England have been made evidence; all those are evidence that are considered as public papers, made

prove that Hannah Bast was the daughter of Conrad Gehr and Anna Maria, his wife, and to show when and where she was born. This burial list was competent to show the death and burial of these ladies, but what the pastor put down in the book as to their parentage, and the time and place of their birth, was incompetent, for the plain reason that it was no part of his duty to make such entries. Such registers are not, in general, evidence of any fact not required to be recorded in them, and which did not occur in the presence of the registering officer. Phillips on Evidence, vol. II, § 280."

So the registry is not admissible to prove the place of birth, though if the child were very young an inference might be warranted that it was born in that parish. Rex v. North Petherton, 5 B. & C. 508 (1826).

[77] Statement condensed and part of opinion omitted.

out by persons who have a duty to the public to perform, and whose duty it is to make them out accurately. On account of that duty and responsibility, credit is given to them. These papers are of as high authority as any of those I have referred to; higher than those of the books of the bank of England, the books at Lloyd's, or the lists of convoy, which have been received as evidence. These are papers which the captain is ordered by the fifteenth section of the statute, to which we have been referred, to make out upon oath, which oath, an officer of the customs is authorized to administer: for what purpose? for the purpose of informing the East India Company (who, though subjects in England, are great sovereigns in India), what kind of persons, and with what sort of arms these persons are going to settlements, the administration of the affairs of which is committed to them. If these are not public papers made with a view to great principles of public policy, I am at a loss to know what are public papers. If so, credit must be given to all papers so made: consequently these papers, I think, were properly received in evidence. * * *

Rule discharged.

BROWNING v. FLANAGIN.

(Court of Errors and Appeals of New Jersey, 1849. 22 N. J. Law, 567.)

This was an action of debt for an escape, brought by Flanagin against Browning, to recover the debt, interest, and costs endorsed upon a capias ad satisfaciendum alleged to have been issued and delivered to the defendant below for execution, while sheriff of the county of Gloucester.

It was proved on the trial, by the former clerk of the county, that there is now, and has been for more than one hundred years past, kept in the office of the clerk of Gloucester, a book of records, called the sealing docket, in which all writs returned by the sheriff were entered, together with the return of the sheriff. It was proved, by the attorney of the plaintiff below, that he issued a pluries ca. sa. in the suit of Flanagin v. Champion, and placed it in the hands of Browning, the defendant below, who was then sheriff of Gloucester. This writ was shown to be lost from the files of the court. And an entry in the sealing docket of the writ and return was offered in evidence by the plaintiff below, and admitted by the court, to the admission whereof the defendant below excepted. The entry was as follows: "John Flanagin v. Federal Champion, second pluries ca. sa., in debt, Jeffries att'y—'Not found.' J. P. Browning, Sheriff." [78]

CARPENTER, J. At the trial the judgment was proved, the issuing of the writ by the attorney, &c. The writ, after search, not being

[78] Statement condensed and part of opinion omitted.

found on the files, and sufficient ground, as supposed, having been shown to let in secondary evidence, the plaintiff below offered to prove its contents by an entry in a book, called "a sealing docket," kept in the clerk's office of the county of Gloucester. He proved that a book of this character had been kept in that office from before the revolution, one hundred years, or more. That a memorandum of all writs issued and returned were entered by the clerk in this book. If issued by the clerk, the note, being a copy of the endorsement, with the number of the writ and the date when issued, was made before delivery to the sheriff; and his return, when made, was also copied into the book. Writs not issued by the clerk, and not in his hands till returned, were entered at the end of the other writs in the proper term, but without date. The entry in question was in the handwriting of the clerk, without date, and it was alleged, by the counsel of the defendant below, out of the usual order of making such entries. The then clerk, by whom the entry was made, was not produced to prove that it had been made by him in the regular course of duty in his office, or to prove any other circumstance in connection with it. He had, long previous to the trial, left the state, and was not within reach of the process of the court. The first exception arises from an objection, on the part of the defendant below, to the reading of this entry, as any proof of the contents of the writ or for any other purpose.

If a record, or other document in the nature of a record, is lost, after a proper foundation is laid, its contents may be proved, like any other document, by proper secondary evidence. No objection seems to arise from the fact, that a mere abstract of the writ, being a copy of the endorsement, was offered as evidence of the contents of the writ, though undoubtedly a complete copy would have been more satisfactory. In a case where an assignment of tolls had been executed, by way of mortgage, by a turnpike company, in an action by the personal representative of the mortgagee, after his death, it was held that after sufficient proof of the loss of the mortgage, entries in a book of the company, endorsed "Mortgage book," containing an abstract of the names of the creditors, the amounts of their securities, and the interest due upon them, was good secondary evidence of such security. Pardoe v. Price, 13 M. & W. 267.

My first impressions as to this book, were to regard it, not in the light of an official register required by law, but as a mere memorandum of the writs issued from, and returned into the office. If kept by the clerk merely for his own convenience and security, and not because required by statute, or necessary, in any strict sense, from the nature of the office, it might, under some circumstances, be used in evidence, but upon a different principle than as offered in the present instance. It would have been admissible only as an entry, made at

the time, according to the established practice of the office, by one having competent knowledge of, and no interest to mistake the matter recorded. Such entries have been frequently held admissible, when made at the time of the transaction by any one in the usual and regular course of professional or other duty, but only when aided by collateral proof. If the person by whom made be alive, even if beyond the jurisdiction of the court, he must be found, and his testimony produced, either personally or by deposition. It is only in case of his death that such entry can be read on proof of the handwriting. 1 Greenl. Ev. § 115; 1 Stark. Ev. 394, 396, &c.; Poole v. Dicas, 1 Bing. N. C. 649; Welsh v. Barrett, 15 Mass. 380; Nicholls v. Webb. 8 Wheat. 326, 5 L. Ed. 628; Wilbur v. Selden, 6 Cow. (N. Y.) 162; Cooper v. Marsden, 1 Esp. 1.

In Massachusetts, insanity has been held equivalent to death. Union Bank v. Knapp, 3 Pick. 96, 106, 15 Am. Dec. 181. Looking at the book in this light, I felt very unwilling to relax the rule, which is settled upon sound and safe principles.

But subsequent examination has placed the book in a very different light. An entry of every action commenced in court, and of the issuing of every writ, is supposed to be made; and so of the return by ministerial officers, of duty performed under each writ. Our own statutes give the clerk fees for making these entries, and I suppose they are in fact made in every county of the state with more or less accuracy, according to the intelligence and diligence of the officer. The original practice still followed in some counties, was to make such entries in the minutes of the court, as part of its proceedings, and ordinarily at the close of each term to which the writs were respectively returned. In other counties, as a matter of convenience, the entries, in regard to the issuing and return of writs, have been transferred to a separate book, styled, as in the present instance, a "sealing docket," which thus became a supplemental book of minutes, in which so much of the proceedings of the court was recorded. In this light, it is rightly to be considered as a book of minutes, in which a portion of the proceedings of the court is recorded; and, so far as regards such entries, strictly an official register. As such, the book from which the entry in question was offered on the trial, was properly admitted as evidence of itself, without the necessity of producing the officer who made the entries, or sustaining its authenticity by his oath. 1 Greenl. Ev. §§ 483, 484; 1 Stark. Ev. 228, 243, etc. (Phil. Ed. 1842). The alleged irregularity in regard to the entry, was a matter for the jury below, and the objection, if entitled to any weight, was one addressed to the credit, and not to the competency of the book. * * *

Affirmed.

HEGLER v. FAULKNER.

(Supreme Court of the United States, 1894. 153 U. S. 109, 14 Sup. Ct. 779, 38 L. Ed. 653.)

The plaintiff Hegler brought ejectment against Faulkner and others to recover a tract of land in the state of Nebraska. Plaintiff claimed title under a deed from an Indian named George Washington; defendants claimed under a later deed from the same grantor. The verdict and judgment were for the defendant.[79]

Mr. Justice SHIRAS delivered the opinion of the court.

The plaintiff contended, in the court below, that the Indian George Washington was of full age on April 16, 1859,—the date of the conveyance to Nuckolls,—or, at all events, so represented himself to be, and that Nuckolls relied upon such representations, and purchased and paid for said land accordingly. These questions of fact were submitted by the court to the jury, and found by them in favor of the defendants.

The errors assigned are to the action of the court in rejecting evidence offered by the plaintiff, and in refusing instructions asked for by him. The first offer was that of an exemplification from the records of the Indian department of instructions given to one Joseph L. Sharp, dated May 14, 1856, under which Sharp acted as an agent for the United States in ascertaining the number and names of the half-breeds entitled to participate in the division of the lands granted by the treaty of Prairie du Chien. Among such instructions the agent was directed to prepare "a report in full, to embrace a list containing names of all applicants, arranged by tribes and families and single persons, showing names, age, sex, relationship to the tribe, place of residence, who are orphans or wards." This was followed by an offer of a certified copy of a census or list of half-breeds entitled to lands, bearing the heading "Office of Indian Affairs," dated February 4, 1858, containing the name, sex, age, degree of blood, and tribe of certain Indians. Upon this list was the name of George Washington, and opposite the name appeared the figures "20," in the column headed "Age." The purpose of these offers was stated to be to show that George Washington was 20 years of age at that date (February 4, 1858), and that he was therefore of full age when, on April 16, 1859, he conveyed the land allotted to him to Houston Nuckolls. The court below regarded the evidence offered as inadmissible for that purpose, and the rejection of the offers is the subject of the first and second assignments of error.

As leading up to the controlling question, namely, the age of the half-breed George Washington, the offer of the instructions under which the agent acted in procuring information for his report would seem

[79] Statement condensed and part of opinion omitted.

to be unobjectionable, but its rejection would not constitute reversible error unless the offer that followed was admissible. That was the offer to put in evidence a census or list filed in the office of Indian affairs, containing the names and ages of half-breeds who, upon testimony presented to that office, were regarded as entitled to participate in the allotments or assignments of the lands awarded by the treaty. If the latter offer was not a proper one, then the rejection of the preceding offer was immaterial.

Was, then, this list filed in the Indian department, and which, or a copy of which, had been sent to William M. Stark, special agent to assign or allot these lands, admissible in evidence in a legal controversy, to prove the age of one of said Indians?

It is contended on behalf of the plaintiff in error that this list is in the nature of a finding or judgment of the executive department of the government in matters committed specially to the president by congress; that the allotment of these lands to the half-breeds was expressly devolved upon the president by act of congress (10 Stat. 332), in order to carry out the treaty; that this act of congress was one making appropriations for the Indian department, and for fulfilling treaty stipulations; that the department, under the directions of the president, made rules and regulations to enforce this provision of law, and did enforce it.

It is, indeed, true that the president speaks and acts through the heads of the several departments in relation to subjects that pertain to their respective duties, and that the allotment of these lands by the Indian department must be considered as made by the president in pursuance of the terms of the act of congress and of the treaty. And it may be admitted that the decision of the special Indian agent, in identifying the Indian half-breeds entitled to participate, and in allotting the portion of each, would, in the absence of fraud, be conclusive. Wilcox v. Jackson, 13 Pet. 498–511, 10 L. Ed. 264.

Conclusiveness is a characteristic of the judgment of every tribunal acting judicially, while acting within the sphere of its jurisdiction, where no appellate tribunal is created. But such conclusiveness is restricted to those questions which are directly submitted for decision. In the case in hand, doubtless the identity of the half-breed George Washington, and his right to receive the land in question as his share of the lands appropriated by the treaty, were finally found. But neither the treaty, the act of congress, nor the instructions of the department contemplated any special inquiry into the ages of the Indians. It is true that in the letter of instructions the agent was directed to report as well the age as the sex and tribal relations of the claimants. But this was merely to enable the agent, when he came to allot the lands, to identify the persons entitled to participate. When the allotment was completed, and was followed, first by a certificate, and finally by a patent, the purposes of the inquiry were fulfilled, and the list used to aid the government functionaries in the task of allotting the

lands cannot be regarded as a record to be resorted to afterwards, in disputes between other parties, to prove the age of the Indians. No provision was made, in either the act of congress or the rules and regulations of the Indian department, to preserve the list as a muniment of title, much less as a public record admissible to prove merely incidental recitals based on hearsay. Such a list does not come within the rule which permits, for some purposes, the use of "official registers or records kept by persons in public office to write down particular transactions occurring in the course of their public duties or under their particular observation." 1 Greenl. Ev. § 483. "It must be remembered that official registers are not, in general, evidence of any fact not required to be recorded in them, and which did not occur in the presence of the registering officer. Thus, a parish register is evidence only of the time of a marriage and of its celebration de facto, for these are the only facts necessarily within the knowledge of the party making the entry. So a register of baptism, taken by itself, is evidence only of that fact. Neither is the mention of the child's age in the register of christenings proof of the day of its birth, to support a plea of infancy." Id. § 493.

In Insurance Co. v. Tisdale, 91 U. S. 238, 23 L. Ed. 314,[80] where the right of action depended on the death of a third person, it was held that letters of administration upon the estate of such person, granted by the proper probate court in a proceeding to which the defendant was a stranger, afforded no legal evidence of such death; and it was said: "The only ground for the admission of the letters of administration is that granting them is a judicial act; but a judgment is not evidence of any matter to be inferred by argument therefrom, or which comes collaterally in question, or is incidentally cognizable,"—citing the Duchess of Kingston's Case, 11 State Tr. 261, and many others.

In Insurance Co. v. Schwenk, 94 U. S. 593, 24 L. Ed. 294, it was held that an entry in the minute book of a lodge of Odd Fellows, of which the deceased was a member, made prior to the issue of a policy, and showing his age as recorded by the secretary of the lodge in the usual manner of keeping its records, was not admissible as evidence of such age.

We do not deem it necessary to discuss this question at greater length. Our conclusion is that the court below did not err in excluding the list offered. It was not an official record, intended as a mode of preserving the recollection of facts, nor was it based upon the personal knowledge of the party making the entry. It was mere hearsay. * * *

Affirmed.[81]

[80] See the opinion for an extensive review of the authorities on the point involved.

[81] See same result in Sturla v. Freccia, L. R. 5 App. Cas. 623 (1880), holding that a report on an application for an appointment to office was not admissible to prove the age and place of birth of the applicant. In that case

MURRAY et al. v. SUPREME LODGE, NEW ENGLAND ORDER OF PROTECTION.

(Supreme Court of Errors of Connecticut, 1902. 74 Conn. 715, 52 Atl. 722.)

Action to recover the amount of a benefit-fund certificate, brought to the Superior Court in New Haven County and tried to the jury before Roraback, J.; verdict and judgment for the plaintiff for $1,144 damages, and appealed by the defendant for alleged errors in the rulings and charge of the court.

TORRANCE, C. J.[82] The certificate sued upon was issued by the defendant to Ellen T. Murray in May, 1898. In it the defendant agreed, among other things, that Ellen T. Murray should be entitled "to participate in the relief and benefit fund of the order to the amount of one thousand dollars," which sum at her death the defendant in said certificate agreed to pay to the plaintiffs, daughters of Ellen T. Murray. This agreement to pay was made upon certain express conditions, one of which was that statements made by Ellen T. Murray in her application for membership were true. On the trial it was conceded that no person over 50 years of age could lawfully become a benefit member of the defendant society; and the main defense was that Ellen T. Murray, when she joined the defendant society, in May, 1898, was over 50 years old, and that she falsely stated the date of her birth in her application as of March 4, 1849, when she knew that it was of a much earlier date. The parties were at issue upon this question as to the age of said Ellen T. Murray, and as to whether her statement of the date of her birth in her application for membership was true.

In proof of the age of Ellen T. Murray at the time of her application for membership in the defendant society, the defendant offered in evidence certified copies of the following documents from the records of the registrar of vital statistics of New Haven: (1) The application made by Patrick Murray, the prospective husband of said Ellen, in July, 1865, to the registrar, for a marriage license between himself and Ellen: (2) the license issued upon said application; (3) the certificate of the celebrant of the marriage of said parties, indorsed on said certificate of license. In the application for the license the age of Ellen was stated to be 22 years. In the other writings her age was not stated. The plaintiffs objected to the admission of the application for license "as irrelevant, immaterial, incompetent, and hearsay," and the court excluded it, but ruled that the other writings were admissible. The defendant also, for the purpose of proving the age of Ellen when

Lord Blackburn appears to have laid undue stress on the fact that the report was not intended for the use of the general public.

That the United States census report is admissible to prove age, see Priddy v. Boyce, 201 Mo. 309, 99 S. W. 1055, 9 L. R. A. (N. S.) 718, 119 Am. St. Rep. 762, 9 Ann. Cas. 874 (1906). For a contrary view as to a local census, see Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201 (1905).

[82] Part of opinion omitted.

she became a member of the society, offered in evidence the record of said marriage in the books of the registrar, as made up from the documents above mentioned, in which record the age of Ellen was stated to be 22 years. To this the plaintiffs objected, "as it appeared from the cross-examination of the registrar that the record contained, at most nothing more than" what was contained in the aforesaid documents, and "that so far as the originals were admissible the same were already in evidence, and that so far as the originals were not admissible" the record of them would not be admissible. The court sustained the objection. For a like purpose the defendant offered in evidence duly certified copies from the registrar's records of returns of births made to him of children born to said Ellen, by the physicians who attended her, as required by law, in which her age at the time of such birth was stated. This evidence, also, the court, on objection of the plaintiffs, excluded. Whether these several rulings were correct or not is the principal question in the case.

From a very early period our law has provided for the record of births, deaths, and marriages in some way by some public official. The first act of this kind seems to have been passed in 1664 (Revision 1808, p. 652, note 1), and ever since that time our statute book has contained provisions, more or less specific, looking to the making and preservation of such records. During the period covered by the documents offered in evidence in the present case, the duty to make and preserve such records was imposed upon a public official called a "registrar," elected by the municipality, and sworn to faithfully perform the duties of his office. One of his duties was to "ascertain, as accurately as he can, by actual inquiry, and in the manner prescribed by law, all the births, marriages and deaths occurring" in the municipality, and to make a record of the same, "in such form and with such particulars relating to such births, marriages and deaths, as shall be prescribed by law." Among other things, his record of births was required to state the age of the child's parents; and his record of marriage was, among other things, required to state the age of each of the parties to such marriage. It was made the duty of the physician attending a woman in childbirth to furnish to the registrar a certificate stating among other things, the age of the mother of the child at the time of such birth; and it was made the duty of the party applying for a marriage license to give the registrar information respecting the age of each of the parties. See Revision 1866, tit. 13, c. 1, § 1. Under the provisions of section 1089 of the General Statutes of 1888, these records of the registrar can be proved by a copy thereof certified by him. It thus appears that the age of Ellen T. Murray at the time of her marriage and at the time of the birth of her children was a fact which the law made it the duty of the registrar to ascertain, and to make and keep a record of the fact so ascertained. The record thus made was a public record, made by a public official, of a fact which the law required him to find and record, and the record was open to public inspection. The record

thus made of this fact the defendant offered in evidence, both in the shape of the record itself, and of a duly certified copy thereof; and the court excluded it on the ground, substantially, that it was hearsay evidence.

Now, unquestionably, the evidence offered and excluded was hearsay evidence, for it was a statement made extrajudicially by one not under oath, and not subject to cross-examination, and it was offered in proof of one of the facts stated in it, to wit, the age of Mrs. Murray. Statements so made are generally obnoxious to the hearsay rule, but to that rule there are many exceptions as well established as the rule itself, and among them is one admitting statements made by public officials in a public record made for public use pursuant to law. The books of the registrar, kept according to law, constitute a public official register; and the statements contained therein, when relevant, are admissible in evidence as a clear exception to the hearsay rule. The necessity for the existence of such an exception is found "in the practically unendurable inconvenience of summoning public officers from their posts on the innumerable occasions when their official doings or records are to be proved in litigation," and the general trustworthiness of such evidence is found in the circumstances under which the statements are made. 1 Greenl. Ev. (16th Ed.) §§ 162m, 484–486; Sturla v. Freccia, 5 App. Cas. 623; Evanston v. Gunn, 99 U. S. 660, 25 L. Ed. 306; Cushing v. Railroad Co., 143 Mass. 78, 9 N. E. 22; Enfield v. Ellington, 67 Conn. 459, 462, 34 Atl. 818; Hennessy v. Insurance Co., 74 Conn. 699, 52 Atl. 490. The evidence offered and excluded in the case at bar comes clearly within this exception to the hearsay rule, and was admissible in proof of the age of Mrs. Murray at the time of her marriage, and at the dates when her children were born. 1 Greenl. Ev. (16th Ed.) § 493. It was not, of course, conclusive, nor was it offered as such; but it was admissible for what it was worth, and the court erred in excluding it. * * *

New trial granted.

GRAGG v. LEARNED.

(Supreme Judicial Court of Massachusetts, 1872. 109 Mass. 167.)

Writ of entry to recover land in Brighton. At the trial in this court, before Wells, J., the tenant offered in evidence an office copy of an instrument purporting to be a deed of the demanded premises from the demandant to one Miller; and it was proved that the original never was in the tenant's possession. This document, which, if duly delivered, was a valid deed, ended thus:

"In witness whereof, I have hereunto put my hand and seal this day, March the twenty-fifth, in the year of our Lord one thousand eight hundred and forty-seven. Samuel Gragg. [Seal.]

"In presence of F. Hilliard."

It purported to be duly acknowledged, and bore a certificate that it had been recorded. The demandant objected to the admission of the instrument without further evidence of its delivery than what appeared upon its face. But the judge admitted it, and instructed the jury that they would be authorized to infer a delivery from the facts in regard to the instrument which thus appeared on the record. The jury returned a verdict for the tenant and the demandant alleged exceptions.

GRAY, J. By the law of this Commonwealth, a copy from the registry of a deed not made to either party to the action, or presumed to be in the custody of either, is sufficient evidence of the execution and contents of the conveyance, without calling the subscribing witnesses or offering any other proof. Eaton v. Campbell, 7 Pick. 10; Samuels v. Borrowscale, 104 Mass. 207, 209; Stockwell v. Silloway, 105 Mass. 517. The dictum of Chief Justice Shaw in Powers v. Russell, 13 Pick. 69, 75, (upon which the demandant relies,) that this rule is founded on the "presumption of law, arising from the common attestation of the witnesses, in their certificate, that it was signed, sealed and delivered," is at variance with the statement of the reason of the rule by Chief Justice Shaw himself in Stetson v. Sullivan, 2 Cush. 494, 498, and by other judges before and since, which is, that our statutes allow no deed to be recorded until it has been acknowledged by the grantor, or proved by subscribing witnesses before a magistrate. Hathaway v. Spooner, 9 Pick. 23, 26; Ward v. Fuller, 15 Pick. 185, 188; Thacher v. Phinney, 7 Allen, 146, 149. It was decided in Dole v. Thurlow, 12 Metc. 157, in which also the opinion was delivered by Chief Justice Shaw, that it was not essential to the validity of a deed, that it should have any subscribing witnesses; and in Thacher v. Phinney, already cited, that a registry copy, offered by the demandant, of a deed to the tenant's grantor, was sufficient evidence of the conveyance thereby made although it disclosed the fact that the deed had no subscribing witnesses. In none of the cases in which such a copy has been admitted in evidence has it been suggested that any further proof of delivery was necessary, when it did not appear that the deed has remained in the possession of the register or had been delivered back to the grantor. It follows that in the present case the copy from the registry was rightly admitted as prima facie evidence of the delivery as well as of the execution of the deed.

Exceptions overruled.[88]

[88] See the statutes of the several states, providing for the acknowledgment and registration of deeds.

PEOPLE v. CHARLIE LEE.

(Supreme Court of California, 1900. 128 Cal. 330, 60 Pac. 854.)

BRITT, C. The defendant, a Chinese, was accused in this case of the crime of forgery, committed by uttering, etc., with fraudulent intent, a paper writing which purported to be a check for a sum of money, dated February 3, 1898, drawn on a certain bank of San Francisco, bearing the signature "J. P. Collin," payable to the order of defendant, and by him indorsed, which check, it is charged, was fictitious; no such person as J. P. Collin being in existence, as defendant well knew. At the trial, which resulted in the conviction of defendant, there was evidence that he passed the check to the complaining witness, and obtained from the latter a payment of money on account thereof at the city of Oakland, in Alameda county, on February 9, 1898; that defendant was arrested for the offense on the same day, and thereupon claimed that he had received the check two days previously from one Hing Lee, who lived (defendant said) in Santa Barbara county, and was there in the employ of a person named Collins. The district attorney then offered in evidence a subpœna issued out of the police court of the city of Oakland on February 11, 1898, directed to "J. P. Collins, Santa Barbara," requiring his attendance as a witness before said police court on February 17, 1898, in a proceeding which we assume to have been the preliminary examination of the defendant on the present charge. Together with the subpœna the district attorney offered also, the return of the sheriff indorsed thereon, dated February 15, 1898, setting forth that he received such subpœna on February 14, 1898, and, after diligent search and inquiry, was "unable to find J. P. Collins in the county of Santa Barbara." Defendant objected to the admission of this paper on various grounds, not necessary to be here set out. He waived the objection, if such he had on the ground that the subpœna was issued from the police court, and agreed that it might be regarded as issued from the superior court, where the trial was in progress. The court overruled the objections made, and held, in effect, that the subpœna and return were competent evidence to prove the nonexistence of the person whose name appeared to be subscribed to the alleged fictitious check.

The return of the sheriff upon process is declared by statute to be prima facie evidence of the facts in such return stated. Pol. Code, § 4178; St. 1897, p. 480. But this must be held to mean that the return is prima facie evidence when the question under investigation is of a character which renders that mode of proof appropriate. Thus, to take some negative illustrations, in proceedings for divorce, residence of the plaintiff in the county where the action is brought is essential to the maintenance of the action. Civ. Code, § 128. On an issue of residence raised by the pleadings in such an action, we suppose no one would claim that the sheriff's return on a subpœna for the attend-

ance of the plaintiff as a witness would be competent evidence to prove or disprove the fact of residence. In an action against a corporation, the summons may be served on the president of the corporation, and the sheriff serving the process must make return of it according to the fact. Code Civ. Proc. §§ 411, 415. The sheriff's certificate that he made service by delivering the proper copies to a specified person, described as president of the defendant corporation, is prima facie evidence, for the purpose of establishing the fact of service on the corporation, that the individual named was in fact such president. But suppose the action involved, let us say, some issue, whether the corporation was bound by some act of such individual as its president; it would hardly be contended that the return on the summons could be competent evidence at the trial to establish his official status.

The case here is but little different in point of principle from the cases instanced. The return of the subpœna that J. P. Collins, wanted as a witness, could not, after diligent search, be found in Santa Barbara county, was prima facie evidence upon an issue to which the simple fact returned might have been relevant,—some question which directly involves a right or liability or consequence resulting from the official act which the return purports to describe (see Stanton v. Hodges, 6 Vt. 64, 66),—as whether the officer had performed his duty in a proper manner, or whether the trial ought to be postponed because of the absence of the witness, or whether his testimony previously taken in the form of deposition, if such had been the fact, might be received in evidence (People v. Reilly, 106 Cal. 648, 40 Pac. 13). But the question whether such a person as J. P. Collin or J. P. Collins had existence in Santa Barbara county or elsewhere at the date of the check was not one which the sheriff was required to officially ascertain or declare. It is illustrated only inferentially, and by very remote inference at that, from the facts stated in the return. It is an issue in no way dependent upon or connected with the discharge of the sheriff's duty in serving or attempting to serve the subpœna. It is therefore to be proved in the ordinary way by testimony of sworn witnesses subject to cross-examination by defendant, and not by official certificate. The admission of the subpœna and return in evidence was material error. Compare People v. Plyler, 126 Cal. 379, 58 Pac. 904; Same v. Eppinger, 105 Cal. 36, 38 Pac. 538.

Defendant has made no point on the circumstance that the subpœna was issued for "J. P. Collins," a name not identical with "J. P. Collin," and we have not considered whether that fact should influence the decision. Some other matters are assigned for error. They are of little importance, and will probably not occur on another trial. The judgment and order denying a new trial should be reversed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed.

ÆTNA LIFE INS. CO. v. MILWARD.

(Court of Appeals of Kentucky, 1904. 118 Ky. 716, 82 S. W. 364, 68 L. R. A. 285, 4 Ann. Cas. 1092.)

O'REAR, J.[84] This is an appeal from a judgment for $5,000 in favor of the appellee (plaintiff below), as the designated beneficiary in a policy insuring her husband, Charles S. Milward, against accidental death. The defense, as made by the answer, consists of a denial that the death was the result of an accident, and a claim that it was due to suicide. The principal points of complaint presented on this appeal are that the verdict was unauthorized by the evidence, that the petition was insufficient, and that competent evidence on appellant's behalf was rejected by the trial court. * * *

On the morning of the death of the insured, the coroner of Fayette county impaneled a jury to inquire into its cause. Evidence was heard, and the premises examined by the jury, five of whom signed and returned a verdict that the body examined by them was that of Charles S. Milward, who came to his death from a pistol shot wound through the brain, the pistol being fired by his own hand. One of the jury refused to join in the verdict. Appellant offered the record of the coroner's inquest as evidence on its behalf in this trial. It was rejected by the trial court, of which appellant complains.

We are of opinion that the record and the finding of the coroner's jury were irrelevant as evidence. While the coroner's inquest is a public function, made on behalf of the state, and while a record of it is required to be made and kept, it cannot, on any well-grounded principle of American common law, become evidence in another inquiry or suit as to the cause of the death investigated. The business of this tribunal is by statute to collect promptly the facts concerning deaths which the coroner has reason to believe were the result of crime. Like the grand jury, it projects an ex parte investigation of supposed or alleged crime resulting in homicide, for the purpose of aiding in the administration of the criminal laws of the state. The accused is neither represented, nor has the right to be, at the inquiry. For even better reasons, other persons who have property interests dependent upon the cause of the death would not be allowed to participate in the hearing before the coroner's jury, with a view to establishing rights by the verdict. That tribunal is unprovided with much of the necessary machinery for conducting such inquiries. It would, it seems to us, be abhorrent to the principles of the common law, as administered in this country, that one not so represented should be bound by the finding of the coroner's jury, his rights concluded without a trial at which he could be heard—a trial "behind his back," as has been said. If such verdict be admissible as evidence, it follows from its very nature that it might alone constitute proof of the main fact, and of every essen-

[84] Part of opinion is omitted.

tial fact in issue. It might, for example, not only show the fact of death by violent and external means within a date covered by the policy, but find also that it was accidental or was not accidental. In either event, a property right of one or the other of the litigants would be determined by a proceeding of which no notice was given to him, upon testimony not preserved, and may be wholly incompetent or insufficient, and without an opportunity to cross-examine the witnesses whose oaths established it. Thus he would be deprived of his property without "a day in court," for the first verdict might be enough, if the only evidence offered or obtainable, and the second one would be merely a formal ratification. If the verdict of the coroner's jury is not binding upon the world as a proceeding in rem, it could not be admitted as evidence on any other ground. It might be proof of the fact of the death of the person examined, and of the identity of the body. Further than that we are not prepared to admit it.

In England the coroner is not only a judicial officer, as well as ministerial, but his court is a court of record. His jurisdiction there extended far beyond the possibilities here. The importance and use of that court may have justified its rank in England, and their accrediting its judgments as those of courts of record in proceedings in rem are usually accorded. Anciently when the goods of a suicide passed to the crown, and when the property of one attainted escheated to the lord, and when death resulted from misfortune or negligence (until the statute of 10 Vict. 62), the deodand was forfeited to the township for use of the king's almoner, the coroner's verdict and the escheator's inquest were treated as judicial findings in rem, and were conclusive evidence as such, although they later came, mainly through the intervention of Lord Hale, to be admitted as rebuttable evidence only. Starkie, Ev. 289, 404. Our system of inquests was not designed for such purpose. Neither the ancient prerogatives of these functionaries, nor the presumptions attendant upon their findings, can have a place in our jurisprudence.[85]

Able counsel present the argument in behalf of the admissibility of this evidence with much earnestness, and have cited a number of cases from other jurisdictions in support of their contention. In Ætna Life Ins. Co. v. Kaiser, 115 Ky. 539, 74 S. W. 203, 24 Ky. Law Rep. 2454, in disposing of an offer to introduce the coroner's inquest as evidence on the trial against the insurance company on the policy, the court said: "We are clearly of opinion that this was incompetent, and was properly rejected." As that opinion did not cite or discuss the authorities, it is assumed in argument that it was adopted not after mature consideration of the question. The leading case in America of the class relied on by appellant is United States Life Ins. Co. v. Vocke, 129 Ill.

[85] That under the modern English rule the coroner's inquest is not admitted to prove the cause of death, see Bird v. Keep, [1918] 2 K. B. D. 692, reviewing a large number of the later cases.

557, 22 N. E. 467, 6 L. R. A. 65. In that case the coroner's jury had found that the insured had come to his death by a pistol shot fired by his own hand, while laboring under a fit of temporary insanity. Although a copy of the inquest was furnished to the insurance company by the beneficiary in the proof of death, the court elected to ignore that fact, and proceeded to a discussion and decision of the more difficult proposition, whether the inquest was not competent as original evidence of the manner in which the assured had died. The opinion cites a number of English cases and text-writers and English statutes concerning the jurisdiction of the coroner, and the effect of verdicts rendered in his court. It was declared that this ancient office was judicial as well as ministerial, and so recognized by parliamentary acts, from which it was said the Illinois statute creating the office was not substantially different. From the similarity of the statutes, which the court held to be but declaratory of the common law, it was decided to apply the English doctrine as to the nature of the inquest. * * *

The Supreme Court of Colorado, in Germania Ins. Co. v. Ross-Lewin, 24 Colo. 43, 51 Pac. 488, 65 Am. St. Rep. 215, holds to the contrary doctrine—that which is applied in this state. The Vocke Case, supra, Pyle v. Pyle, 158 Ill. 289, 41 N. E. 999, following it, and the California case rested upon it, are analyzed and rejected. As showing the impolicy of the old English rule if attempted to be applied to insurance cases, when suicide was a controlling question, that court reasoned thus: "In case of death under suspicious circumstances, or resulting from accident, the rule permitting inquisitions to be used in evidence would result in a race and scramble to secure a favorable coroner's verdict, that would influence, and perhaps control, in case suit should be instituted against life insurance companies upon policies of insurance, and in case of accidents occurring as the result of negligence on the part of corporations operating railways, street car lines, mining for coal, the precious metals, etc. Law-writers of late have frequently animadverted upon the carelessness with which such inquests are frequently conducted, and to allow inquisitions to be used in a suit between private parties upon a cause of action growing out of the death of the deceased, as in this case, would be to introduce an element of uncertainty into the practice which we think would be contrary to public policy, and pernicious in the extreme; and for these reasons we conclude, upon careful consideration, that the safer and better rule is to exclude such inquisitions." Citing State v. County Com'rs, 54 Md. 426; Goldschmidt v. Mutual Life Ins. Co., 102 N. Y. 486, 7 N. E. 408. * * *

Affirmed.[86]

[86] For the contrary view, see Foster v. Sheppard, 258 Ill. 164, 101 N. E. 411, 45 L. R. A. (N. S.) 167, Ann. Cas. 1914B, 572 (1913). But see Peoria Cordage Co. v. Industrial Board of Illinois, 284 Ill. 90, 119 N. E. 996, L. R. A. 1918E, 822 (1918), to the effect that the verdict of the coroner's jury is not admissible to prove that an injury which caused the death of an employé

MILLER v. NORTHERN PAC. RY. CO.

(Supreme Court of North Dakota, 1908. 18 N. D. 19, 118 N. W. 344, 19 Ann. Cas. 1215.)

FISK, J.[87] This is an appeal from a judgment of the district court of Eddy county in defendant's favor rendered pursuant to a verdict directed by the court.

The action was brought to recover damages from defendant, as a common carrier of freight, for alleged negligence in transporting a certain car of flax belonging to plaintiff from Barlow, in this state, to Duluth, Minn., whereby it is claimed that a certain quantity of such flax was lost in transit. The car was consigned to Crumpton & Crumpton, commission brokers at West Superior, Wis., and in due course the same was sold by them at Duluth and a return of the proceeds made to plaintiff, which returns were based upon weights taken by the state weighmaster's department of the state of Minnesota at Duluth. Plaintiff, to prove his cause of action, relied solely upon the discrepancy between the weights taken at Barlow at the time the flax was loaded into the car and the weights as shown by the records in the office of the state weighmaster aforesaid; no evidence being offered to show leakages in the car or that it had been tampered with while in transit. Appellant relies for a reversal of the judgment upon alleged errors of the trial court in rejecting testimony offered by him to show the records made in the office of the state weighmaster pertaining to the car of flax in question. This testimony consisted of a deposition of one J. B. Sutphin, state weighmaster at Duluth, who testified that, according to his records, the car was weighed by one Bagley at the time of its arrival, who was at that time a properly qualified assistant weigher in his department, and that such assistant made a record in writing of the date, description, and weight of the car and turned the same into his office in regular course of business pursuant to his official duty, where it had been at all times since. The witness had no personal knowledge of such weighing and did not know of his own knowledge whether it was correctly weighed or not. All he knew about it was that it was weighed in accordance with the system in vogue in his department and in accordance with the statutes of Minnesota in force at that time applicable thereto. * * *

was received in the course of his employment, because such an inquiry was beyond the scope of the coroner's statutory authority.

Compare Morris & Co. v. Industrial Board of Illinois, 284 Ill. 67, 119 N. E. 944, L. R. A. 1918E, 919 (1918), annotated, supporting the admissibility of a verdict of the coroner's jury to prove that the cause of death was a fall on a stairway on the premises of the employer.

The modern cases on this point are collected in the note to Krogh v. Modern Brotherhood of America, 45 L. R. A. (N. S.) 404 (1913).

[87] Part of opinion of Fisk, J., the opinion on rehearing, and the dissenting opinion of Spalding, J., are omitted.

Under the provisions of the Minnesota law in question, we find nothing in express terms making such record prima facie evidence of the truth of the matters therein set forth in the courts of Minnesota; but this law does provide that such weighmaster and his assistants shall, upon demand, give to any person or persons having weighing done a certificate under his hand and seal showing the amount of each weight, number of car, etc., and that such certificate shall be admitted in all actions, etc., as prima facie evidence of the facts therein contained. The Code of this state (section 7298, Rev. Codes 1905) provides that: "Entries in public or other official books or records, made in the performance of his duty by a public officer of this state, or by another person in the performance of a duty specially enjoined by law are prima facie evidence of the facts stated therein." And section 7299 of the same Code provides that: "An entry made by an officer, or board of officers, or under the direction and in the presence of either in the course of official duty is prima facie evidence of the facts stated in such entry."

It is contended by counsel for appellant that the latter section refers to official records generally, and is not confined to those made by officers in this state. In this we think he is in error. It is apparent to our minds that it was the legislative intent that these sections should apply only to domestic records. There is therefore no express statute in force in this state making foreign records, such as the one in question, prima facie or any evidence per se of the facts therein stated; but the sections above quoted, in our opinion, are not exclusive in their provisions, and, as we construe them, there is nothing therein contained which restricts or limits the courts to domestic records in giving effect to them, when properly proved as prima facie evidence. While the question is not free from doubt, and while there seems to be a dearth of authorities upon the precise point here involved, we are of the opinion that the testimony was admissible and should have been received. We think it comes within the well-recognized exception to the rule excluding hearsay testimony in cases of public records made by public officers in the discharge of their official duties. We know of no good reason why this exception should be limited to public records in the state where kept, and no such restriction of the rule seems to have been recognized by the authorities.

The ground upon which this exception rests is well stated in Wigmore on Ev. vol. 3, §§ 1630–1683; 1 Greenleaf on Ev. (16th Ed.) vol. 1, §§ 483, 484, 493; 1 Whart. Ev. §§ 639, 347; 9 Am. & Eng. Enc. Law (2d Ed.) 882–883; 17 Cyc. 306, and cases cited. In paragraph 2, § 1633, of Prof. Wigmore's valuable work on Evidence, it is stated: "The subjective influence of the official duty being the essential justifying circumstance, it follows that an official statement by a foreign officer is equally admissible with one made by a domestic officer. That the duty is not recognized by the domestic law is immaterial; it exists for the foreign officer; and so far as it exists, it affords an equally official sanction. This application of the principle, though plain, has

rarely been drawn in question." And again, in section 1652, the same author states: "That an official statement authorized to be made is the statement of a foreign officer does not make it any the less admissible. The essential thing is the authority of the officer, and a foreign authority equally satisfies the principle. There is, in the United States, the additional consideration that, under the federal Constitution (article 4, § 1) and the federal Revised Statutes (section 906 [U. S. Comp. St. 1901, p. 677]), the courts of each state are required to give full faith and credit to the records of other states, and this may well be held to imply that recognition should be given (not merely as a matter of comity, but as a matter of legal right) to an official authority created by the laws of another state for its domestic recording officers." * * *

Affirmed (on the ground that the error was harmless).[88]

VII. REPUTATION

(A) In Regard to Rights in Land

MOREWOOD v. WOOD.

(Court of King's Bench, 1791. 14 East, 327, note.)

Trespass for breaking and entering the plaintiff's close called Swanwick Common, in the parish of Alfreton, in the county of Derby, and digging stones therein, and carrying them away, &c. The defendant pleaded, that there are certain wastes or commons lying open to one another, one called Swanwick Common, being the close in which, &c. the other called Swanwick Green, in Alfreton, &c. and that he was seized in fee of a messuage and lands in Alfreton, in right of which he prescribed for the liberty of digging for and carrying away all necessary flags and stones in Swanwick Common, and in Swanwick Green, for the repair of his houses, fences, &c. The plaintiff replied, that he was lord of the manor of Alfreton, and that the defendant of his own wrong committed the trespass. The defendant, in his rejoinder, insisted on his prescriptive right as stated in the plea; on which issue was joined. At the trial before Hotham, B. at Derby assizes, the defendant called many witnesses, who proved that, for between 60 and 70 years past, he and those from whom he claimed had been in the constant exercise of the right stated in his plea; in many instances to the

[88] See, also, Oakes v. United States, 174 U. S. 778, 19 Sup. Ct. 864, 43 L. Ed. 1169 (1899), admitting a record of the Confederate States, preserved in the War Department of the United States.

Compare Morrissey v. Wiggins Ferry Co., 47 Mo. 521 (1871) excluding a foreign church register of baptisms, though the Missouri statute made similar local registers admissible.

knowledge of the lord, who had threatened to bring actions, and been dared to do so by the defendant's ancestors, who insisted on their right. On the other hand, the plaintiff produced a presentment in 1717, of the freeholders of the court baron of the manor of Alfreton, of which the plaintiff is lord, and which presentment was signed by one Robert Wood, the foreman, and others; which name of Robert Wood was proved to tally with the subscription (1) to the will of Robert Wood, the grandfather from whom the defendant claimed, and which will was produced from the registry. One of the items in that presentment was, —"If any person gets stone without leave of the lord of the manor, we pain him 10*s*." The plaintiff also called another witness to prove that, in a conversation with the defendant's uncle, from whom the defendant also claimed, the uncle had admitted that the lord of the manor had the right, and he would not be beholden to him for the stone. The jury found for the defendant. Thus much appeared on the Judge's report, on a motion for a new trial. But the plaintiff's counsel stated further, (which was admitted by the other side, and so taken by the Court,) that the learned Judge had rejected other evidence which they had tendered, and for which alone the new trial was moved for, viz.

1st, Other presentments of a similar nature to the one received in evidence; but to which no subscription could be proved by any person from whom the defendant claimed; this was offered as evidence of reputation.

2d, General parol evidence of reputation, that none but the lord had a right to dig stone, &c. on the locus in quo.

LORD KENYON, C. J. (after the argument).[89] The evidence given by the defendant of an usage of about 70 years is extremely strong in his favour; and the only evidence to weigh against it is that of the presentment signed by Robert Wood: but that is not necessarily inconsistent with it. The lord might have the general right, and yet a particular tenement have a prescriptive right also. On that ground, therefore, there is no pretence for impeaching the verdict. With respect to the other question raised respecting the rejection of general evidence of reputation; it is involved in great dispute; and one is apt to imbibe prejudices from the opinion one has always heard inculcated. Upon the Oxford circuit which I went, such evidence was never received; and I cannot help thinking that that practice is best supported by principle. Evidence of reputation upon general points is receivable, because all mankind being interested therein, it is natural to suppose that they may be conversant with the subjects, and that they should discourse together about them, having all the same means of information. But how can this apply to private titles, either with regard to particular customs or private prescriptions? How is it possible for strangers [90] to

[89] Opinions of Ashhurst and Grose, JJ., omitted.

[90] Parke, B., in Crease v. Barrett, 1 C., M. & R. 919 (1835): "* * * The objection now taken is, that the answer to the ninth article is not admissible, not because reputation on such a subject is not evidence, it being a question

know any thing of what concerns only these private titles? I barely, however, throw out these hints as the ground of my present opinion; laying in my claim to change that opinion if I should hear any thing which shakes it.

BULLER, J. I have already mentioned what has been the general practice on the Oxford and on the Western circuit; and as there are two judges from each of those circuits in court, it is hardly likely for us to agree upon the general point. But thus far I agree with my lord and my brother Ashhurst, that in no case ought evidence of reputation to be received, except a foundation be first laid by other evidence of the right. Now here there was no foundation, or at least a very slight one, in comparison to the evidence given by the defendant. But I cannot agree that it ought not to be received at all. It was settled that it ought in the cases cited in argument, and also in many other instances which relate merely to private titles: in one in particular, as to whether such a piece of ground is parcel of one close or another. So again in the case of pedigrees. But as to this particular case, the evidence is very strong with the defendant. It was not proved that the estate in question was in the possession of the defendant's grandfather at the time he signed the presentment which was read in evidence; and even if that were made out, all the evidence since for above 60 years is the other way. The defendant's ancestors have all that time taken stone in defiance of the presentment, and in the face of the lord himself, who was dared to bring an action for it. Now, supposing all the evidence of reputation had been received, I think it ought to have weighed so slightly with the jury, that the court ought not to grant a new trial. For I do not know that, because evidence which ought to have been received was rejected, therefore the court are bound to grant a new trial, if they see clearly that the verdict is right, notwithstanding such evidence had been admitted.

Rule discharged.

of the custom of mining in a particular district, but because it comes from the customary tenants, who in that character have nothing to do with the mines; and it is insisted, that it is a requisite qualification of hearsay evidence on such a subject, that it ought to be derived from those who are themselves concerned in mining, or receiving the dues of the mines. That hearsay evidence on some such subjects cannot be received, unless with the qualification that it comes from persons who have a special interest to inquire, is clear. Thus, in cases of pedigree, it must be derived from relatives by blood, or from the husband, with respect to his wife's relationship: it is not admissible, if it proceeds from servants or friends. Johnson v. Lawson, 2 Bing. 86 [1824]. And in this description of hearsay evidence the line is clearly defined. So, in cases of rights or customs, which are not, properly speaking, public, but of a general nature, and concern a multitude of persons, as questions with respect to boundaries and customs of particular districts, though the rule is not so clearly laid down, it seems that hearsay evidence is not admissible, unless it is derived from persons conversant with the neighbourhood."

ROE dem. BEEBEE v. PARKER.

(Court of King's Bench, 1792. 5 Term R. 26.)

In this ejectment to recover certain customary lands in the manor of Sedgley, which was tried at the last assizes for Stafford before Perryn, B., the lessor of the plaintiff claimed under a custom of the manor for the youngest kinswoman to inherit in default of issue, and of brothers, sisters, nephews and nieces, of the person last seised. The plaintiff offered in evidence an entry in the court rolls of the manor, stating what the custom was: but the defendant's counsel objected that such evidence of the custom ought not to be received, until instances had been proved of such a mode of descent having taken place. On the other side it was alleged, that the contrary had been held in a case in this court, wherein such evidence had been determined to be admissible; and under this impression the cause proceeded, and the evidence was given as follows: * * *

It appeared that some of the ancient court rolls were lost; but no instance in the court rolls was produced of any admission beyond sisters, nor was any instance of the youngest kinswoman taking proved by living witnesses. It appeared however that, if the lessor of the plaintiff were not entitled, another branch of that family, who did not dispute the lessor's right, had a better title than the defendant. The jury found a verdict for the plaintiff.

A rule having been obtained, calling on the plaintiff to shew cause why the verdict should not be set aside, on the ground that the evidence of the presentment of such a custom on the court rolls, by the homage, was not of itself sufficient to establish the custom, in as much as no instance was produced of its having been put in ure; which it was contended was the true principle on which the determination of Denn dem. Goodwin v. Spray [1 Term R. 466] was founded;

Bearcroft, Bower, Leycester, and Simpson, shewed cause against the rule. * * * But with respect to the mode of proof the court rolls of a manor were not only good evidence of the custom, but the best evidence; because the highest credit was given to the publicity and authenticity of the records of the manor. Then in either respect, it was the same whether the homage presented what the custom was generally, or whether particular instances were stated by them. * * * If this kind of proof uncontradicted were not sufficient evidence of itself it would scarcely be possible in cases like the present, where the rolls were lost, to prove every particular sort of descent by instances; for it could scarcely happen that living witnesses could speak from their own knowledge [91] to all of them.[92]

[91] Le Blanc, J., in Weeks v. Sparke, 1 M. & S. 679 (1813): "* * * The question arose upon a claim of a prescriptive right of common; such a right

[92] Statement condensed and opinion of Grose, J., omitted.

LORD KENYON, C. J. Considering the real merits of this case, a more unrighteous attempt was never made in a court of justice. For it is admitted that if the plaintiff be not entitled to recover under the custom, on which she relied, another relation is; and the general question is whether the defendant, who is a wrong-doer, shall prevent either of these parties recovering; that alone would be a sufficient reason for our refusing to grant a new trial. However I disclaim deciding upon that ground; for the objection, which has been made to the evidence of the plaintiff's claim, tends to shake one of the fundamental rules of law. I admit that the custom of one manor cannot be extended, by analogy, to another: but the mode of descent, under which a party claims, must be established by proof; and the question here is whether or not there were any evidence of the custom, upon which the plaintiff's claim was founded. The custom is clearly defined in the paper writing produced from the Rolls; and, without referring to the strict rules of law, let us consider the authenticity of this document on principles of plain common sense. Near a century and an half ago the homage (the tenants holding under the lord of the manor) being convened together eo nomine as the homage (not for the purpose of extending their claims either against the lord or strangers, but) in order to ascertain those rights which were their own in common with the rest of the tenants, and being possessed of all that information which either tradition or their own personal observation could furnish, proceeded to describe the several customs, which regulated the descent of the different species of tenure within this manor. Now can it be supposed that these persons, acting under the sanction of an oath, could for no purpose whatever give a false representation of these customs; or is it not more probable that their account was the true one? Common sense and common observation would induce us to believe the latter. The argument against the verdict seems to admit that this document was a degree of evidence when it was produced to the jury; and if it were admissible in evidence, it not being opposed by any other species of evidence, and the jury having given credit to it, it puts an end to the question. And that this was admissible cannot be doubted; for tradition and the received opinion are the evidence of the lex loci. A distinction indeed prevails between a prescription as applied to a particular tenement, and a custom

as the party alleged to have existed beyond the time of legal memory; and the question is how that right is to be proved. First, it is to be proved by acts of enjoyment within the period of living memory. And when that foundation is laid, then inasmuch as there cannot be any witnesses to speak to acts of enjoyment beyond the time of living memory, evidence is to be admitted from old persons, (not any old persons, but persons who have been conversant with the neighborhood where the waste lies over which the particular right of common is claimed,) of what they have heard other persons, of the same neighborhood, who are deceased, say respecting the right. Thus far it is evidence as applicable to this prescriptive right, it being a prescription in which others are concerned as well as the person claiming it."

affecting the whole district. And the latter has gone so far that the custom of one manor has been given in evidence to shew the custom of another, where they are both governed by the Border-Law. Now here was full proof of a tradition respecting the custom of descent in this manor; it was the solemn opinion of twenty-four homagers, who are the constitutional judges of that court, delivered on an occasion when they were discussing the interests of all the tenants of the manor. I cannot distinguish this from the instance of a terrier, which is certainly evidence. The case of Goodwin v. Spray is distinguishable from the present. Every thing that was said by the Court in giving judgment must be understood secundum subjectam materiem. That case first decided that such an instrument as the present is admissible; and then that that part of it, which said that lands were not partible either between males or females, in general terms, was to be explained by the custom as it had existed in point of fact, which did not extend to nieces. And if that decision go farther, and determine that such a document is not admissible in evidence unless instances in fact be previously proved to warrant the introduction of it, I must beg leave to dissent from it. In this case, supposing the defendant had demurred to this evidence, I think that the Court must have drawn the same conclusion from it which the jury have drawn; and therefore on the law of the case, without recurring to the first ground which I mentioned, I think that the rule for a new trial should be discharged.

Rule discharged.[93]

DOE, Lessee of DIDSBURY, v. THOMAS et al.

(Court of King's Bench, 1811. 14 East, 323)

This was an ejectment to recover a farm consisting of 35 acres of land, in the parish of Tideswell in Derbyshire, which was tried at Derby, before Wood, B. Ann Didsbury, the lessor, claimed the premises under the will of Samuel White, dated 26th of November 1754, whereby he devised them by the description of, "all those his closes, lands, and hereditaments, with the appurtenances, situate at Tideswell, then in the possession of his son Richard White, to trustees, (C. Flint, the lessor, being the executor of the surviving trustee,) for a term of 500 years, in trust to raise £260. for certain purposes; and subject thereto, to his son Richard White for life; remainder to his grandson Richard White for life: remainder to the heirs of the body of his said grandson R. W.[94] * * *

[93] In Reed v. Jackson, 1 East, 355 (1801), on the issue of a customary right of way over the land in controversy, a verdict in another action between different parties was admitted, and Lawrence, J., observed: "Reputation would have been evidence as to the right of way in this case; a fortiori, therefore, the finding of twelve men upon their oath."

[94] Part of case omitted.

The only question made at the trial was, whether Samuel White, the testator, was seised of these premises at the time of making his will and at his death; the plaintiff insisting that he was so seised; having, as it was alleged, purchased them of Sir John Statham, and permitted his son Richard to occupy them until his (the testator's) death. It appeared that the premises in dispute consisted of a farm called the Meadow Farm, originally seven closes, but now divided into nine, and in all 35 acres: and it was proved by several witnesses that one George Robinson, who was tenant to Sir John Statham, occupied the farm before the first Richard White had it; and that Richard took possession of it about 61 years ago, and continued possessed as long as he lived, and occupied no other land which could have been his father's during that time. That his father, Samuel, lived from 10 to 14 years after the first Richard was in possession of the farm. But another witness, who also deposed to the fact of the first Richard's taking possession of and occupying the Meadow Farm at the same time when his brother, Edward White, occupied another farm called Foxlow's Croft, said that both farms were reputed to be Sir John Statham's, and to have been purchased by Samuel White of Sir John Statham at the same time. Then a deed was proved, dated 25th of March 1752, and made between Samuel White of the one part, and Edward White, one of his sons, of the other part; whereby Samuel White, in consideration of natural love and affection, &c. bargained and enfeoffed his son Edward and his heirs of all that farm, &c. within Tideswell, called Foxlow's Croft; all which said farm, &c. have been lately purchased amongst other lands and hereditaments by the said Samuel White of and from Sir John Statham, &c.; habendum to Edward White in fee.

Objection was taken by the defendant's counsel to the evidence of reputation before stated; but the learned Judge was of opinion that, coupled with the deed above mentioned, the evidence was admissible. He thought that as it was in proof that Sir John Statham was the landlord of the Meadow Farm when it was occupied by G. Robinson before the first Richard White's occupation of it: and that as the deed also proved that Sir John Statham was also the owner of Foxlow's Croft, and that Samuel White had purchased that, amongst other lands and hereditaments, of Sir John Statham; and as it was also proved that both the sons (Edward and Richard,) took possession of their respective farms at the same time; there was a sufficient basis laid to admit reputation that those other lands and hereditaments referred to in the deed were the Meadow Farm: * * * The jury found for the plaintiff.

Clarke, in last Easter term, moved for a new trial, upon the ground of the objection taken at the trial against the admissibility of the evidence of reputation, that the land at Tideswell, described in the will as then in the possession of the testator's son Richard, had belonged to Sir John Statham, and was purchased of him by Samuel White, the testator. He insisted that in no case was reputation admissible to prove

ownership or possession of private property. And a rule having been granted. * * *

THE COURT agreed that the rule must be made absolute; LORD ELLENBOROUGH, C. J., saying that it was very unfortunate for the lessor, where the verdict must be the same upon another trial, that they should be obliged to send the cause to trial again.

Rule absolute.[95]

DUKE OF NEWCASTLE v. BROXTOWE.

(Court of King's Bench, 1832. 4 Barn. & Adol. 273.)

See ante, p. 53, for a report of the case.[96]

[95] For a collection of the earlier cases on the point, see notes to principal case, 14 East, 327–331.

Morton, J., in Green v. Chelsea, 24 Pick. (Mass.) 71 (1836): "The justice who presided at the trial, went far enough in permitting the tenants to prove that the premises were called the town landing and known by that name, and did right in excluding evidence that it was reputed to be the town's property. Reputation is never evidence of title, nor is it ever admissible in support of private rights."

Though only a private boundary is in issue, yet when it is shown to depend on a public boundary, the latter may be proved by reputation to the same extent as if it were in issue. Thomas v. Jenkins, ante, p. 110.

[96] Lawrence, J., in the Berkley Peerage Case, 4 Camp. 401 (1811): "I concur with the Judges who have stated their opinions against the admissibility of the evidence. From the necessity of the thing, the declarations of members of the family, in matters of pedigree, are generally admitted; but the administration of justice would be perverted if such declarations could be admitted which have not a presumption in their favour that they are consistent with truth. Where the relator had no interest to serve, and there is no ground for supposing that his mind stood otherwise than even upon the subject (which may be fairly inferred before any dispute upon it has arisen,) we may reasonably suppose that he neither stops short, nor goes beyond the limits of truth in his spontaneous declarations respecting his relations and the state of his family. The receiving of these declarations, therefore, though made without the sanction of an oath, and without any opportunity of cross-examination, may not be attended with such mischief as the rejection of such evidence, which in matters of pedigree would often be the rejection of all the evidence that could be offered. But mischievous indeed would be the consequence of receiving an ex parte statement of a deceased witness, although upon oath, procured by the party who would take advantage of it, and delivered under that bias which may naturally operate on the mind in the course of a controversy upon the subject. Notwithstanding what is said in Goodright v. Moss, I cannot think that Lord Mansfield would have held that declarations in matters of pedigree, made after the controversy had arisen, ought to be submitted to the jury. They stand precisely on the same footing as declarations on questions of rights of way, rights of common, and other matters depending upon usage; and although I cannot call to mind the ruling of any particular Judge upon the subject, yet I know that according to my experience of the practice, (an experience of nearly forty years,) whenever a witness has admitted that what he was going to state he had heard after the beginning of a controversy, his testimony has been uniformly rejected. If the danger of fabrication and falsehood be a reason for rejecting such evidence in cases of prescription, that will equally apply in cases of pedigree, where the stake is generally of much greater value. * * *"

THE QUEEN v. BLISS.

(Court of Queen's Bench, 1837. 7 Adol. & E. 550.)

Indictment for obstructing a public highway. Plea, not guilty. On the trial before Gaselee, J., at the Suffolk Spring assizes, 1836, a principal question was, whether the way obstructed was public or private. A witness for the prosecution stated that one Ramplin, a publican, who was dead at the time of the trial, had planted a willow thirty years ago on a meadow, of which he was tenant and occupier, and over which the way in question now ran. The counsel for the prosecution then asked "what Ramplin said, when he planted the willow, about his planting it?" The question was objected to, but admitted by the learned judge, and the witness answered that Ramplin said he planted it to show where the boundary of the road was when he was a boy. The willow had remained ever since. The jury found that the way was public, and a verdict was taken for the crown. In the ensuing term, a rule nisi was obtained for a new trial, on the ground that the above evidence ought not to have been admitted.

LORD DENMAN, C. J.[97] The question in this case was, whether the road obstructed was or was not a public highway. To prove that it was so, a witness was called whose statement was calculated to make a great impression on the jury. He stated that Ramplin, a former occupier of the meadow over which the road ran, had planted a willow, and in doing so, said that he planted it to show where the boundary of the road was when he was a boy. And it is inferred, from the circumstances, that Ramplin meant to speak of the road as having been public. I think the evidence was not admissible. It is not every declaration accompanying an act that is receivable in evidence: if it were so, persons would be enabled to dispose of the rights of others in a most unjust manner. The facts that Ramplin planted a willow on the spot, and that persons kept within the line pointed out by it, would have been evidence; but a declaration to show that the party planted it with a particular motive is not so. Then, is the declaration evidence as made against the party's interest? If we held that it was, we should get rid of the authority of Daniel v. North, 11 East, 372, where it was held that a tenant cannot, merely by his own admission, bind the landlord. It is true that the landlord and tenant here may have had the same interest; but so they possibly may in any case: they might in Daniel v. North. Neither was the evidence admissible as showing reputation. Any statement from a person since deceased is to be received with caution. Lord Ellenborough, in a leading case on this subject, allowed, with great reluctance, the admissibility of reputation as evidence. But here the deceased party is reported to have said that the

[97] Opinion of Patteson, J., omitted.

boundary of the road was at a particular spot; that is, that he knew it to be so from what he had himself observed, and not from reputation. I think, therefore, that the rule ought to be absolute.

WILLIAMS, J. There is no doubt that evidence of reputation is admissible where the question to which it applies is merely whether the road be public or not. In Ireland v. Powell, Peake on Evidence, 16, 5th edit., the question being whether a turnpike stood within the limits of a town, Chambre, J., admitted evidence of reputation that the town extended to a certain point, and allowed it to be proved that old people, since dead, had declared that to be the boundary, but not that those people had said that there formerly were houses where none any longer stood; observing that that was evidence of a particular fact, and not of reputation. The statement offered in evidence here is very like the declarations so rejected. It is not reputation, in the proper sense. Declarations accompanying acts are a wide field of evidence, and to be carefully watched. The declaration here had no connection with the act done; and the doing of the act cannot make such a declaration evidence.

COLERIDGE, J. It is a rule that evidence of reputation must be confined to general matters, and not touch particular facts. To try whether the declaration here was admissible according to that rule, let it be severed from the fact of planting which took place at the same time. Then it stands that Ramplin said he planted the tree for a certain purpose; namely to show the boundary. That is a particular fact; and evidence given of it is like proof of old persons having been heard to say that a stone was put down at a certain spot, or that boys were whipped, or cakes distributed, at a particular place, as the boundary; which statements would not be admissible.

Rule absolute.

DOE dem. MOLESWORTH et al. v. SLEEMAN.

(Court of Queen's Bench, 1846. 9 Q. B. 298.)

Ejectment for land, &c., in the county of Devon. On the trial before Coleridge, J., at the Devon Spring assizes, 1845, it appeared that Sir W. Molesworth claimed, as his own land, certain slips of ground called landscores, extending respectively to the distance of eighteen feet from the boundary fences of an alleged manor called Affaland, of which he was the proprietor: and it became a question on the evidence, whether Affaland was or was not a manor, and whether, if it had formerly been a manor, it had not ceased to be so, and become only a manor by reputation. In proof of title to the landscores, the plaintiff's counsel offered in evidence declarations of old persons deceased as to the reputed boundary of the manor, and as to the claim of eighteen

feet beyond the fence as part of the manor lands. The evidence was objected to, but received:

[After verdict for defendant, a rule nisi for a new trial was obtained.]

LORD DENMAN, C. J., delivered the judgment of the Court.

The plaintiff claimed this property, seeking to prove it his by showing that it was within the boundary of his reputed manor of Affaland; as to the line of which boundary he tendered evidence of reputation. The learned Judge told the jury that they were to consider whether this reputed manor was a manor, and that, if it were not, evidence of reputation as to the line of boundary ought not to be considered by them, because in that case there was no probability of conversations taking place on this subject, as there were no tenants of the manor interested in holding such conversations.

But, on consideration, we cannot accede to this doctrine: for a reputed manor is that which has been a manor, though from some supervening defects it has ceased to be so. There seems to be no reason why such conversations might not be held during the existence of the manor, and kept in the memory since. And, further, the supposed discourse which may be proved as reputation is not confined to tenants, but may proceed from any persons residing in the neighbourhood, and likely to have been engaged in talking upon the subject.

Curzon v. Lomax, 5 Esp. N. P. C. 60, and Soane v. Ireland, 10 East, 259, are among the authorities on these points.

Rule absolute.

CLEMENT v. PACKER.

(Supreme Court of the United States, 1888. 125 U. S. 309, 8 Sup. Ct. 907, 31 L. Ed. 721.)

Ejectment for a tract of land in the state of Pennsylvania.

The plaintiff claimed that the northern boundary of this tract was identical with the southern line of the defendant's tracts, and that such southern boundary was about 60 rods further north than that claimed by the defendant, and down to which he was in actual possession. The question in the case, as exhibited by the record, is one of location, the burden of proof being on the plaintiff below to show the location of the northern boundary of the William Elliott tract, and that the 120 acres in dispute are within the limits of that tract.

To show the true location of the maple at the common corner of the Reynolds and Billington tracts to be 60 rods south of where Rockefeller had claimed to locate it, he [defendant] offered in evidence the deposition of John Fisher, deceased, taken in several cases pending in the common pleas court of Northumberland county, between the plaintiff in error and the Northumberland Coal Company in 1878, it having been admitted that John Fisher was dead. This deposition

was offered to prove by John Fisher that, in 1815, Henry Donnel was surveying the Brush Valley lines, and he (Fisher) was with him as chain-carrier; that when they were running the line between the Billington and Reynolds tracts, and were at a point about 60 rods south of the stump located by Rockefeller at a swamp, they found a stone corner,—"stones piled up." Donnel said: "This is the corner; here is where we located these warrants 21 or 22 years ago." The plaintiff below objected to the admission of these declarations of Henry Donnel. The court sustained the objections, and rejected those portions of the deposition embraced in brackets, and sealed the bill of exceptions at the instance of the defendant.

The jury returned a verdict for the plaintiff below, upon which judgment was rendered. The defendant below then sued out this writ of error.[1]

Mr. Justice LAMAR. * * * The second specification relates to the rejection by the court of a portion of the deposition of John Fisher, referred to in the above statement. We gather from the brief of counsel that the ground on which these declarations were ruled out was that they were not within any of the exceptions to the general rule that hearsay evidence is inadmissible to establish any specific fact which in its nature is capable of being proved by the testimony of a person who speaks from his own knowledge. In The Mima Queen v. Hepburn, 7 Cranch, 290, 296 (3 L. Ed. 348), Chief Justice Marshall says: "To this rule there are some exceptions which are said to be as old as the rule itself. These are cases of pedigree, of prescription, of custom, and in some cases of boundary. * * * Also matters of general and public history."

Upon the subject of boundary there is a general agreement that, by the English rule, evidence of the declarations of deceased persons as to the boundary of parishes, manors, and the like, which are of public interest, is admissible, but that such evidence is inadmissible for the purpose of proving the boundary of a private estate, unless such boundary is identical with another of public interest. In many of the states this strict rule has been extended, and these declarations have been admitted to prove the boundaries of lands of private persons. This extension of the rule has, we think, been sustained by the weight of authority in the American state courts, as justified upon grounds as strong as those on which the original rule rests. In Boardman v. Lessees of Reed, Mr. Justice McLean states one of these grounds. He says, (6 Pet. 328, 341 [8 L. Ed. 415,]): "That boundaries may be proved by hearsay testimony is a rule well settled, and the necessity or propriety of which is not now questioned. Some difference of opinion may exist as to the application of this rule, but there can be none as to its legal force. Landmarks are frequently formed of perishable materials. * * * By the improvement of the country, and from oth-

[1] Statement condensed and part of opinion omitted.

er causes, they are often destroyed. It is therefore important, in many cases, that hearsay or reputation should be received to establish ancient boundaries." This was a case of private boundaries purely, and the declarations were rejected, not upon the ground of hearsay, but because they were considered as immaterial, and not tending to elucidate any question before the jury.

The limitations upon this extension of the original rule are different in different states. We do not deem it necessary, in the present case, to lay down any definite rule, applicable to all cases, as to when declarations of deceased persons constitute valid evidence to establish private boundaries. The question is one involving the ownership of real property in Pennsylvania, and it becomes our duty to ascertain the rule established in that state, especially as respects the admissibility of the declarations of deceased surveyors in cases of boundaries between private estates. In the case of Caufman v. Congregation, 6 Bin. (Pa.) 59, the plaintiff claimed a certain number of acres which were surveyed by one Wilson, an assistant of the deputy surveyor, since deceased. The deputy surveyor returned to the land-office a smaller quantity than was contained in Wilson's actual survey. On the trial of the case evidence of what was said by Wilson was objected to by the defendant upon the ground that the official return of the survey was the best evidence of the survey. The evidence was held by the supreme court of Pennsylvania to have been rightly received. Chief Justice Tilghman said: "It will be recollected that Wilson is dead; otherwise nothing less than his own oath could have been received. Where boundary is the subject, what has been said by a deceased person is received as evidence. It forms an exception to the general rule. It was necessary for the plaintiffs to show their possession of the lands. * * * It was impossible for the plaintiffs to show the extent of their possession without showing the lines run by Wilson. Those lines were the plaintiffs' boundaries; at least such was their claim. It appears to me, therefore, that what was said by Wilson came within the exception which admits the words of a deceased person to be given in evidence in a matter of boundary." * * *

These decisions [2] clearly require the admission of the testimony rejected by the court below, and the decisions cited by the counsel for defendant in error also seem to us in harmony with the tenor and effect of them. * * *

To sustain the rejection of the evidence much reliance is placed on the decisions of this court in the cases of Hunnicutt v. Peyton, 102 U. S. 333, 26 L. Ed. 113, and Ellicott v. Pearl, 10 Pet. 412, 9 L. Ed. 475. But as the question is one of Pennsylvania law, to be controlled

[2] In the omitted passages, the opinion had reviewed the following cases: Kennedy v. Lubold, 88 Pa. 246 (1879); Kramer v. Goodlander, 98 Pa. 366 (1881); McCausland v. Fleming, 63 Pa. 36 (1869); Conn v. Penn, Pet. C. C. 496, Fed. Cas. No. 3,104 (1818).

by Pennsylvania decisions, the observations of the court in the cases cited are not pertinent. * * *

The case of Ellicott v. Pearl, supra, was brought to this court by a writ of error to the circuit court of the United States for the district of Kentucky; and, in the decision here, this court adhered to the English rule, and rejected the evidence of the declaration of a deceased surveyor as to the boundary of a private estate. In so doing, this court was simply enforcing the rule as it existed in Kentucky at that time. In Cherry v. Boyd, Litt. Sel. Cas. 8, decided by the supreme court of that state in 1800, it was held that evidence of the parol declarations of a surveyor concerning the marks or lines of a private estate were inadmissible. This being the settled law of Kentucky, this court could not have decided otherwise than it did in Ellicott v. Pearl. But even in that case the court uses the following guarded language: "The doctrine in America, in respect to boundaries has gone further, and has admitted of general reputation as to boundaries between contiguous private estates." * * *

Judgment reversed.[3]

HEMPHILL v. HEMPHILL.

(Supreme Court of North Carolina, 1905. 138 N. C. 504, 51 S. E. 42.)

This is an action of ejectment. The question at issue is the location of the line dividing the lands of the plaintiffs and defendants. Both of these tracts originally constituted one tract, owned by Andrew Hemphill. About 1850 a parol division of this land was made between B. C. Hemphill, one of the plaintiffs, and John R. Hemphill, both sons of Andrew Hemphill. The plaintiffs claim that the line in question, located when the land was divided, runs from the mouth of the branch emptying into Reem's creek to the point of a ridge, and thence in a southeasterly direction on the face of the mountain across minor ridges and gullies to the Jump Corner. The defendants claim that the line runs from the mouth of the branch to the point of the ridge, and thence in a northeasterly direction up the ridge to the Vance line. Between these two lines contended for is the triangular piece of land in controversy.

[There was a verdict and judgment for plaintiffs, from which defendants appealed.]

HOKE, J. (after stating the facts). The rights of the parties to this controversy were made to depend upon the correct location of the divisional line between Benjamin C. and John R. Hemphill, under whom the defendants claim; and the defendants contend that the true location of this line runs from the "mouth of the branch to the point of the ridge, and thence in a northeasterly direction up the ridge to the

[3] In Sasser v. Herring, 14 N. C. 340 (1832), the court refused to extend the doctrine to statements by the deceased landowner in his own favor.

Vance line." In order to establish this position, the defendants offered, first, the deed from John R. Hemphill, now dead, to the heirs of John Brigman, bearing date November 14, 1866, as a declaration of John R. Hemphill on the correct location of the line in dispute. The defendants further proposed to prove by a witness (John G. Chambers) that he had known the land in controversy for 50 years; that he knew the general reputation in that community as to the true location of this divisional line; and that, according to such reputation, the same ran along the top of this ridge, and was placed as the defendants claimed. On objection by the plaintiffs, this testimony was held incompetent, and the defendants excepted.

It is the law in this state that, under certain restrictions, both hearsay evidence and common reputation are admissible on questions of private boundary. Sasser v. Herring, 14 N. C. 340; Shaffer v. Gaynor, 117 N. C. 15, 23 S. E. 154; Yow v. Hamilton, 136 N. C. 357, 48 S. E. 782.

The restrictions on hearsay evidence of this character—declarations of an individual as to the location of certain lines and corners—established by repeated decisions are that the declarations be made ante litem motam, that the declarant be dead when they are offered, and that he was disinterested when they were made. Bethea v. Byrd, 95 N. C. 309, 59 Am. Rep. 240; Caldwell v. Neely, 81 N. C. 114. The declarations of John R. Hemphill in this deed to the heirs of John Brigman as to the location of his own line are hearsay. They are incompetent for the reason that he was interested when the same were made, and the judge below ruled correctly in excluding them.

On the second point—the evidence offered from the witness John G. Chambers on the general reputation as to the location of the divisional line: Such evidence has been uniformly received in this state, and the restriction put upon it by our decisions seems to be that the reputation, whether by parol or otherwise, should have its origin at a time comparatively remote, and always ante litem motam; second, that it should attach itself to some monument of boundary or natural object, or be fortified and supported by evidence of occupation and acquiescence tending to give the land in question some fixed or definite location. Den v. Southard, 8 N. C. 45; Mendenhall v. Cassells, 20 N. C. 43; Dobson v. Finley, 53 N. C. 496; Shaffer v. Gaynor, 117 N. C. 15, 23 S. E. 154; Westfelt v. Adams, 131 N. C. 379–384, 42 S. E. 823. The proposed evidence comes fully up to the requirement of these decisions. The reputation is attached to a placing reasonably definite, and the witness stated that he had known the land for 50 years; knew the general reputation in the community as to the line in dispute, and where such line was placed by that reputation. We think it appears by fair intendment that the reputation offered had its origin ante litem motam, and at a time sufficiently remote.

There was error in rejecting the proposed evidence, which entitles the defendant to a new trial.

(B) In Regard to Persons

KIMMEL v. KIMMEL.

(Supreme Court of Pennsylvania, 1817. 3 Serg. & R. 336, 8 Am. Dec. 655.)

See ante, p. 404, for a report of the case.

REG. v. ROWTON.

(Court of Criminal Appeal, 1865. 10 Cox, Cr. Cas. 25.)

See post, p. 764, for a report of the case.

FRAZIER v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, 1861. 38 Pa. 104, 80 Am. Dec. 467.)

This was an action on the case brought against the Pennsylvania Railroad Company by William Frazier, who was a brakesman employed by the defendants, to recover damages for personal injuries received by him in the course of his employment, by reason of a collision of trains, caused by the negligence of one of the conductors of the defendant.

After proving the manner in which the collision occurred, and the injury occasioned by it, that the train conducted by Shaeffer was running out of time according to the company's schedules and instructions, and that although in the opinion of the witnesses the accident "might have happened to a good and careful man," yet there "was a little carelessness about it," the plaintiff offered to prove by Shaeffer the conductor (who was no longer in the service of the company), that he had had several collisions on the road before, for which he was fined by the company, and that the agents, &c., of the company, knew this; that the former collisions were caused by his carelessness; that they were known to the company, and were so treated by them. To all which the defendants objected, on the ground that previous special acts of negligence are not matters for the jury as to general character, and also for the reason that there can be no recovery against the company for injury done to one servant by the carelessness of another. But the court overruled the objection, admitted the evidence, and sealed a bill of exceptions for defendant.[4]

The opinion of the court was delivered by

LOWRIE, C. J. The fundamental averment here is, that it was because of the carelessness of the conductor that the brakesman was injured, and, in order to show that the company was responsible for this, it is averred that they were in fault in knowingly or negligently employing a careless conductor. The first count avers the duty of the

[4] Statement condensed and part of opinion omitted.

company to have a careful and skillful conductor, and that this one was not so and they knew it. The third, fourth, and fifth counts aver, that the company might by proper care have known the conductor's character for care and skill, and that the plaintiff did not know it.

The question of character thus became an important one, and we are constrained to say that it was tried on improper evidence. Character for care, skill, and truth of witnesses, parties or others, must all alike be proved by evidence of general reputation, and not of special acts. The reasons for this have been so often given, that we need not repeat them. 1 Greenl. Ev. §§ 461–469; Elliott v. Boyles, 31 Pa. 67. Character grows out of special acts, but is not proved by them. Indeed, special acts do very often indicate frailties or vices that are altogether contrary to the character actually established. And sometimes the very frailties that may be proved against a man, may have been regarded by him in so serious a light, as to have produced great improvement of character. Besides this, ordinary care implies occasional acts of carelessness, for all men are fallible in this respect, and the law demands only the ordinary.

In the case of Ryan v. C. V. Railroad Co., 23 Pa. 384, we decided, that where several persons are employed as workmen in the same general service, and one of them is injured through the carelessness of another, the employer is not responsible. Many cases were there cited in support of this principle, and many more might be added now. 10 Mees. & W. 109, 5 Com. B. R. 599, 616; 9 Exch. 223; 11 Id. 832; 16 Queen's B. R. 326; King v. Boston & Worcester R. Corp., 9 Cush. (Mass.) 112; Gillshannon v. Stony Brook R. Corp., 10 Cush. (Mass.) 228; 3 Ellis & B. 402; 3 McQueen, 266, 300; 3 Hurlst. & N. 648; Smith's Master and Servant (Eng. Ed. 1860) 133, 146; Carle v. Bangor & Piscataquis Canal & R. R. Co., 43 Me. 268; Noyes v. Smith, 28 Vt. 59, 65 Am. Dec. 222; Russell v. Hudson R. R. Co., 17 N. Y. 134, 153; Whaalan v. Mad River & Lake Erie R. Co., 8 Ohio St. 249. We need not reconsider this question in its general aspect.

This rule was not disregarded on the trial, but if the company employ a conductor known by them to be unfit for the business, this new fact changes the question to be solved, and the court below charged, that in such a case the company are chargeable with the consequences of the carelessness of the conductor. This instruction seems to us correct, and is supported by many decisions cited by the plaintiff's counsel, to which may be added Railroad Co. v. Barber, 5 Ohio St. 541, 67 Am. Dec. 312. * * *

Judgment reversed.[5]

[5] Accord: Rosenstiel v. Pittsburg Rys. Co., 230 Pa. 273, 79 Atl. 556, 33 L. R. A. (N. S.) 751 (1911), annotated.

Compare Consolidated Coal Co. of St. Louis v. Seniger, 179 Ill. 370, 53 N. E. 733 (1899), to the effect that repeated acts of negligence may be proved to establish incompetency.

PARK v. NEW YORK CENT. & H. R. R. CO.

(Court of Appeals of New York, 1898. 155 N. Y. 215, 49 N. E. 674, 63 Am. St. Rep. 663.)

HAIGHT, J.[6] This action was brought by the plaintiff, who was an engineer in the employ of the defendant, to recover for injuries sustained by reason of a collision with a freight train, caused by the negligence of one Brown, a brakeman in the employ of the defendant. * * *

Inasmuch as the plaintiff and Brown were co-servants, this action could not be maintained without showing that Brown was an incompetent man, unfit for the service in which he was engaged, and that such incompetency was known, or should have been known, by the officers of the defendant. * * *

The plaintiff, in order to establish his cause of action, gave considerable evidence with reference to the general reputation of Brown for carelessness, which was taken under the objection and exception of the defendant, which we shall not consider in detail. The character of this evidence has recently been under consideration in this court in the case of Youngs v. Railroad Co., 154 N. Y. 764, 49 N. E. 1106. Inasmuch as there was no opinion written in that case, we will briefly allude to the facts and the question decided. In that case, as in this, it became necessary to show that an employé was incompetent. This the plaintiff sought to do by showing his general reputation for carelessness from the speech of people. It was objected to by the defendant. The objection was sustained, and an exception was taken by the plaintiff. The court then stated to the plaintiff's attorney: "I will allow you to show any specific acts of negligence on the part of the engineer while engaged in the business of engineering, and I will allow you to show that those acts of carelessness were generally known in the community, and that the defendant had actual knowledge of such specific acts, or that they were so general that, upon proper inquiry, the defendant ought to have known." A nonsuit was granted, and the same was affirmed in the general term of this court.

We are aware that in some states the courts have permitted incompetency of servants to be shown by general reputation, but we have never gone to that extent in this state. It appears to us that the safer and better rule is to require incompetency to be shown by the specific acts of the servant, and then that the master knew or ought to have known of such incompetency. The latter may be shown by evidence tending to establish that such incompetency was generally known[7]

[6] Part of opinion is omitted.

[7] McBride, J., in Benoist v. Darby, 12 Mo. 196 (1848): "* * * We concur in the correctness of the exception laid down by the supreme court of Louisiana in the case of Brander v. Feraday, 16 La. 296 [1840], and recognized as law by Mr. Greenleaf in his treatise on evidence, vol. 1, page 168, and which we think embraces the questions under consideration. The court

in the community. Marrinan v. Railroad Co., 13 App. Div. 439, 43 N. Y. Supp. 606; Baulec v. Railroad Co., 59 N. Y. 356, 17 Am. Rep. 325; Monahan v. City of Worcester, 150 Mass. 439, 23 N. E. 228, 15 Am. St. Rep. 226; Gilman v. Railroad Co., 13 Allen (Mass.) 433, 90 Am. Dec. 210; Davis v. Railroad Co., 20 Mich. 105, 4 Am. Rep. 364.

One Dean was sworn as a witness for the plaintiff, and testified that he knew Brown when he worked for the defendant at Schenectady. He testified that he had never heard his mental characteristics talked about, and knew nothing of his mental reputation, but stated that he had heard of a handle to his name,—a nickname. He was then asked to give his nickname. This was objected to. The objection was overruled and exception taken, and the witness answered that he was called "Crazy Brown." This was 8 or 10 years before, and he had not heard him spoken of before this accident within the last 10 years. We think that this evidence was prejudicial and incompetent, and, without considering the other numerous exceptions in the case, that a new trial should be granted.

The judgment should therefore be reversed, and a new trial granted, with costs to abide the event. All concur, except GRAY, J., absent, and MARTIN, J., not sitting. Judgment reversed.

DOE dem. FLEMING v. FLEMING.

(Court of Common Pleas, 1827. 4 Bing. 266.)

The lessor of the plaintiff claimed the premises sought to be recovered in this ejectment as heir at law to his brother, the person last seised.

His father was still alive, and the only evidence of the lessor of the plaintiff's having been born in lawful wedlock was the reputation of his parents having lived together as husband and wife.

A verdict having been found for the plaintiff at the trial before Best, C. J., Middlesex sittings after last term.

Wilde, Serjt., moved for a new trial, on the ground that though reputation was evidence of marriage in ordinary cases, yet where the plaintiff was to recover as heir at law, where his being such was the sole question to be tried, and his father was still alive, direct evidence of the marriage ought to have been furnished.

say that 'where particular knowledge of a fact is sought to be brought home to a party, evidence of the general reputation and belief of the existence of that fact among his neighbors is admissible to the jury as tending to show that he also had knowledge as well as they.' It is next to impossibility in very many cases to fix a positive knowledge of a fact upon an individual, notwithstanding the interest he may have in being correctly informed, and doubtless is informed thereof, and we cannot see the injustice of permitting a party to raise a presumption of knowledge in such a case by showing that the community are informed on the subject, and hence the party interested may also have similar knowledge."

PARK, J. The general rule is, that reputation is sufficient evidence of marriage, and a party who seeks to impugn a principle so well established, ought, at least, to furnish cases in support of his position; as we have heard none, I see no reason for disturbing the verdict.

BEST, C. J. The rule has never been doubted. It appeared on the trial that the mother of the lessor of the plaintiff was received into society as a respectable woman, and under such circumstances improper conduct ought not to be presumed.

Rule refused.[8]

RINGHOUSE v. KEEVER.

(Supreme Court of Illinois, 1869. 49 Ill. 470.)

Mr. Justice LAWRENCE [9] delivered the opinion of the Court.

This was an action in ejectment, brought by Maria Keever, claiming as widow and heir of her former husband, Henry Hardie. It is objected, that the proof of the death was not sufficient. The ordinary rule is, that it is general reputation among the kindred only of a deceased person, that is admissible in proof of death, but that rule has been sometimes relaxed, as in Scott's lessee v. Ratliffe, 5 Pet. 81, 8 L. Ed. 54. Where, as in the present case, the deceased left no kindred that are known, the rule must be relaxed from necessity.

In this case, the depositions of two witnesses were taken, who lived in New Orleans, and who were present at the marriage of Hardie in that city, in 1845. They testify that he had but one child, who died, and that he, also, died of cholera in 1849. His death was announced in the newspapers, and he was spoken of by his acquaintances as dead. His widow subsequently married her present husband.

The instruction given for the plaintiff is not sufficiently qualified as a rule of universal application, but in this case it worked no prejudice, as the evidence was competent and sufficient. In a population as unstable as ours, and comprising so many persons whose kindred are in distant lands, the refusal of all evidence of reputation in regard to death, unless the reputation came from family relatives, would sometimes render the proof of death impossible, though there might exist no doubt of the fact, and thus defeat the ends of justice. * * *

Judgment reversed (on other grounds).[10]

[8] See same rule approved in Birt v. Barlow, 1 Doug. 171 (1779); Travers v. Reinhardt, 205 U. S. 423, 27 Sup. Ct. 563, 51 L. Ed. 865 (1906).

[9] Part of opinion omitted.

[10] Welch v. New York, N. H. & H. Ry. Co., 182 Mass. 84, 64 N. E. 695 (1902), death of a witness proved by reputation brought home to the family. The limitation to family repute appears to be derived from the rule in cases of pedigree.

VIII. ENTRIES AND STATEMENTS IN MATTERS OF PEDIGREE

DOE ex dem. FUTTER v. RANDALL.

(Court of Common Pleas, 1828. 2 Moore & Payne, 20.)

This was an action of ejectment. At the trial, before Lord Chief Baron Alexander, at the last Summer Assizes at Norwich, the lessor of the plaintiff claimed as cousin and heir-at-law of one John Futter, who was seised, and in possession, of the premises sought to be recovered by this action, and who died so seised in 1769. It appeared, by the plaintiff's pedigree that John Futter the ancestor left a son James, who had issue a son James, whose eldest son was Samuel, under whom the lessor of the plaintiff claimed. The defendant was in possession under the person last seised, who claimed under Richard, the brother of John Futter.

For the lessor of the plaintiff, a witness stated, that he remembered John Futter, who was a wholesale tailor; that he left a widow, who married a person named Edwards, twenty-eight days after her first husband's death; that she died twenty-eight years since; and that he, Edwards, was buried about fifty-eight years ago. Another witness (James Chapman), aged eighty-two, son of Ann Futter by Chapman, said, that he had heard his uncle James talk of the father of John; that he knew John, but did not know where he lived; that his uncle James lived at St. Faith's, and that he had heard him speak of a cousin, but did not recollect his christian or sirname, nor where he lived; that he had heard James Futter, his uncle, say that James Futter of Vintry was the cousin of John, who had the estate at Cawston; that James Futter of Cawston was the son of witness's uncle; that James of Vintry had two sons, Samuel and James; that Samuel had been dead some time, but that witness did not know what children he had. A third witness (Elizabeth Cooper) said, that she knew Mrs. Edwards; that her first husband was John Futter; that she said that James Futter was to have the estate; that John, her husband, used to say, that the estate would go to James Futter, and after his death, to his heir; that Mrs. Edwards also said, that her first husband told her on his death-bed that the estate would go into the family of the Futters, and that it was Futter of Vintry who was to succeed. Two other witnesses swore that they knew James Futter of Vintry, and had often heard him say that he was cousin to John Futter of Cawston, the wholesale tailor, who had the estate; and that after the decease of Mrs. Edwards, the estate would come to him; that James of Vintry left two sons, Samuel and James; that Samuel was the eldest, and died, leaving a son named Samuel, who was married. The jury found a verdict for the plaintiff.

Lord Chief Justice BEST. This is an application for a new trial, and we are bound to suppose that every objection and observation as

to the admissibility or effect of the evidence tendered for the plaintiff at the former trial was made by the counsel for the defendant, and attended to by the Judge, and that the whole of the plaintiff's evidence was left to the jury, and it appears to me that they have drawn a right conclusion. They were satisfied that the family of the Futters, under whom both parties claimed, was one and the same family, and the plaintiff was entitled to show that James was a member of that family. If not, it is quite clear that the declarations now objected to could not have been received in evidence. They were admitted, not for the mere purpose of showing that he was connected with the family, but that he was a member of it. If, however, there were no other evidence than the declarations of John, to show that James was a member of the family, they could not have been received, as that would be carrying the rule as to the admissibility of hearsay evidence further than has been ever yet done, viz. to allow a party to claim an alliance with a family by the bare assertion [11] of it. But it appears to me that there was other satisfactory evidence in this case to show that James of Vintry, was a member of the Futter Family; and there was no evidence to show that there were two families of that name; and, even in the defendant's pedigree, the name of James Futter is introduced as being descended from John. Laying that aside, however, it is necessary to look at the testimony of Mrs. Cooper: she said that she knew Mrs. Edwards, whose first husband was John Futter, under whom lessor of the plaintiff claimed; that she (Mrs. Edwards) said that James Futter was to have the estate, and that John Futter, her husband, used to say that the estate would go to James Futter, and, after his death, to his heir. That was evidence to show that James was a relation; and, putting out of the question what John said as to the estate descending to the heir of James, still his declarations, as to the latter being related to the family were admissible and properly received. So, the witness Chapman, although he was eighty-two years of age, might have had his recollection called to certain facts with respect to James Futter; for a person at an advanced age frequently remembers circumstances which passed in his early days, although he may have but a faint or imperfect recollection of more recent occurrences. He said that James Futter of Cawston was a relation of the family, viz. the son of his, the witness's, uncle. It must be admitted, after the case of Vowles v. Young, that the declarations of a party connected by marriage are receivable in evidence. Consanguinity or affinity by blood, therefore, is not necessary, and for this obvious reason, that a party by marriage is more likely to be informed of the state of the family of which he is become a member, than a relation who is only distantly connected by blood; as, by frequent conversation, the former may hear the par-

[11] See Doe dem. Jenkins v. Davies, 10 Adol. & El. (N. S.) 324 (1847), ante. p. 111.

ticulars and characters of branches of the family long since dead: and, if such a party, on cross-examination, were questioned as to the declarations made by a person deceased, although he did not hear them himself, it would be sufficient for him to state that he had heard his relations say that the deceased declared who and what his cousins or other relatives were. Although hearsay evidence is only admissible on questions of pedigree or prescription, yet it is absolutely necessary in such cases, as the facts cannot be proved by living witnesses in the ordinary manner. Still, the declarations of deceased parties must be taken with all their imperfections; and, if they appear to have been made honestly and fairly, they are receivable. If, however, they are made post litem motam, they are not admissible, as the party making them must be presumed to have an interest, and not to have expressed an unprejudiced or unbiased opinion. Here, however, I am of opinion, that the testimony of Mrs. Cooper, as to the declarations made by John Futter, the first husband of Mrs. Edwards, that James Futter was to have the estate, was admissible to show his relationship to the family, and lets in the account given of that person by Chapman, one of the other witnesses. Considering, therefore, that this evidence was admissible, and coupling it with the other testimony in the cause, I am of opinion that the plaintiff's pedigree was satisfactorily proved, and, consequently, that the jury were fully warranted in finding a verdict for him.

Mr. Justice BURROUGH. It does not appear, from the report, that any objection was taken to the competency of either of the witnesses tendered for the plaintiff. I was one of the counsel in the case of Vowles v. Young, which appears to me to be in point. There, one Thomas Roberts said, that he had heard Samuel Noble, the husband of Mary Noble, say that she was illegitimate; and it was held, that the declarations of Noble were admissible; and the Lord Chancellor (Erskine) said, 13 Ves. 144: "Upon questions of pedigree, inscriptions upon tomb-stones, and engravings upon rings are admitted." Id. 147. "The law resorts to hearsay of relations, upon the principle of interest in the person from whom the descent is to be made out; and it is not necessary that evidence of consanguinity should have the correctness required as to other facts. If a person says, another is his relation or next of kin, it is not necessary to state how the consanguinity exists. It is sufficient that he says A. is his relation, without stating the particular degree; which, perhaps, he could not tell, if asked. But it is evidence, from the interest of that person in knowing the connexions of the family." As, therefore, in this case, the declarations of John Futter, that James was to have the estate, were corroborated and confirmed by the testimony of Chapman, I am of opinion, that there is no ground to disturb this verdict.

Mr. Justice GASELEE. I was at first inclined to think that the objections raised by my Brother Wilde were well founded; but in Doe d.

Northey v. Harvey, 1 Ry. & Mood. 297, the declarations of the late husband of one of the family were held to be admissible in order to prove a pedigree, although he was not otherwise related to the family; Mr. Justice Littledale thinking, that, for the purpose for which the declarations by the husband were offered, he must be considered as one of the family. That case appears to me to be in point to show that no improper evidence was received at the trial of this cause, and that the Jury were warranted in finding a verdict for the plaintiff. This rule, therefore must be—

Discharged.

JOHNSON v. LAWSON et al.

(Court of Common Pleas, 1824. 2 Bing. 86.)

This cause was tried at the Kent Summer assizes, 1823, before Graham, B.

The question for the jury was, whether one Francis Lidgbird (whose claim the plaintiff supported) or Henry Wilding (whose claim the defendant supported) was heir at law to Henry Lidgbird, who died seised of certain lands in October, 1820, and was the son of John Lidgbird, formerly sheriff of Kent.

In consequence of a separation having taken place between John the sheriff and his wife, their son Henry was brought up, from about the age of nine months, with Miss Weller, afterwards Mrs. Hollinworth, till he went to college, and he spent his vacations at Mrs. Hollinworth's house: John Lidgbird, the sheriff, was on the point of marriage with Mrs. Hollinworth (which was prevented by his son Henry,) and after the death of John, Henry lived with Mrs. Hollinworth for twenty-three or twenty-four years, and she was the only person in his confidence; this was proved by Mrs. Lucretia Pakenham, niece of Mrs. Hollinworth, who had died before the trial.

On the part of the plaintiff it was proposed, among other evidence, to give evidence of declarations made by Mrs. Hollinworth, as to Francis Lidgbird being the heir of Henry, who died seised; but the learned judge refused to receive such evidence.

It was then proved by Mrs. Elizabeth Withers, that a Mrs. King had been Henry Lidgbird's housekeeper for twenty-four years, and it was proposed to give evidence of declarations by Mrs. King, who was no longer living, as to Francis Lidgbird being the heir to Henry, but this was objected to by defendant's counsel: and Mr. Baron Graham rejected it, saying "that it seemed to him to be carrying the principle of hearsay evidence too far; De Grey, C. J., having laid it down, that it must be confined to persons who are members of the family."

Another witness, Mrs. Sophia Ridley, was also called, to give similar proof of declarations by Mrs. Hollinworth and Mrs. King, but was also rejected.

A verdict having been found for the defendants, Peake, Serjt., obtained a rule nisi for a new trial, against which Taddy, Serjt., was to have shown cause; but the court called on Peake to support his rule.[12]

BEST, C. J. This is a question of great importance, and if I felt any doubt I should desire another argument; but, as it is dangerous to express doubt where none is entertained, I shall at once pronounce my opinion. As a general rule, hearsay is not admissible evidence, but to this general rule pedigree-causes form an exception, from the very nature of the case. Facts must be spoken of which took place many years before the trial, and of these, traditional evidence is often, the only evidence which can be obtained,[13] but evidence of that kind must be subject to limitation, otherwise it would be a source of great uncertainty, and the limitation hitherto pursued, namely, the confining such evidence to the declarations of relations of the family affords a rule at once certain and intelligible. If the admissibility of such evidence were not so restrained, we should, on every occasion, before the testimony could be admitted, have to enter upon a long inquiry as to the degree of intimacy or confidence that subsisted between the party and the deceased declarant. In Beer v. Ward, Lord Chief Justice Abbott seems to have doubted at first, influenced perhaps by a recollection of the dicta in the Chancery cases, yet he afterwards acceded to the authority of the decisions which have confined the declarations admissible to those of

[12] Statement abridged and opinion of Park, J., omitted.

[13] Bartol, J., in Craufurd v. Blackburn, 17 Md. 49, 77 Am. Dec. 323 (1861): "By the ordinary rules of evidence, the declarations of persons, not parties to the cause, are excluded on the ground that they are mere hearsay. But it is a well recognized exception to this rule that, in matters of pedigree the declarations of deceased members of the family are admitted. Cope's Adm'r v. Pearce, 7 Gill, 247 [1848]; [Charlotte Hall School v. Greenwell] 4 G. & J. 416 [1832]. 'The term "pedigree" embraces not only descent and relationship, but also the facts of birth, marriage and death, and the time when these events happen.' 7 Gill, 264. This exception to the general rule had its origin in the necessity of the case. 'From the necessity of the thing,' said Lord Mansfield, [Berkeley Peerage Case] 4 Camp. 415 [1811], 'the hearsay of the family as to marriage, births, and the like, are admitted;' this language is cited in 7 Gill, 264. But it is objected, that although such declarations to prove pedigree are ordinarily admissible, yet they ought to have been excluded in this case, because the necessity did not exist, there being a party to the alleged marriage, living and competent to testify, and because it was inadmissible upon the principle, that the best evidence of which the nature of the thing is capable must be given. This objection arises from a misapprehension of the rule. Such declarations are not held to be admissible or inadmissible according to the necessity of the particular case; but they are admitted as primary evidence on such subjects by the established rule of law, which, though said to have had its origin in necessity, is universal in its application. Nor do such declarations stand upon the footing of secondary evidence, to be excluded where a witness can be had who speaks upon the subject from his own knowledge. 'Hearsay evidence is, of course, inadmissible, if the person making the declaration is alive, and can be called. But the declarations of a deceased mother, as to the time of the birth of her son, are admissible, though the father is living and not called.' Hubback on the Evidence of Succession, 660, (48 Law Lib.)"

And so in Jarchow v. Grosse, 257 Ill. 36, 100 N. E. 290, Ann. Cas. 1914A, 820 (1912).

deceased relations: it is true, he admitted the declarations of the servants, but this was subject to further discussion, and to avoid the possibility of incurring further expense. If we look into the cases, we shall find that the rule has always been confined to the declarations of kindred. In Goodright d. Stephens v. Moss [Cowper, 592], no one can read the judgment of Lord Mansfield, and say that the admissibility of such declarations is to depend upon the degree of intimacy in the party making them. Lord Mansfield says, "An entry in a father's family bible, an inscription on a tombstone, are good evidence. So the declarations of parents in their lifetime." Aston, J., says, "rejecting the general declarations of the father and mother was wrong." It is clear, that neither of these judges supposed the practice to extend beyond admitting the declarations of members of the family. As to the two cases in Chancery, the question in the first was, whether the declarations of a man who had married into a family were admissible. Now, such a question would never have been discussed if there had been any such practice as receiving the declarations of ordinary acquaintances; and though the expressions of the chancellor may seem to go beyond, he decided only on the ground that the declarations of a husband might be received. The evidence there, indeed, might perhaps have been rejected on other grounds, inasmuch as the witness had a strong bias in favour of the legitimacy he was called on to establish. In the second case Lord Eldon only says, "I accede to the doctrine of Lord Mansfield as it has been stated from Cowper, but it must be understood as it has been practised and acted upon."

What then has been the practice? to limit the admissibility to declarations of members of the family. It is true, a different opinion was expressed by a most learned judge in Rex v. Eriswell [3 Term R. 719]. But that judge must have been misled into the opinion by the manuscript case which has been cited; that case, however, must be untenable at all events, because, though declarations of members of the family may be received, it is impossible to say, that in any shape declarations of acquaintances, as to declarations of members of the family can ever be admissible. But it does not appear that any objection was made at the time; and that circumstance at once disposes of the authority of the case. As to the Nisi Pruis case at Lancaster, I wish such cases were never cited. It is not right to repeat opinions hastily formed and delivered in the hurry of trial, and the practice of referring to them has occasioned all the confusion that the enemies of our law object to. That decision probably conduced to mislead Mr. Justice Buller, for in his own statement of the case of the Duke of Athol v. Lord Ashburnham, Bull N. P. 295, he speaks only of the declarations of a brother or other near relation: it is not wonderful that Lord Kenyon should speak with some hesitation on the point, after Mr. Justice Buller had spoken so decidedly. The practice of receiving declarations in evidence is an exception from our general rules; it has been carried as far as it can with safety, and we must not extend it farther.

BURROUGH, J. I was engaged in the case of Vowles v. Young (13 Ves. 146) and we objected to the declarations of the husband, that they were made after the death of his wife, when he was no longer connected with her family; but they were received, on the ground that his knowledge must have been acquired while he was yet connected. This exception from the general rule, that hearsay shall not be admitted, must be construed strictly, and the natural limits of it are the declarations of members of the family. If we go beyond, where are we to stop? Is the declaration of a groom to be admitted? of a steward? of a chambermaid? of a nurse? may it be admitted if made a week after they have joined the family? and if not, at what time after? We should have to try in every case the life and habits of the party who made the declaration, and on account of this uncertainty such evidence must be excluded. The argument for the defendant rests on here and there a loose expression from a judge, and on the circumstance that there is no case in which such evidence is reported to have been excluded; but before we can admit it, we must be referred to some case to warrant its admission. We have heard of no such case, and therefore the present rule must be

Discharged.

INHABITANTS OF NORTH BROOKFIELD v. INHABITANTS OF WARREN.

(Supreme Judicial Court of Massachusetts, 1860. 16 Gray, 171.)

Action of contract for the support of William M. Chickering, a pauper.

At the trial in the superior court before Lord, J., the plaintiffs introduced evidence tending to show that Harvey Chickering, the pauper's father, was the legitimate son of Nathaniel Chickering and Ruth Richardson, (who, as was agreed, were married in Connecticut on the 22d of February, 1804,) and that Nathaniel gained a settlement in the defendant town under the St. of 1793.

The defendants, to prove that Harvey was born before the marriage of his parents, and was therefore illegitimate, called a witness who testified that, in the fall of 1803, in company with her aunt, Mrs. Blair, she made a visit to a relation who lived near the house in which Ruth Richardson was then living, and while there saw Harvey Chickering, then an infant two or three weeks old; that she remembered the date from the fact that Mrs. Blair's only daughter, named Susanna, was with them and was about a year old, and that this daughter was born in September, 1802, and died on the 12th of December, 1803; and that she had been kept in remembrance of the date of Susanna's death by constant intercourse with her family since and by frequent reference to the family record. The Blair family was not related to the Richardson or the Chickering family.

The defendants then offered, as evidence that Susanna died on the 12th of December, 1803, a large ornamented sheet of parchment, bearing the inscription "family record," on which were entered the dates of the birth and marriage of Susanna Blair's parents, the dates of the birth and death of Susanna, and of the birth, marriage and death of two sons born subsequently of the same parents. One of these sons, forty-seven years old, testified that, ever since his earliest recollection, his father had kept this parchment framed and hanging in a conspicuous place in his dwelling-house, and had handed it down to him; that during all this time the same entries had been on it; and that his father and mother were dead. And there was evidence that the entries of the births and deaths upon the parchment were made, all at one time, by direction of Susanna's father, more than forty years before the trial; that the record of the marriages of his children had been added, from time to time, as they occurred; and that he and his son kept and exhibited the parchment as a true statement of the events recorded on on it.

The defendants also offered to prove that an ancient gravestone in the burial-ground of the Blair family bore the name Susanna, and had inscribed on it December 12, 1803, as the date of her death.

The evidence offered by the defendants was excluded; the jury returned a verdict for the plaintiffs, and the defendants alleged exceptions.

BIGELOW, C. J. At the trial of this case, the date of the birth of the father of the pauper, Harvey Chickering, became a material fact, because the legal settlement in controversy depended on the question whether the father was born prior to the marriage of his parents, which took place on the 22d of February 1804. To prove the illegitimacy of Harvey Chickering, the defendants introduced a witness who testified that she saw him, then an infant, during the life time of Susanna E. Blair. It then became important to establish the date of Susanna's death, because if she died before the date of the marriage of the parents of Harvey Chickering, it would follow that he must have been born out of wedlock.

It was a case therefore where the proof of a fact material to the issue depended on the existence of another collateral fact. The factum probandum might well be inferred from satisfactory evidence that an event, otherwise immaterial, took place at a particular time. Such testimony is not only competent, but without it it would often be impossible to prove essential facts in a court of justice. Direct and positive proof cannot always be obtained, and in matters especially which relate to remote periods it is necessary to resort to circumstantial evidence and presumption to supply the place of that testimony which is lost by the lapse of time and the imperfection of human memory. Such evidence in the strict legal sense is not collateral. It raises, it is true, a new and distinct inquiry; but if it affords a reasonable presumption or inference as to the principal fact or matter in issue, it is

relevant and material and does not tend to distract or mislead the jury from the real point in controversy.

The objection more strenuously urged to the evidence offered at the trial is to the nature and quality of the proof by which the defendants sought to establish the date of Susanna Blair's death. It is not denied that this evidence would have been competent, if it had been introduced to prove a fact directly in issue, such, for instance, as the date of the pauper's birth; but it is contended that it was inadmissible to establish a fact collateral in its nature, from which the main fact in issue was to be deduced by inference. But we know of no such distinction in the rules of evidence. The competency of proof cannot be made to depend on the inference or conclusion which is sought to be drawn from it. If it is competent to prove a particular fact in controversy when it is directly in issue, it is equally competent when the same fact is to be established in order to form the ground of an inference or presumption from which the material subject of inquiry can be deduced. The true test is, to inquire whether the evidence is admissible to prove the fact which it is offered to establish, and not whether such fact is directly or only collaterally in issue.

In the present case, the defendants sought to prove the date of the death of Susanna Blair by a document or chart containing a record of the births, marriages, and deaths kept in her family for a long series of years, and handed down by her deceased parent to his sons as containing a true statement of the events therein recorded; and also by proof of the inscription on the tombstone erected to her memory in the family burial-ground. Such evidence is deemed to be competent and satisfactory proof of family descent, and also of the dates of the leading events in family history, such as births, marriages and deaths, especially when they relate to ancient occurrences. They are contemporaneous with the events which they record; they are made by parties who are cognizant of the facts, and who would have no interest or motive in misstating them; and they are in their nature public, openly exhibited, and well known to the family, and therefore may be presumed to possess that authenticity which is derived from the tacit and common assent of those interested in the facts which they record.

Some of the authorities seem to limit the competency of this species of proof to cases where the main subject of inquiry relates to pedigree, and where the incidents of birth, marriage and death, and the times when these events happened, are directly put in issue. But upon principle we can see no reason for such a limitation. If this evidence is admissible to prove such facts at all, it is equally so in all cases whenever they become legitimate subjects of judicial inquiry and investigation.

We are therefore of opinion that the rejection of the proof offered at the trial to establish the date of the death of a person who deceased more than fifty years previously was erroneous. 1 Greenl. Ev. §§ 103,

104; Berkeley Peerage Case, 4 Campb. 401; Monkton v. Attorney General, 2 Russ. & Myl. 162; Jackson v. Cooley, 8 Johns. (N. Y.) 131.

Exceptions sustained.[14]

PLANT et al. v. TAYLOR et al.

(Court of the Exchequer, 1861. 7 Hurl. & N. 211.)

CHANNELL, B.[15] This was an action of ejectment, tried before my Brother Byles, at the Cheshire Spring Assizes, of last year. It was brought to recover certain premises at Cranage, in the county of Chester. Both the plaintiffs and defendants claimed under a settlement made by one Richard Taylor (whom we will call "the settlor"), the plaintiffs claiming as tenants in common in fee, by virtue of an appointment made by one Elizabeth Taylor, entitled in default of lawful children of Thomas Taylor, the elder, the son and heir of the settlor: the real defendants (who were admitted to defend as landlords) claiming as tenants in common in fee, either as entitled by an appointment made by him under the settlement, or as his heirs in default of appointment; and likewise claiming the benefit of an alleged outstanding term, created long anterior to the settlement, and to the history of which it is necessary to draw attention. * * *

Supposing the defendants to be the lawful children of Thomas Taylor, the elder, it is admitted that the plaintiffs would not be entitled, and that the defendants would not require the benefit of this term. On the other hand, supposing the defendants not to be the lawful children of Thomas Taylor, the elder, they would not be entitled, either under the appointment made by him or under the settlement in default of appointment; for the settlement only gave the power and made the limitation expressly in favour of lawful children. At the trial it was denied that they were his lawful children, by reason that

[14] Holmes, J., in Com. v. Stevenson, 142 Mass. 466, 8 N. E. 341 (1886): "We see no sufficient reason why a person should not be allowed to testify to the date of his birth, if that question is fairly open on the exceptions. The certificate which is made evidence by the Pub. St. c. 32, § 11, is hearsay, and no more likely to be accurate than the sworn statement of the party concerned, based, as it must be, on family tradition, and fortified by his knowledge of himself. Hill v. Eldridge, 126 Mass. 234 [1879]; Cheever v. Congdon, 34 Mich. 296 [1876]; State v. Cain, 9 W. Va. 559, 570 [1876]."

And so in State v. Marshall, 137 Mo. 463, 36 S. W. 619, 39 S. W. 63 (1897).

The general proposition, that the same sort of evidence may be used to prove a given fact without regard to whether the latter is ultimate or evidential, is illustrated by the rule that reputation is admissible to establish a public boundary, though merely for the purpose of locating a private boundary, Thomas v. Jenkins, 6 Adol. & Ellis, 525 (1837), ante, p. 110. But in England it seems to be well settled that the present exception does not admit even family hearsay to prove the mere fact of birth or death, or the time or place of such events, except as involved in a question of pedigree, Rex v. Erith, 8 East, 539 (1807); Haines v. Guthrie, 13 Q. B. D. 818 (1884), excluding a deceased parent's statement of age on a plea of infancy.

[15] Statement and part of opinion omitted.

previous to his marriage with their mother he had been married to another woman, one Anne Wickstead, who, it was admitted, lived until 1844.

At the trial the plaintiffs proved their pedigree as heirs of Elizabeth Taylor, who would be entitled in default of lawful children of Thomas, and their title was not disputed in such event. On the other hand, on the part of the defendants, it was proposed to prove declarations [16] by Thomas Taylor to disprove his first marriage, which were objected to and rejected. The learned Judge was not asked to put the question of legitimacy to the jury, nor to determine it as a question on which the admissibility of the evidence might depend. * * *

It becomes necessary, then, to dispose of the cross rule for a new trial.

In the course of the argument we expressed a strong opinion that the evidence rejected by the learned Judge was rightly rejected. As we have stated more than once, the sole question of fact in dispute at the trial was the legitimacy of the defendant Taylor and the female defendants. This depended on the validity of the marriage of the persons who were de facto their father and mother.

The fact of the marriage of the father, Thomas Taylor, with Anne Wickstead before his marriage with the mother of the defendant Taylor, and that Anne Wickstead was at that time living, was proved.

The defendant, Taylor, was called as a witness to prove declarations by his father respecting his first marriage. Before a declaration can be admitted in evidence the relationship of the declarant de jure, by blood or marriage, must be established by some proof, independent of the declaration itself. See the cases cited in Taylor on Evidence, vol. 1, p. 526, note 4.

Slight evidence, no doubt, would be sufficient. Here there was no proof of any relationship de jure between the declarant and the defendant. The proof was the contrary.

Perhaps the learned Judge was right in rejecting the evidence, on the ground that any declaration made by Thomas Taylor, the father, on the subject, though not made post litem motam, or after dispute as regards the property had actually arisen, would be a declaration by a person whose mind could not be free from bias. It was manifestly in many ways directly for his interest to make a declaration tending to disavow his first marriage, or having a tendency to show that it was an illegal marriage, and consequently did not invalidate the second.

[16] The nature of the excluded statements is indicated by the following remark by Pollock, C. B., during the course of the argument: "Declarations of a deceased person are only admissible for the purpose of reputation, not of proving facts. It may be proved by the declaration of a parent that one of his children was older than another, but his declaration is not admissible for the purpose of proving that his marriage with a second wife, in the lifetime of the first, was valid, because the first wife was married at the time she married him. The declarations must be made respecting facts of a domestic nature, not such as are cognizable in a court of criminal justice."

No case has been cited in which the declaration of a deceased person, obviously for his interest, has ever been received.

We are of opinion that the rule to enter a verdict for the plaintiffs must be made absolute, and the rule for a new trial must be discharged.

Rules accordingly.[17]

GEE v. WARD.

(Court of Queen's Bench, 1857. 7 El. & Bl. 509.)

LORD CAMPBELL, C. J.,[18] in this Term (April 27th), delivered judgment.

This was an action of ejectment tried before my brother Willes at the Liverpool Assizes. Each party at the trial sought to make out that he was the heir at law of one Jane Gee, a lunatic, who died in 1854. The plaintiff gave prima facie evidence of his pedigree, according to which one John Gee appeared to have been the son of Nathaniel Gee. According to the defendant's case, John Gee was the son of Newman Gee: and in support of his case he offered in evidence the deposition of Martha Shallcross, a deceased member of the family, made by her in a matter of lunacy in 1806. This was objected to as inadmissible, on the ground of its having been made post litem motam. It appeared that a commission of lunacy had been awarded against Jane Gee in 1806, under which she had been found a lunatic; and, on the petition of some of her relatives, it had been referred to the Master to inquire who was or were a proper person or proper persons to be appointed committee or committees of the lunatic, and also who was the heir at law and next of kin of the lunatic, to whom the order of reference directed notice to be given. The relations who had petitioned exhibited a state of facts, and supported that state of facts by certain depositions, and, amongst others, that of Martha Shallcross. We must assume, on the report of the learned Judge, that "no dispute appeared to have existed upon the subject before the death of Jane Gee in 1854." The deposition having been received in evidence, and the verdict having passed for the defendant, a rule for a new trial was obtained, which has been argued before us, and upon which we have now to give our opinion.

The question is, whether the deposition received at the trial was admissible as the declaration of a deceased member of the family, in a case of pedigree. After great deliberation, we think that this deposition was properly received in evidence, according to the rule by which, in cases of pedigree, an exception is made to the common doctrine of

[17] Compare the Berkley Peerage Case, 4 Camp. 401 (1811), where the declarations of the reputed father were admitted to prove legitimacy.

See, also, Goodright v. Moss, Cowper, 591 (1777), where the statement of the father and mother were admitted to disprove a claim of legitimacy.

[18] Statement omitted.

hearsay not being evidence, and the declarations of deceased members of the family, made ante litem motam, are receivable.

The conditions under which such declarations are said to be receivable are, that they have been made by deceased members of the family, who, as such, are supposed to have had peculiar means of knowledge, and that they have been made before the arising of a dispute or controversy on the subject-matter in question. Such declarations are not excluded, if made ante litem motam, even though made by a person expecting that the interest he is speaking about will ultimately vest in himself. "If no controversy existed at the time, the principle acted on is, that such declarations are admissible, though subject to observation;" per Abbott, C. J., in Doe dem. Tilman v. Tarver, Ry. & M. 141; nor is evidence of this nature excluded, if made ante litem motam, by its being made for the purpose of proof, or of preventing future disputes, as in the common cases of entries made by fathers of families. Another rule on the subject is that, to exclude testimony of this nature, the lis or controversy must be on the very point in question; and declarations are not excluded, by reason of lis mota, if made on a collateral point to that on which the lis exists. This distinction was recognised in Freeman v. Phillipps, 4 M. & S. 497 (E. C. L. R. vol. 30), where Bayley, J., says that, if it were necessary to go into the question of lis mota, he thinks the distinction correct, that when the declarations are on the very point they are not evidence, but when the point in controversy is foreign to that which was before controverted, there never has been a lis (within the rule), and, consequently, the objection does not apply.

It has, however, been suggested that depositions taken in suits, from their very nature and purpose, and from the mode of taking them, are exceptions to the general rule, and are not admissible as declarations of deceased members of families in matters of pedigree; and the expressions of some of the Judges in the Berkeley Peerage Case are cited in proof of such an exception. We think, however, that these expressions cannot be taken as authority except with reference to the case, then before the House, of a lis mota on the very point. In that case it had been thought proper, in the assumed state of facts in the questions proposed to the Judges, to state distinctly that the fact in question was disputed by C. D. in the former suit. Therefore the case cannot be considered as deciding that depositions are in no case to be received. All the learned Judges who concurred in thinking that the evidence ought to be rejected, point out the lis mota, dispute or controversy, as excluding the evidence. It is true that Mr. Justice Lawrence, after showing the evidence to be excluded by lis mota, proceeds to say that he is likewise of opinion that "no deposition can be received in evidence as a declaration, to prove a fact which it was the object of that deposition to establish." If this means a disputed fact,

directly in issue between the parties, it is clearly correct; but if it was meant to apply to any fact collateral to the fact in dispute, or as to which there was no dispute, it is too large a rule of exclusion, and inconsistent with later authorities. The learned Judge points out that, besides the general danger arising from there being a lis or dispute on the very point, there was the additional danger of the deposition being prepared with the object of proving the particular fact in dispute; but, in the case before the House, the particular fact had been in dispute in the prior proceeding. The expressions of the learned Judge, and certainly the decision of the House, therefore ought not to be taken as establishing the general doctrine that no deposition or answer on oath is admissible as the declaration of a deceased member of the family.

In the Banbury Claim of Peerage, 2 Sel. N. P. 755 (10th Ed.), a bill in Chancery and the depositions were rejected; and it has been supposed that the Judges in that case intended to say that depositions in a suit in Chancery could not be received as declarations of the deceased members of a family under the rule in question. Besides the remark, however, that the declarations in the prior suit were in that case probably subject to objection, on the ground of the very point having been in dispute in the earlier suit, it will be found on examination that the Judges say no more than that the bill and depositions in question were not evidence either of the facts or as declarations in matters of pedigree, confining themselves very much to the terms of the question put to them; and they proceed to say that the statements in the bill and depositions were no evidence that the deponents were relations of the family. Some of the depositions in that case were mentioned as not being the depositions of members of the family; whilst it is stated that some of the deponents stated themselves to be members of the family; and, there not being the necessary evidence aliunde of their being members of the family, the Judges were perfectly right in saying that the depositions were not evidence as declarations in a matter of pedigree: and they proceed to say, in answer to a subsequent part of the same question, that the statements in the depositions are not proof of the deponents being relations of the family. The answer appears in effect to be, that neither the bill nor the depositions in question were evidence; and that the depositions, purporting to be made by members of the family, were not made evidence by the deponents stating themselves to be members of the family without proof of that fact aliunde. Accordingly, this case has always been cited as showing the necessity of proof of the relationship aliunde to let in declarations as the declarations of deceased members of the family.

This subject is ably treated by Mr. Phillipps in his book upon Evidence (vol. 1, p. 206, 10th Ed., by Phillipps and Arnold): and, after examining his authorities, we concur in the rule which he there lays

down. According to this rule the evidence in the present case was admissible; and the verdict for the defendant founded upon it ought not to be disturbed.

Rule discharged.

CHAMPION et al. v. McCARTHY.

(Supreme Court of Illinois, 1907. 228 Ill. 87, 81 N. E. 808, 11 L. R. A. [N. S.] 1052, 10 Ann. Cas. 517.)

FARMER, J.[19] * * * The controversy is as to whether the complainant, Henry McCarthy, is an heir of John Earl, deceased, and entitled to an interest in the lands of which he died seised. Complainant claimed to be an illegitimate son of Susan Champion, who was the mother of John Earl. It is admitted that Earl was an illegitimate son of said Susan Champion, whose maiden name was Ayres. She originally lived in Elizabeth township, near Brockville, Ontario, Canada. There she was married to Elias Champion in 1830. John Earl was born to Susan Champion (then Susan Ayres) in 1822, and after her marriage to Elias Champion he became a member of his mother's family and lived with her up to the time of her death, in 1893, usually being known by the name of John Champion. In 1849 Elias and Susan Champion, and several children born to them after their marriage, and John Earl, moved to Du Page county, Ill., where they resided about one year, and then moved to Ogle county, where they lived until the parents died. Susan Champion died in 1893, leaving a will, in and by which she devised to John Earl the real estate in controversy. Complainant claimed to be an illegitimate son of said Susan Champion, born to her in Canada in 1826, before her marriage to Elias Champion. This would make him a half-brother to John Earl, and, as such, an heir[20] entitled to a one-fourth interest in the real estate of which John Earl died seised. * * *

William Knott testified, for complainant, that John Earl boarded at his house after his mother's death, and that while boarding at his house Earl told witness he had a brother by the name of Dan Champion, who lived out West, a sister named Lydia Cheshire, and a brother in Iowa by the name of Henry McCarthy; that his mother had told him Henry McCarthy was his brother, and he wanted him to have his property.

Eliza Vance testified that John Cheshire, the husband of Lydia Cheshire, told her (the witness) shortly after the death of his mother-in-law, Susan Champion, that Henry McCarthy was his wife's brother. John Cheshire died before this suit was instituted.

Delos W. Baxter testified he was a practicing lawyer and had practiced about 25 years. He had held the offices of state's attorney and state Senator. He had known Susan Champion from his boyhood, and also

[19] Part of opinion omitted.

[20] Under the provisions of section 2, c. 39, Rev. St. Ill. 1905.

the members of her family, including John Earl. He had been employed by Susan Champion in a lawsuit in the early part of his professional career. He testified that in 1886 Susan Champion came to his office with William Stocking, who was the conservator of John Earl, to get him to draw her will; that in transacting the business she talked of her family, and said Henry McCarthy, John Earl, Lydia Cheshire, and Daniel Champion were her children, and also mentioned a child or children of a deceased daughter. Some time after this talk, the witness drew the will, and went with Mr. Stocking to the home of Mrs. Champion to have it executed. On this occasion the witness said Mrs. Champion again told him Henry McCarthy was her son, but that it was not generally known in the neighborhood, and for that reason she did not want his name mentioned in the will. She also said that McCarthy, Mrs. Cheshire, and Daniel Champion were all well provided for, and that as John was not bright he needed what she had. The witness further testified that, after the death of Mrs. Champion, John Cheshire and Daniel Champion (who died before this suit was begun) told him that Henry McCarthy was a half-brother of John Earl, and would share in the distribution of his estate. The proof also shows some degree of intimacy between Henry McCarthy and Susan Champion and her family. He was a visitor at the home of Susan Champion a number of times while she was living, and at the home of Lydia Cheshire after the death of Susan Champion.

This is the substance, we believe, of the most material testimony relied upon by complainant, Henry McCarthy, which in our opinion was competent. Appellants insist that this testimony was incompetent. It is not denied that hearsay evidence, such as declarations of deceased parents and members of the family, may be proven to establish pedigree; but it is contended that the rule permitting such proof is limited to cases of legitimate relationship, and cannot be heard to establish illegitimacy. While this position is apparently sustained in Flora v. Anderson (C. C.) 75 Fed. 217, cited and relied on by appellants, that case is not in harmony with the great weight of authority, as well as the better reason. That case followed the English case of Crispin v. Doglioni, 3 Swab. & Tr. 44, which appears to have been based upon the common-law rule that an illegitimate is filius nullius. This common-law rule has been abrogated in this and other states by statute (Miller v. Pennington, 218 Ill. 220, 75 N. E. 919, 1 L. R. A. [N. S.] 773; Bales v. Elder, 118 Ill. 436, 11 N. E. 421); and, where such statutes have been enacted, Crispin v. Doglioni cannot be regarded as authority to be followed. The declarations sought to be proved in that case were those of a deceased brother of the intestate putative father, and the court held that the putative father had no relationship with a bastard son, and his declarations, or those of members of his family, were therefore incompetent.

As to whether declarations of the supposed father and members of his family are competent, there is some conflict in the authorities. In

Elliott on Evidence (volume 1, § 376), it is said: "There is a conflict as to whether the declarations as to a son's illegitimacy, by a member of the father's family, should be rejected. The better rule is not to exclude such testimony in a proper case. There seems to be no dissent whatever, however, as to the admission of the declarations, in a proper case, as to illegitimacy, made by a member of the mother's family. There is, perhaps, a technical reason for excluding the declarations as to illegitimacy where they show that the person is a bastard, and not, therefore, a member of the father's family; but this would hardly apply in case of the mother, and in most of the states there are statutes which change the common-law status of bastards." In Wigmore on Evidence (volume 2, § 1492), the author says it has been held in England that, where the relationship sought to be established is that of an illegitimate child, the declarations of the father's relations are not competent, citing Crispin v. Doglioni. The author adds: "The principle of the ruling has been disapproved in England, and ought not to be followed in this country. It seems never to have been doubted that the declarations of the parents themselves, or the repute in the household where the child lived, as to a child's legitimacy or illegitimacy, are receivable, although it is obvious, upon the false theory of Crispin v. Doglioni, the father's declarations of illegitimacy would be inadmissible."

The case of Crispin v. Doglioni was approved in Northrop v. Hale, 76 Me. 306, 49 Am. Rep. 615; the approval being upon the ground that the ruling was correct, where the bastard occupied the position the common law placed him in. In the Northrop Case, the claimant to an estate sought to establish that he was the illegitimate son of the intestate by the declarations of a deceased sister of the intestate. The court, after citing and reviewing authorities, English and American, say: "It would seem, therefore, that the declarations of the intestate would be admissible to show that the appellant was her illegitimate son; and, if the mother's declarations would be, why would not be those of the mother's sister, in whose family the child was born and brought up and in which the mother lived at the time and for years after?"

The rule that declarations of the supposed parent and deceased members of his or her family may be proven to establish the parentage, where the relationship is illegitimate, is supported in Craufurd v. Blackburn, 17 Md. 49, 77 Am. Dec. 323; Blackburn v. Crawford, 3 Wall. 175, 18 L. Ed. 186; Watson v. Richardson, 110 Iowa, 678, 80 N. W. 407; and Alston v. Alston, 114 Iowa, 29, 86 N. W. 55. In all of these cases it is held that the declarations of the putative father may be proven. Unquestionably, by the great weight of authority, the declarations of the mother and the members of her family are competent to prove the relation of parent and child, without regard to whether the claim is that the child was legitimate or illegitimate. It is, of course, to be understood that this rule is applicable only in cases where the child

was born before marriage of the mother, or in cases where she had never been married. Besides the declarations of Susan Champion, the complainant proved the declarations of John Earl and Daniel Champion that Henry McCarthy was their brother, and of John Cheshire, husband of Lydia Cheshire, oldest daughter of Susan Champion, that said Henry McCarthy was the brother of his wife and John Earl. We think these declarations of these parties were all competent. John Cheshire's relationship to the family, as husband of Susan Champion's daughter, was sufficient to render his declarations admissible. Greenwood v. Spiller, 2 Scam. 502; Bradner on Evidence, p. 427.[21] * * *

Counsel for Henry McCarthy insist that the testimony of Daniel McCarthy was competent, and should have been considered by the master. He testified that he and Henry McCarthy were sons of the same father, but not of the same mother, and that he had heard his father say that Susan Champion was Henry McCarthy's mother. Daniel said he was 14 or 15 years old when he heard this declaration made, and it is apparent this was several years after Susan Champion had been married to Elias Champion. It does not clearly appear from the abstract that Daniel McCarthy's father was dead at the time he testified; but, if he was, we think his declarations were incompetent. Such declarations to establish pedigree must be of members of the family and not of third persons. Daniel McCarthy's father and Susan Champion were in no way related, were never members of the same family, and while his declarations, if dead, might be competent to prove that he was the father of Henry, if that were the question at issue, they were not competent to prove that Susan Champion was the mother. * * *

Affirmed.

AALHOLM et al. v. PEOPLE.

(Court of Appeals of New York, 1914. 211 N. Y. 406, 105 N. E. 647, L. R. A. 1915D, 215, Ann. Cas. 1915C, 1039.)

WERNER, J.[22] The state has in its possession money and property aggregating over $50,000 in amount and value, which it received from the estate of one William A. Kenneally, who died testate in the city of Brooklyn in 1868. No person entitled to this property could be found, and it was turned over to the state to await the appearance of claimants. Many persons, to the number of 100 or more, have at different times presented their claims based on their alleged relationship to the testator, but none was successful until the present petitioner appeared and satisfied the referee of the validity of his claim. * * *

[21] For same result under a similar statute, see Northrop v. Hale, 76 Me. 306, 49 Am. Rep. 615 (1884).

[22] Part of opinion omitted.

The testator, William A. Kenneally, was the son of a sergeant in the British army named John Kenneally, by a wife whose maiden name was Mary Finn. The petitioner says he is also a son of the same Sergeant John, but by another wife. If this claim is well founded, it follows that he is a half-brother of the testator. The only evidence of the petitioner's relationship to Sergeant John, and through him to the testator, consists of declarations made to the petitioner by his mother, who has been dead many years; and by the petitioner's half-sister, who is also dead, to her children who are the petitioner's nephews and nieces. The testimony as to these declarations is given by the petitioner and these nephews and nieces. * * *

Declarations in regard to pedigree, although hearsay, are admitted on the principle that they are the natural effusions of persons who must know the truth and who speak on occasions when their minds stand in an even position without any temptation to exceed or fall short of the truth. Whitelock v. Baker, 13 Vesey, 514; Berkeley Peerage Case, 4 Camp. 401. The admissibility of such declarations is subject to three conditions: (1) The declarant must be deceased. (2) They must have been made ante litem motam, i. e., at the time when there was no motive to distort the truth. (3) The declarant must be related either by blood or affinity to the family concerning which he speaks.

The declarations which we are considering concededly conform to the first two of these conditions. The question here is whether they come within the third. The learned counsel for the respondent contends, and the Appellate Division has held, that the declarations of the petitioner's mother, Margaret Kearns Hardiman, as to her marriage to Sergeant John Kenneally, are not alone sufficient to bring them within that part of the rule requiring the declarations to be made by a member of the family concerning which they are advanced. More concretely stated, the decision is that such declarations are not competent, unless there is some proof dehors the declarations themselves that the declarant was related to the family which the declarations are intended to affect. Counsel for the appellant insists, on the other hand, that these declarations, if taken as true, are shown to have been made by a member of the family of Sergeant John; and the contention in this regard seems to be that the declarations themselves supply the necessary corroborative testimony.

In Blackburn v. Crawford, 3 Wall. 175, 187, 18 L. Ed. 186, it was sought to prove that certain persons were nephews and nieces of one Dr. Crawford, whose estate they claimed. They were children of a woman who, it was claimed, had married a brother of Dr. Crawford. This marriage was disputed. The declarations of a sister of the mother of the claimants were received in evidence to the effect that the mother had told her that she had married a brother of Dr. Crawford. These declarations were objected to on the ground that the declarant was not shown to be related to the family of Dr. Crawford.

In sustaining this objection the United States Supreme Court, speaking by Mr. Justice Swayne, said:

"It is well settled that, before the declarations can be admitted, the relationship of the declarant to the family must be established by other testimony. Here the question related to the family of Dr. Crawford. The defendants in error claimed to belong to the family, and to be his nephew and nieces. To prove this relationship, it was competent for them to give in evidence the declarations of any deceased member of that family. But the declarations of a person belonging to another family—such person claiming to be connected with that family only by the intermarriage of a member of each family—rest upon a different principle. A declaration from such a source of the marriage which constitutes the affinity of the declarant is not such evidence aliunde as the law requires." * * *

The qualification is one of growing importance. Without it a person may establish his relationship to any family he chooses by simply stating that he has heard from a member of his family a recitation of the facts establishing the desired connection. In this country, filled with densely crowded cities in which large fortunes are no longer rare, it will be wiser and safer to maintain this rule, circumscribed by this qualification, than to relax it even in cases that appear to be meritorious. It may prove a hardship now and then to require even slight evidence of the relationship of a decedent to the family of which he declares before his declarations will be received, but the consequences of the contrary rule would inevitably be much more serious.

With a single exception, the English cases sustain this qualification. Plant v. Taylor, 7 Hurl. & N. 211, 237; Hitchins v. Eardley, L. R. (2 P. & D.) 248; Smith v. Tebbitt, L. R. (1 P. & D.) 354; Atty. Gen. v. Kohler, 9 H. L. Cases, 660. It is also the rule in other states. Northrop v. Hale, 76 Me. 306, 49 Am. Rep. 615; Wise v. Wynn, 59 Miss. 588, 42 Am. Rep. 381; Anderson v. Smith, 2 Mackey (D. C.) 281; Lanier v. Hebard, 123 Ga. 633, 51 S. E. 632. The exception referred to is found in a case, cited by counsel for the appellant, which seems in theory to uphold the qualification above set forth, but in fact ignores it. In Monkton v. Atty. Gen., 2 Russell & Mylne, 147, a narrative written by one John Troutman, purporting to give a genealogical account of his family, was admitted in evidence as a declaration to prove the relationship of the claimants to the testator, Samuel Troutman. John Troutman, the declarant, who had died prior to the trial, was a member of the family of the claimants; but if we read the facts aright there was no other evidence connecting the two families. Lord Brougham there said:

"I agree entirely that in order to admit hearsay evidence in pedigree, you must, by evidence dehors the declarations, connect the person making them with the family. But I cannot go the length of holding that you must prove him to be connected with both branches of the family, touching which his declaration is tendered. That he is con-

nected with the family is sufficient; * * * to say that you cannot receive in evidence the declaration of A., who is proven to be a relation by blood of B., touching the relationship of B. with C., unless you have first connected him also by evidence dehors his declaration with C., is a proposition which has no warrant either in the principle upon which hearsay is let in, or in the decided cases."

This case is often cited and has been the subject of much comment, and it seems to have produced most of the confusion in which this subject of pedigree is involved. When that case came before the House of Lords upon an appeal in a subsequent proceeding (sub nom. Robson v. Atty. Gen., 10 Clark & Fin. 471), this question was not passed upon, and, in respect of the admissibility of the narrative of John Troutman, the court plainly stated that it desired to be "understood as not expressing any opinion as to the admissibility of it in point of law." In Wise v. Wynn, supra, the Monkton Case was commented upon as follows:

"The same doctrine (i. e., requiring proof dehors the declarations) was announced in Monkton v. Atty. Gen., 2 Russ. & Myl. 147, though it may perhaps be doubted whether the conclusion reached in that case does not offend against the doctrine."

Sitler v. Gehr, 105 Pa. 592, 51 Am. Rep. 207, and Estate of Hartman, 157 Cal. 206, 107 Pac. 105, 36 L. R. A. (N. S.) 530, 21 Ann. Cas. 1302, are in the same category with the Monkton Case. That case also appears to be vouched for by no less an authority than Prof. Wigmore in his well-known work on Evidence (volume 2, § 1491). If we read him aright, he expresses the view that the Monkton Case sets forth the true doctrine, and he argues, in effect, that when a declarant is shown to be connected with the family whose relationship with another family is in dispute, his declarations are competent without any independent evidence connecting the two. This statement of the rule, it seems to us, is too broad. When a declarant who claims relationship by consanguinity has been shown to be a member of one branch of a family, it is of course not necessary to prove him also related to the other branch in order to make his declarations competent; but, until there is some independent evidence connecting his family with the other family, the case is not brought within the qualification of the rule which is supported by the great weight of authority. Much more is this qualification to be observed in cases of asserted relationship by affinity, as in the case of the declarant upon whom the petitioner relies to prove his consanguinity to the testator. Proof of the marriage of the petitioner's mother to Sergeant John Kenneally is essential to establish the petitioner's relationship to the testator. There is no such proof in the case at bar, unless we accept the mother's unsupported declarations as evidence of the asserted relationship, and this we regard as inadmissible.

There are a few jurisdictions in which it has been held that the declarant need not be related, either by blood or marriage, to the

family of which he declares. It is of course the logical corollary of this unqualified rule that the declarations of any person who claims to know the facts are to be regarded as competent, whether he is or is not related to the family of whose pedigree he speaks. The reasoning in support of this relaxed rule is well illustrated in Carter v. Montgomery, 2 Tenn. Ch. 216, 227, 228, where the prevailing English and American rule is very clearly stated. * * *

We live in a state where the social conditions, no less than the rapid growth of our population and the constant increase of similar family names, are urgent reasons for preserving the rule in its integrity. Identity of names, religion, and nativity are too common to be alone sufficient evidence of family connections. Any extension of the hearsay rule in regard to pedigree, permitting declarations by persons not related by blood or marriage to the person from whom descent is the matter in issue, would open the door to frauds and uncertainties which should not be invited or encouraged.

The petitioner's case, whatever its merit, fails at the point of greatest importance, because it lacks the support of any evidence, aside from the declarations testified to by him and his nephews and nieces, which tends to establish his relationship to Sergeant John Kenneally, and through him to the testator William A. Kenneally. We agree therefore with the Appellate Division in the conclusion that the petitioner has not proved his right to the money and property of William A. Kenneally's estate, now in the custody of the state.[23] * * *

The order of the Appellate Division should be modified by directing a new hearing.

[23] And so in Vantine v. Butler, 240 Mo. 521, 144 S. W. 807, 39 L. R. A. (N. S.) 1177 (1912), and cases collected in note to principal case, L. R. A. 1915D, 215 (1914).

For the contrary view, see Estate of Hartman, 157 Cal. 206, 107 Pac. 105, 36 L. R. A. (N. S.) 530, 21 Ann. Cas. 1302 (1910), though there it appears that there was some other evidence of relationship. The same thing appears to be true in Sitler v. Gehr, 105 Pa. 577, 51 Am. Rep. 207 (1884). In Jarchow v. Grosse, 257 Ill. 36, 100 N. E. 290, Ann. Cas. 1914A, 820 (1912), it was held that, in case the declarant was the person whose estate was claimed, no other evidence of relationship was necessary; and so in Wise v. Wynn, 59 Miss. 588, 42 Am. Rep. 381 (1882), suggesting that in such cases the admissibility might be supported on the theory of an admission or a statement against interest.

IX. Spontaneous Statements [24]

(A) As to a Mental State [25]

TUBERVILLE v. SAVAGE.

(Court of King's Bench, 1670. 1 Mod. 3.)

Action of assault, battery, and wounding. The evidence to prove a provocation was, that the plaintiff put his hand upon his sword and said, "If it were not assize-time, I would not take such language from you." The question was, If that were an assault?

The Court agreed that it was not; for the declaration of the plaintiff was, that he would not assault him, the Judges being in town; and the intention as well as the act makes an assault. Therefore if one strike another upon the hand, or arm, or breast in discourse, it is no assault, there being no intention to assault; but if one, intending to assault, strike at another and miss him, this is an assault: so if he hold up his hand against another in a threatening manner and say nothing, it is an assault. In the principal case the plaintiff had judgment.

TRELAWNEY v. COLEMAN.

(Court of King's Bench, 1817. 1 Barn. & Ald. 90.)

In an action for adultery, tried before Holroyd, J., at the Middlesex sittings after last term, letters from the wife to the husband (while apart from each other) were offered in evidence by the plaintiff to shew that they lived on terms of mutual affection. It appeared that they had been separated for six months only, and they had lived together some months before the wife became acquainted with the de-

[24] The phrase, "res gestæ," has quite commonly been applied to the various sorts of statements treated in this section, but the usage is unfortunate and has led to much confusion, because also applied to the proof of words where no question of hearsay is involved. Such a comprehensive phrase, indiscriminately invoked to explain or justify the admission of hearsay and that which is not hearsay, is bound to lead to loose thinking, and to obscure the real problem in any given case.

[25] Various mental states may be important as ultimate facts; that is, a rule of law may attach certain consequences to an act when done with a given intent. For example, the asportation of a chattel with the proper wrongful intent amounts to larceny; and so the tearing or burning of a will with intent to revoke works a revocation. In such cases the only problem under this topic is how far assertions of such an intent are receivable to prove it. More frequently it is sought to prove a mental state as a basis for an inference that an act was done or omitted, or that such mental state continued. In such cases there are two problems, viz.: Whether such mental state is a proper basis for the inference in question; and, if so, how far assertions of such intent, belief, etc., are admissible to prove it.

fendant. The plaintiff had been a midshipman in the navy, and was a man in slender circumstances. The letters were proved to have been written at the time they bore date, and long before the wife was suspected of adultery, or was even acquainted with the defendant: but no direct evidence was given as to the cause of their living separate when the letters were written: and Gurney objected that they could not be received. But Holroyd, J., permitted them to be read, and the plaintiff had a verdict.

Gurney now moved for rule nisi for a new trial, on the ground of these letters having been improperly received in evidence.

LORD ELLENBOROUGH, C. J.[26] I have no doubt that these letters were admissible evidence. What the husband and wife say to each other is, beyond all question, evidence to shew their demeanor and conduct, whether they were living on better or worse terms: what they write to each other may be liable to suspicion; but when that is cleared up, that ground of objection fails: that was satisfactorily explained in the present case by proof of the letters being written at the time they bore date, and long before any suspicion of the wife's misconduct.

BAYLEY, J. I think these letters were properly received: when it is once established that the manner in which the husband and wife conduct themselves towards each other, (when together,) is admissible evidence; it follows that letters, which in absence afford the only means of shewing their manner of conducting themselves towards each other, are also admissible. There may indeed, in letters, be an assumed affection, which does not actually exist; but the behaviour of the parties themselves is open to the same objection; for they may (when together) assume an appearance of affection which has not any foundation in truth and sincerity. As to these letters, there is nothing to raise any suspicion of collusion, for they are proved to have been written at the time when they bear date, and long before any suspicion of the adulterous intercourse.

Rule refused.[27]

[26] Opinion of Abbott, J., omitted.

[27] Compare Willis v. Bernard, 8 Bing. 376 (1832), where in a similar action the wife's letters to a third person were admitted for the same purpose. In the latter case, Tindal, J., observed: "* * * The second objection is, that the letter contains statements of fact which could not with propriety be submitted as evidence to a jury, and might improperly influence their judgment. I admit that the letter does contain statements of fact, and if it had been used as evidence of those facts, there ought to be a new trial. But it was produced for the purpose of showing the state of the wife's feelings; the jury were cautioned that it was not to be taken as evidence of the facts, and it contains passages sufficient to show the general good feeling of the wife. 'I wrote yesterday to John in a packet that was sent over by the steamboat in order to leave New York, if possible, by the Pacific the 1st of August, but I had not time to write to you by the same parcel.' And in the body of the letter she says, 'I earnestly entreat you to forward this plan as much as you can, and thus procure me one of the greatest pleasures the money could ever afford me, of being able to forward in any degree, however trifling, the hap-

THOMPSON et al. v. BRIDGES et al.

(Court of Common Pleas, 1818. 8 Taunt. 336.)

Trover for goods taken by the defendants, as sheriff of Middlesex, in execution under a fi. fa., dated the 27th of November, 1816. At the trial, before Burrough, J., at the Middlesex sittings after the last term, the plaintiff proved the trading and the act of bankruptcy, early in November, 1816. He then proved the petitioning creditor's debt, by the production of the bankrupt's acceptance for £105., in favor of Elvey, the petitioning creditor. The counsel for the defendant stated, that he should show the transaction to be founded in fraud, and called a witness, who swore that the bankrupt informed him, previous to his bankruptcy, that he (the bankrupt) had lost a cause in the King's Bench; and that if a commission could be taken out against him, it would destroy the effect of the judgment in that action; that the bankrupt asked him whether any person could not be made bankrupt; to which the witness replied in the negative, unless there were a sufficient debt due by the person to be made bankrupt; whereupon the bankrupt said he did not owe £10. to any man, and inquired of the witness, whether, if the witness were to draw a bill to be accepted by him (the bankrupt) the witness would become his creditor? Upon the refusal of the witness to draw such a bill, the bankrupt said he had a friend who would do it for him. This testimony was corroborated. For the plaintiff it was urged, that this evidence was inadmissible; but Burrough, J., admitted it, stating, that he received it as evidence, for the purpose of showing that there was a scheme [28] or contrivance to obtain a fraudulent commission. The learned judge told the jury that the cause mainly turned upon the petitioning creditor's debt, and that if

piness or benefit of my husband.' Surely as a declaration of the wife's feelings, this was not to be excluded. No doubt it renders the administration of justice more difficult when evidence, which is offered for one purpose or person, may incidentally apply to another; but that is an infirmity to which all evidence is subject, and exclusion on such a ground would manifestly occasion greater mischief than the reception of the evidence."

Compare Holmes, J., in Buckeye Powder Co. v. Du Pont Powder Co., 248 U. S. 55, 39 Sup. Ct. 38, 63 L. Ed. — (1918): "* * * Several exceptions were taken to the exclusion of statements by third persons of their reasons for refusing or ceasing to do business with the plaintiff. We should be slow to overthrow a judgment on the ground of either the exclusion or admission of such statements except in a very strong case. But the exclusion in this instance was proper. The statement was wanted not as evidence of the motives of the speakers but as evidence of the facts recited as furnishing the motives. Lawlor v. Loewe, 235 U. S. 522, 536, 35 Sup. Ct. 170, 59 L. Ed. 341 [1915]; Elmer v. Fessenden, 151 Mass. 359, 362, 24 N. E. 208, 5 L. R. A. 724 [1890]."

[28] Andrews, C. J., in Mills v. Lumber Co., 63 Conn. 103, 26 Atl. 689 (1893): "The declaration of a party that he intends to do a certain act, or pursue a certain course of conduct, is always admissible when the issue is whether or not the party making the declaration did the act or followed the course of conduct, because the declaration proves that those feelings exist which prompt the act or the conduct."

they should be of opinion that the bankrupt gave the acceptance proved, for the purpose of upholding the commission, then there would be no petitioning creditor's debt, observing, that, although the bankrupt could not be called to destroy the commission, yet he was of opinion, that the bankrupt's declarations were evidence to show, that the bankrupt and some other person had concerted the commission. The jury found a verdict for the defendants. And now,

Pell, Serjt., moved for a new trial.

DALLAS, J. There are many cases where the declarations of a bankrupt are admissible in evidence, and my Brother Pell has principally rested his objection in this case, on the ground that the declarations of the bankrupt have been improperly received. But if the petitioning creditor's debt be founded in collusion, the commission fails, and the evidence received at the trial, went to show that such collusion had existed, and so, in my opinion, became part of the res gestæ. I think that the evidence was properly admitted and left to the jury, and that they have come to a right conclusion on the case.

The rest of the court concurring, the rule was

Refused.

HADLEY v. CARTER.

(Superior Court of Judicature of New Hampshire, 1835. 8 N. H. 40.)

This was an action on the case, brought against the defendant for enticing away one Andrew Bryant, a hired man in the plaintiff's employ.

On the trial, the plaintiff proved that said Bryant was in his employ, as a hired laborer, under a contract to work for a year for a certain sum as wages, and that previous to the expiration of the year he left the employ of the plaintiff; and the plaintiff offered evidence tending to show that said Bryant left through the advice and persuasion of the defendant. * * *

In order to show that said Bryant left the plaintiff's employ of his own accord and for reasons of his own, the defendant introduced the testimony of David E. Dow, a partner of the plaintiff in the wheelwright business at the time, who gave evidence that the day preceding the night on which Bryant left, Bryant came to him and said he was in trouble,—That prior to his entering the employ of the plaintiff he was in embarrassed circumstances and in the custody of a sheriff, who had a writ against him,—That for the purpose of relieving himself he forged a note against a man in Sandwich and put it into the plaintiff's hands as security, and that the plaintiff paid the debt against him,—That it was agreed that the plaintiff should keep the note in his own hands, and that he should go to work for the plaintiff and pay him,—That when he had worked enough, as he thought, to pay the amount, he asked for the note, but the plaintiff put him off,—That he had asked for it a number of times, but it was not given up, and that the plain-

tiff had told him he had written to the man in Sandwich, and the answer was that if he had such a note it was forged. The witness further testified that Bryant said at the same time, that a brother of the plaintiff was at enmity with him, and had threatened a prosecution, and that he expected service of it every hour—that he asked the witness' advice if he had not better go and see the plaintiff, who was then absent and spoke of taking the stage—that in the evening, the witness told him the defendant, Carter, was going next day to Littleton, and if he must go he had better go with him—that the last Bryant said, was that he had concluded to go with the defendant, and the next morning he was gone.

To the admission of this evidence the plaintiff objected; but it was admitted, and the jury having returned a verdict for the defendant, the plaintiff moved for a new trial, because he was precluded from introducing the evidence aforesaid, to show that Bryant was indebted to him, and because the declarations of Bryant were admitted on the part of the defendant.[29]

UPHAM, J. * * * The only question in the case which it becomes necessary to consider, is, whether the declarations made by the servant, at the time of his leaving the employ of the plaintiff, of the motives which governed him in leaving, are admissible as evidence.

The testimony of the witness as to mere declarations of the servant could not certainly be evidence; for the servant himself should be produced, and proof of his sayings would be rejected on the general rule respecting hearsay evidence. There are, however, exceptions to the general rule. Where declarations of an individual are so connected with his acts as to derive a degree of credit from such connection, independently of the declaration, the declaration becomes part of the transaction, and is admissible in evidence.

The evidence in such case is not regarded as mere hearsay testimony. It does not rest upon the credit due to the declarant, but may be admitted even though the declarant in ordinary cases would not be believed upon his oath. The testimony is admitted on the presumption, arising from experience, that when a man does an act, his cotemporary declaration accords with his real intention, unless there be some reason for misrepresenting such intention. Its connection with the act gives the declaration greater importance than what is due to the mere assertion of a fact by a stranger, or a declaration by the party himself at another time. It is part of the transaction, and may be given in evidence in the same manner as any other fact.

In this instance the servant, at the time of preparation for leaving, disclosed causes for such a design, of a character strongly implicating himself, and tending to negative entirely any suspicion of intentional misrepresentation of his true motive. He communicated this design in connection with the fact of asking advice what course to pursue, and

[29] Statement condensed and part of opinion omitted.

accompanied his declarations of the motive assigned, with the act of leaving. The declaration then is so connected with the fact as to give character to it, and the fact carries with it, at the same time, in the declaration, evidence of the motive.

Where it is necessary, in the course of a cause, to inquire into the nature of a particular act, and the intention of the person who did the act, proof of what the person said at the time of doing it is admissible, to shew its true character. Richardson's N. H. Justice 164.

Where in cases of bankruptcy, the question is with what intent the party absented himself from his house, his declaration, cotemporary with the fact of departure, is evidence to explain that intention. 1 Starkie's Ev. 48.

On the same principle, in an action against a voluntary bailee, for the loss of goods by carelessness and gross negligence, the defendant may give in evidence his own acts and declarations immediately before and after the loss, to repel the allegation that the loss was occasioned by his own neglect, carelessness, and mismanagement. Tompkins v. Saltmarsh, 14 Serg. & R. (Pa.) 275. See, also, Pool v. Bridges, 4 Pick. (Mass.) 378; Digby v. Stedman, 1 Esp. 329; Aveson v. Ld. Kinniard, 6 East, 193; Price v. Earl of Torrington, 1 Salk. 285.

We are of opinion that the declarations of the servant, made in this instance in connection with the act of leaving, became part of the res gestæ, and are admissible as being fully within the rule applicable to cases of that character. There must, therefore, be

Judgment on the verdict.[80]

RAWSON et al. v. HAIGH et al.

(Court of Common Pleas, 1824. 2 Bing. 99.)

In this cause, which was tried at the Guildhall sittings, after Hilary term last, before Lord Gifford, C. J., the plaintiff's evidence was commenced by putting in the commission of bankrupt and proceedings against Richard Wilkinson. The trading was thereby substantiated, but the proof of the act of bankruptcy was, as contended by the defendant's counsel, insufficient, and his lordship reserved that point, with liberty for the defendants to move for a nonsuit thereon.

The commission of bankrupt bore date the 6th of September, 1822.

The deposition of the act of bankruptcy was dated the 17th September, 1822, and was made by William Llewellyn. After setting out the examinant's knowledge of the bankrupt, and proving his trading for the space of four years immediately antecedent to the commission, it

[80] And so in Elmer v. Fessenden, 151 Mass. 359, 24 N. E. 208, 5 L. R. A. 724 (1890).

See, also, Gilchrist v. Bale, 8 Watts (Pa.) 355, 34 Am. Dec. 469 (1839), where a wife's complaints of ill treatment were admitted to show her reason for leaving her husband.

stated that on or about the second of July, 1822, Wilkinson had a meeting with the examinant relative to some accounts in which Wilkinson had, as examinant understood and believed, an interest, and at such meeting an appointment was made for the following morning at eleven o'clock, when the accounts were to be produced, and the business relating thereto to be finished. That on the morning of the 3d of July examinant went to Wilkinson's lodgings, where the appointment was to be kept, when, instead of meeting with Wilkinson, examinant received from Wilkinson's brother a note, (marked B,) and two or three days after, examinant received from Wilkinson a letter (marked C.) The examinant then deposed to the signature of Wilkinson to the letter, (marked A,) and concluded with stating his belief, that Wilkinson did not attend to the appointment in consequence of his apprehension that a writ had been or was about to be issued against him.

The note marked B was from Wilkinson to Llewellyn, and after alluding to Wilkinson's sudden departure, proceeded, "A letter from Paris, on urgent business is the cause. I shall be back, I hope, in ten days: in the mean time I shall make proposals to your son's creditors, and trust on my return to find all settled;" and then in a postscript, "I will write immediately to Messrs. R. and S. at Bristol, so do not feel uneasy about them or any of your son's friends; my brother will deliver you your account current with your son."

The letter marked C was also from R. Wilkinson to Llewellyn, dated Calais, 4th July, 1822, and was as follows: "My brother will show the letters I have written from Bristol and Yorkshire: I hope you will approve of them. If you could accompany him in the rounds which he is going to make, you would contribute to get the business settled a moment the sooner, and then your account current can be arranged in two hours between us. I am so much tired with writing that I can hardly keep my head up, so you must excuse brevity, particularly as I have to go off to-night for Paris."

The letter marked A was from R. Wilkinson, dated Paris, the 2d of August, 1822, addressed to Messrs. W. and J. B. Sedgwick, and the following extract alone bore on this case: "as some of Mr. W. B. Llewellyn's creditors have threatened to make me solely responsible, I am under the necessity of remaining in France, apprehensive that some lawsuit, or even arrest, may be instituted against me, and which would ruin all my hopes and expectations for hereafter; I therefore feel myself under the necessity of requesting of them all a declaration, that no arrest or lawsuit shall be put in force against me; and I trust, gentlemen, you will have no objection to grant me the same, being perfectly convinced that a personal interview will do more towards the settling of Mr. Llewellyn's concerns than can be done by correspondence."

The act of bankruptcy relied on, was the departing the realm with intent to defraud or delay creditors. A verdict having been found for the plaintiffs,

Vaughan, Serjt., obtained a rule nisi to set it aside, and enter a nonsuit instead.

BEST, C. J. It appears from the learned judge's report to have been left to the jury to determine whether or no Wilkinson had committed an act of bankruptcy; if so, the only point for us to determine is, whether evidence was adduced of such an act. The words of the statute, 13 Eliz. c. 7, s. 1, are, "If any merchant—shall depart the realm—or otherwise—absent himself—to the intent or purpose to defraud or hinder any of his creditors—he shall be reputed, deemed, and taken for a bankrupt." It is not necessary for us to decide, whether, if a party leaves the realm with one purpose, and afterwards stays away with another, namely, to defraud his creditors, such a staying away would be an act of bankruptcy, because, upon the evidence before us, I am clearly of opinion that Wilkinson departed the realm with intent to hinder his creditors. In the letter of the 3d of July, which he left at his lodgings at the time of his departure, and which was addressed to a person who had had a meeting with him relative to some accounts in which he was interested, after speaking of his sudden absence, he says, "In the mean time I shall make proposals to your son's creditors," and "I will write immediately to Messrs. R. and S., so do not feel uneasy about them, or any of your son's friends:" Was not this letter of itself sufficient to raise suspicion? But in a letter dated the very next day from Calais, he says, "If you could accompany my brother in the rounds which he is going to make, you would contribute to get the business settled a moment the sooner, and then your account current can be arranged in two hours between us." Does not this letter show that he was embarrassed in his affairs, and that he departed because he apprehended his creditors would act hostilely? Then comes the third letter from Paris, in which he says, "As some of Mr. W. B. Llewellyn's creditors have threatened to make me solely responsible, I am under the necessity of remaining in France." Now, when these letters are coupled with the fact of his running away in a hurry, would not a jury be warranted in finding that he went to avoid his creditors? If so, there has been a clear act of bankruptcy.

But it has been urged, that the second and third letters having been written subsequently to the act of departing the realm, were not admissible in evidence: I am clear that they were admissible. The going abroad was of itself an equivocal act, and where an act is equivocal, we must get at the motive with which it was committed. In ninety-nine cases out of a hundred, this can only be got at by the declarations of the party himself. The present, therefore, is an exception to the rule which says, that a party shall not make himself a bankrupt

by his own declarations. It is true, this exception must be taken subject to limitations; a line must be drawn; and it is clear that a party must not be enabled to avail himself of declarations made at a time long subsequent to the act in question. The declarations, in order to be admissible, must be made, or the letters written, at the time of the act in question; but it is sufficient if they are written at any time during the continuance of the act; the departing the realm is a continuing act, and these letters were written during its continuance. If there was an intention to hinder creditors, it is not necessary that they should actually have been hindered, or even have called and been denied. The jury, therefore, were warranted in the finding they have come to, and the present rule must be discharged.

PARK, J. I do not enter into the question, whether the act of merely departing the realm is, unexplained, an act of bankruptcy; but I am satisfied that declarations made during departure and absence are admissible in evidence to show the motive of the departure. It is impossible to tie down to time the rule as to the declarations: we must judge from all the circumstances of the case: we need not go the length of saying, that a declaration made a month after the fact would of itself be admissible; but if, as in the present case, there are connecting circumstances, it may, even at that time, form part of the whole res gestæ. I was present at the trial of Bateman v. Bailey, 5 T. R. 512, and the learned judge who presided thought that declarations made subsequently to the act were within the rule which excludes the bankrupt from proving his own act of bankruptcy: but the Court of King's Bench held otherwise, and sent the case down for a new trial, because there might be no other means of getting at the motives which occasioned the act in question. The declarations, however, must be connected with the state of the party's mind at the time, and in the present instance I think the connection sufficiently clear for the admission of the letters.

BURROUGH, J. I was a commissioner of bankrupts many years, and I should have had no doubt on letters such as these.

Rule discharged.

INHABITANTS OF SALEM v. INHABITANTS OF LYNN.

(Supreme Judicial Court of Massachusetts, 1847. 13 Metc. 544.)

Assumpsit to recover the expenses incurred by the plaintiffs in supporting a pauper whose settlement was alleged to be in the town of Lynn.

At the trial in the court of common pleas, before Wells, C. J., the plaintiffs undertook to prove that the pauper gained a settlement in Lynn, under the Rev. St. c. 45, § 1, by her husband's residing there for the space of ten years together, and paying all taxes duly assessed on him for five of those years. It was in evidence that her husband,

William Stanwood, removed from Lynn to Marblehead, where he remained about four months, and then returned to Lynn; and the question was submitted to the jury, whether said William thus removed from Lynn with an intention of returning thereto. See Billerica v. Chelmsford, 10 Mass. 396. To prove such intention, the defendants offered to show his statements, made immediately after his return to Lynn. But the judge ruled that the inquiry must be confined to such declarations as were made by said Stanwood after he had formed the intention of removing from Lynn, at and about the time of his said removal, and while remaining in Marblehead; and the judge excluded the defendants' question as to the declarations of said Stanwood after he had returned to Lynn.

The jury found a verdict for the plaintiffs, and the defendants alleged exceptions to the said rulings.

DEWEY, J. The proposed evidence of the declarations of Stanwood was clearly incompetent. The declarations of a party to an act are, under proper limitations, competent evidence to show the intention of such party, in reference to such act. If made at the same time with the act, they may be considered as a part of the res gestæ, and so admissible. Somewhat greater latitude is allowed, in reference to the time of making such declarations, where the question relates to the domicil of the party at a particular period. The cases of Thorndike v. City of Boston, 1 Metc. 242, and Kilburn v. Bennett, 3 Metc. 199, cited by the defendants' counsel, were unlike the present, and do not furnish any authority to sustain the exceptions to the ruling of the court of common pleas. The declarations, proposed to be offered in evidence here, were not made by a party while doing any act, but were a recital of past transactions and past purposes. They were not explanatory of an act about to be done, nor made in reference to any future action; but they were merely declarations in relation to a past transaction, and they fell clearly within the ruling of this court, in the case of Haynes v. Rutter, 24 Pick. 242.

Exceptions overruled.[31]

CAMPBELL v. PEOPLE.

(Supreme Court of Illinois, 1854. 16 Ill. 17, 61 Am. Dec. 49.)

CATON, J.[32] The plaintiff in error, who is a negro, was indicted for the murder of Goodwin Parker. The evidence in the case tends very strongly to show that the deceased made an assault upon the prisoner, and that the homicide was committed in necessary self-defense. It appears that the deceased and three others went to seek the prisoner at

[31] See Viles v. Waltham, 157 Mass. 542, 32 N. E. 901, 34 Am. St. Rep. 311 (1893), for a more extended discussion of the question; Matter of Newcomb, 192 N. Y. 238, 84 N. E. 950 (1908).

[32] Part of opinion omitted.

his father's house, in the night time. The deceased went to the door of the house, leaving his companions thirty or forty yards back, to whom he was to give warning if Campbell was in the house. Shortly after the deceased went to the door, he called to the others to come on, and informed them that the negro was there. They rushed up, when the deceased and the prisoner were seen some distance from the house, engaged together, and there the deceased was stabbed, and died in a few minutes. When the deceased went to the house, he had a hatchet in his hands, which was found near the spot where he was killed; and after the negro was committed to jail, a wound was observed upon his head which penetrated to the skull, and which appeared to have been made with a hatchet, an axe or a hammer. There was no pretense that there was any sort of justification or legal cause for arresting or assaulting the prisoner.

Upon the trial, the defense offered to prove that on that day, and at other times shortly before his death, the deceased had made threats against the prisoner. This evidence the court ruled out, and an exception was taken. In this the court unquestionably erred, although they may never have come to the knowledge of the defendant till after the homicide was committed. If the deceased had made threats against the defendant, it would be a reasonable inference that he sought him for the purpose of executing those threats and thus they would serve to characterize his conduct towards the prisoner at the time of their meeting, and of the affray. If he had threatened to kill, maim, or dangerously beat the defendant, it would be a fair inference, especially so long as the evidence shows that he had a hatchet in his hands, that he had attempted to accomplish his declared purpose, and if so, then the prisoner was justified in defending himself, even to the taking of the life of his assailant, if necessary. While the threats, of themselves. could not have justified the prisoner in assailing and killing the deceased, they might have been of the utmost importance in connection with the other testimony, in making out a case of necessary self-defense. The evidence offered was proper, and should have been admitted. * * *

Judgment reversed.[33]

[33] And so in Wiggins v. Utah, 93 U. S. 465, 23 L. Ed. 941 (1876).

Compare the treatment of the same problem in McMillen v. State, 13 Mo. 30 (1850), where threats made shortly before the difficulty were excluded as not being a part of the res gestæ. In State v. Sloan, 47 Mo. 604 (1871), a series of threats were thought to be so connected as to make them a part of the transaction. In State v. Elkins, 63 Mo. 159 (1876), the res gestæ notion appears to have been abandoned: "When threats by the person killed should be admitted in evidence or rejected, is a question involved in a great deal of doubt and uncertainty. If they have been made a long time antecedent to the commission of the act, they may be not only valueless but entirely inadmissible. The relations of the parties may have since entirely changed, and in the intervening time the person making them may have wholly abandoned any previously conceived intention of harming the person against whom they were uttered. It is impossible to lay down any general rule on the sub-

WHITELEY v. KING et al.

(Court of Common Pleas, 1864. 17 C. B. [N. S.] 756.)

This was an action of ejectment brought by the plaintiff, the grandson and heir-at-law of one John Whiteley, to recover certain lands in the county of York, which were claimed by the defendants as devisees under a will made by John Whiteley on the 6th of December, 1859, and a codicil dated the 17th of December, 1861.

The will, which revoked all former wills, was not to be found at the death of the testator; but a draft was produced by one Sutcliffe, the attorney who prepared it, and in whose custody it had remained down to December, 1861.

The cause was tried before Blackburn, J., at the last Summer Assizes at Leeds. It appeared that, at that time, the testator was desirous of making some alteration in his will, and wrote to Sutcliffe requesting him to let him have the will, and giving him instructions for a codicil thereto; that Sutcliffe accordingly went to him with the will and codicil; that the testator executed the codicil; that Sutcliffe was requested, either by the testator or by one of his daughters who was present to leave them with the testator; that he did so; and that he saw no more of them: nor did it appear that they had ever been seen by any one since. The testator died in 1863.

In order to rebut the presumption arising from the absence of the will and codicil, that the testator had destroyed them, evidence was offered on the part of the defendants, of repeated declarations made by the testator to different members of his family, down to a short period before his death, expressing his satisfaction at having settled his affairs, and telling one person that he had named him one of his executors, and another that his will was at Sutcliffe's.

This evidence was objected to on the part of the plaintiff, but admitted by the learned judge on the authority of Patten v. Poulton, 1 Swab. & Trist. 55, 27 Law J. Probate, 41, where it was held by Sir C. Cresswell that the presumption that a will left in the keeping of the testator, if it cannot be found at his death, has been destroyed by him animo revocandi, is a presumption of fact which prevails only in the absence of circumstances to rebut it; and that among such circumstances are declarations by the testator of good will towards the persons benefited by it, adherence to the will, as made, and the contents of the will itself: and he left it to the jury to say whether or not the testator had destroyed the will and codicil animo revocandi.

The jury found that the will had not been revoked, and accordingly the verdict was entered for the defendants.

ject. Their relevancy, admission or rejection, depends materially upon the circumstances surrounding each particular case."

In State v. Whitsett, 232 Mo. 511, 134 S. W. 555 (1910), the same court, in dealing with the question of threats made by a defendant, thought that their remoteness in point of time affected their weight, but not their admissibility.

Kemplay now moved for a new trial on the ground that the declarations of the testator were not admissible. * * * That the missing will was intentionally destroyed is a presumption of fact which it requires strong evidence to rebut. [ERLE, C. J. Surely you may look at a man's words to see what his intentions are. The question here was whether the testator had the intention to destroy his will and codicil. Down to the last moment almost of his life he is found declaring his satisfaction that he has settled his affairs.] Declarations accompanying an act, no doubt, are admissible. But mere loose conversations deposed to by interested persons ought not to outweigh the presumption arising from the absence of the document.

ERLE, C. J. I am of opinion that there should be no rule in this case. The non-appearance of the will and codicil raising a presumption of fact that the testator intended to revoke them, evidence tending to prove the contrary intention was admissible. For this purpose the ordinary channels of information may be resorted to. The declarations of the testator are cogent evidence of his intentions. In this case his repeated declarations down to within a very few days of his death, were abundant evidence that the testator did not intend to cancel or destroy the will. He on several occasions expressed his satisfaction that he had "settled his affairs," and on one occasion said that he had left his will with Mr. Sutcliffe. If declarations are evidence of intention,—as the cases cited show they are,—there was abundant evidence to satisfy the jury here that the testator had no intention to cancel or revoke the will and codicil, and consequently the verdict was properly found for the defendants.

BYLES, J. I am of the same opinion. I see no reason why the declarations of the testator should not be admitted as part of his conduct, to show his intentions as to the disposition of his property.

KEATING, J. I am of the same opinion. I think it would be wrong to cast a doubt upon a well-established rule of law by granting a rule.

Rule refused.[34]

DODGE v. BACHE.

(Supreme Court of Pennsylvania, 1868. 57 Pa. 421.)

This was an action on the case, by John N. Bache against William E. Dodge and others, commenced May 4, 1860, to recover for the loss of a quantity of logs, belonging to the plaintiff, alleged to have been carried away by a freshet occasioned by the opening of a dam of the defendant. The case was tried before Streeter, P. J., of the Thirteenth Judicial District.

[34] And so in Sugden v. St. Leonard's, 1 P. D. 154 (1876).

For a collection of the modern American cases on this point, see note to In re Francis, 50 L. R. A. (N. S.) 861, loc. cit. 867 et seq. (1913).

The plaintiff gave evidence that the defendants carried on the lumbering business at Manchester Mills on Pine creek and at other mills on Marsh creek, which empties into Pine creek. The dam was built across Marsh creek and was raised about four feet above the dam proper by slash-boards; that W. W. McDougall was the general agent of the defendants in the summer or fall of 1855, had come in 1853 and left in 1856; he gave evidence further that he had logs in the stream below the defendants' dam which had been carried away by a rise in the stream; also evidence tending to show that the rise was occasioned by the cutting of the slash-boards of defendants' dam. A witness of plaintiff testified that he had driven some of the plaintiff's logs to the boom at Williamsport, where he got them sawed for the plaintiff, that there were about 170,000 feet sawed. The principal question was whether the boards had been cut by McDougall, the agent of the defendants. A witness testified that she had seen McDougall and Charles Grinnell go together to the mill and saw Grinnell on the dam with an axe apparently chopping something; that it was in December, 1855, that McDougall and Grinnell were thus seen on the dam; there was evidence that the dam was cut in the fall or winter of 1855.

The plaintiffs then offered to prove by Ezra Chandler, "that some time in the fall and winter of 1855, and before the dam was let off, McDougall told the witness that he wanted the witness to put in some logs that were lying at the Strap Mill, that were scattered along the edge of the creek at a former floating, and said he was going to float them through to the Manchester Mills before the creek froze up; and said he was going to cut the slash at the Marsh creek pond to float them through, and that the logs were so put in by him for that purpose."

The defendants objected, that declarations of an agent were not evidence against the principal unless made at the time the act was done; and that a principal is not to be affected by the declarations of an agent as to his intentions. The evidence was admitted and a bill of exceptions sealed.[35]

The opinion of the court was delivered, March 19, 1868, by

SHARSWOOD, J. The first error assigned is as to the admission of the testimony of Ezra Chandler. One of the questions in the cause, if not the principal one, was whether McDougall, the agent of the defendants, had cut the slash-boards of the dam at the Marsh creek pond, by which an artificial freshet was caused in the stream below, and the plaintiff's logs were carried away and lost. It was offered to prove by Chandler that McDougall had declared that he intended to do this, before the dam was let off. It was objected to on the ground that such declaration of the agent was no part of the res gestæ, and, therefore, upon the familiar and well-settled rule of evi-

[35] Statement condensed and part of opinion omitted.

dence, not admissible against his principal. But clearly this rule had no application. The declaration was offered not as in itself affecting the principal, but in corroboration of the other testimony in the cause that McDougall and Charles Grinnell, his workman, were seen to go to the mill together—that Grinnell soon after was observed on the dam with an axe and that he appeared to be chopping something. Now, when the question is whether a person has done a particular thing, and some evidence of it has been given, it is surely competent to show in corroboration that he had avowed his purpose beforehand. His principals would not have been affected by his mere intentions unexecuted. But to confirm other evidence of the act itself, his declarations were unquestionably admissible—not as the declarations of an agent but of the individual whose act was in question. We think, therefore, that there was no error in the admission of this evidence. * * *

Judgment reversed (on other grounds).

MUTUAL LIFE INS. CO. v. HILLMON.

(Supreme Court of the United States, 1891. 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706.)

This case came up on a writ of error to review a judgment of the Circuit Court in favor of the plaintiff in an action on a life insurance policy.

Mr. Justice GRAY [36] (after holding that error had been committed in limiting the challenges to jurors). * * * There is, however, one question of evidence so important, so fully argued at the bar, and so likely to arise upon another trial that it is proper to express an opinion upon it.

This question is of the admissibility of the letters [37] written by Walters on the first days of March, 1879, which were offered in evidence

[36] Statement and part of opinion omitted.

[37] The following are the letters in question:

"Wichita, Kansas,

"March 4th or 5th or 3d or 4th—I don't know—1879.

"Dear sister and all: I now in my usual style drop you a few lines to let you know that I expect to leave Wichita on or about March the 5th, with a certain Mr. Hillmon, a sheep-trader, for Colorado or parts unknown to me. I expect to see the country now. News are of no interest to you, as you are not acquainted here. I will close with compliments to all inquiring friends. Love to all.

"I am truly your brother,

"Fred. Adolph Walters."

Another letter was dated "Wichita, March 1, 1879," was signed by Walters, and began as follows:

"Dearest Alvina: Your kind and ever welcome letter was received yesterday afternoon about an hour before I left Emporia. I will stay here until the fore part of next week, and then will leave here to see a part of the country that I never expected to see when I left home, as I am going with a man by

by the defendants, and excluded by the court. In order to determine the competency of these letters it is important to consider the state of the case when they were offered to be read.

The matter chiefly contested at the trial was the death of John W. Hillmon, the insured; and that depended upon the question whether the body found at Crooked creek on the night of March 18, 1879, was his body or the body of one Walters.

Much conflicting evidence had been introduced as to the identity of the body. The plaintiff had also introduced evidence that Hillmon and one Brown left Wichita, in Kansas, on or about March 5, 1879, and traveled together through southern Kansas in search of a site for a cattle ranch; and that on the night of March 18th, while they were in camp at Crooked creek, Hillmon was accidentally killed, and that his body was taken thence and buried. The defendants had introduced evidence, without objection, that Walters left his home and his betrothed in Iowa in March, 1878, and was afterwards in Kansas until March, 1879; that during that time he corresponded regularly with his family and his betrothed; that the last letters received from him were one received by his betrothed on March 3d, and postmarked at "Wichita, March 2," and one received by his sister about March 4th or 5th, and dated at Wichita a day or two before; and that he had not been heard from since.

The evidence that Walters was at Wichita on or before March 5th, and had not been heard from since, together with the evidence to identify as his the body found at Crooked creek on March 18th, tended to show that he went from Wichita to Crooked creek between those dates. Evidence that just before March 5th he had the intention of leaving Wichita with Hillmon would tend to corroborate the evidence already admitted, and to show that he went from Wichita to Crooked creek with Hillmon. Letters from him to his family and his betrothed were the natural, if not the only attainable, evidence of his intention.

The position taken at the bar that the letters were competent evidence within the rule stated in Nicholls v. Webb, 8 Wheat. 326, 337, 5 L. Ed. 628, as memoranda made in the ordinary course of business, cannot be maintained, for they were clearly not such.

But upon another ground suggested they should have been admitted. A man's state of mind or feeling can only be manifested to others by countenance, attitude, or gesture, or by sounds or words, spoken or written. The nature of the fact to be proved is the same, and evi-

the name of Hillmon, who intends to start a sheep ranch, and as he promised me more wages than I could make at anything else I concluded to take it, for a while at least, until I strike something better. There is so many folks in this country that have got the Leadville fever, and if I could not of got the situation that I have now I would have went there myself; but as it is at present I get to see the best portions of Kansas, Indian Territory, Colorado, and Mexico. The route that we intend to take would cost a man to travel from $150 to $200, but it will not cost me a cent; besides, I get good wages. I will drop you a letter occasionally until I get settled down; then I want you to answer it."

dence of its proper tokens is equally competent to prove it, whether expressed by aspect or conduct, by voice or pen. When the intention to be proved is important only as qualifying an act, its connection with that act must be shown, in order to warrant the admission of declarations of the intention. But whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party.

The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact as his own testimony that he then had that intention would be. After his death there can hardly be any other way of proving it, and while he is still alive [38] his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation.

The letters in question were competent, not as narratives of facts communicated to the writer by others, nor yet as proof that he actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon than if there had been no proof of such intention. In view of the mass of conflicting testimony introduced upon the question whether it was the body of Walters that was found in Hillmon's camp, this evidence might properly influence the jury in determining that question.

The rule applicable to this case has been thus stated by this court: "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. Those expressions are the natural reflexes of what it might be impossible to show by other testimony. If there be such other testimony, this may be necessary to set the facts thus developed in their true light, and to give them their proper effect. As independent, explanatory, or corroborative evidence it is often indispensable to the due administration of justice. Such declarations are

[38] Holmes, J., in Elmer v. Fessenden, 151 Mass. 359, 24 N. E. 208, 5 L. R. A. 724 (1890): "* * * If, as may be assumed, the excluded testimony would have shown that the workmen when they left gave as their reason to the superintendent that the defendant had told them that the board of health reported arsenic in the silk, the evidence was admissible to show that their belief in the presence of poison was their reason in fact. Lund v. Tyngsborough, 9 Cush. 36, 41, 43 [1851]; Aveson v. Kinnaird, 6 East, 188, 193 [1805]; Hadley v. Carter, 8 N. H. 40, 43 [1835]; United States v. Penn, 13 Nat. Bankr. R. 464, 467, Fed. Cas. No. 16,025 [1876]. We cannot follow the ruling at nisi prius in Tilk v. Parson, 2 C. & P. 201 [1825], that the testimony of the persons concerned is the only evidence to prove their motives. We rather agree with Mr. Starkie, that such declarations made with no apparent motive for misstatement may be better evidence of the maker's state of mind at the time, than the subsequent testimony of the same persons. Stark. Ev. (10th Am. ed.) 89."

regarded as verbal acts, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury." Insurance Co. v. Mosley, 8 Wall. 397, 404, 405, (19 L. Ed. 437).

In accordance with this rule, a bankrupt's declarations, oral or by letter, at or before the time of leaving or staying away from home, as to his reason for going abroad, have always been held by the English courts to be competent, in an action by his assignees against a creditor, as evidence that his departure was with intent to defraud his creditors, and therefore an act of bankruptcy. Bateman v. Bailey, 5 Term. R. 512; Rawson v. Haigh, 9 J. B. Moore, 217, 2 Bing. 99; Smith v. Cramer, 1 Scott, 541, 1 Bing. N. C. 585.

The highest courts of New Hampshire and Massachusetts have held declarations of a servant, at the time of leaving his master's service, to be competent evidence, in actions between third persons, of his reasons for doing so. Hadley v. Carter, 8 N. H. 40; Elmer v. Fessenden, 151 Mass. 359, 24 N. E. 208, 5 L. R. A. 724. And the supreme court of Ohio has held that, for the purpose of proving that a person was at a railroad station intending to take passage on a train, previous declarations made by him at the time of leaving his hotel were admissible. Railroad Co. v. Herrick, 49 Ohio St. 25, 29 N. E. 1052. See, also, Jackson v. Boneham, 15 Johns. (N. Y.) 226; Gorham v. Canton, 5 Greenl. (Me.) 266, 17 Am. Dec. 231; Kilburn v. Bennett, 3 Metc. (Mass.) 199; Lund v. Tyngsborough, 9 Cush. (Mass.) 36.

In actions for criminal conversation, letters by the wife to her husband or to third persons are competent to show her affection towards her husband, and her reasons for living apart from him, if written before any misconduct on her part, and if there is no ground to suspect collusion. Trelawney v. Colman, 2 Stark. 191, and 1 Barn. & Ald. 90; Willis v. Bernard, 5 Car. & P. 342, and 1 Moore & S. 584, 8 Bing. 376; 1 Greenl. Ev. § 102. So letters from a husband to a third person, showing his state of feeling, affection, and sympathy for his wife, have been held by this court to be competent evidence, bearing on the validity of the marriage, when the legitimacy of their children is in issue. Gaines v. Relf, 12 How. 472, 520, 534, 13 L. Ed. 1071.

Even in the probate of wills, which are required by law to be in writing, executed and attested in prescribed forms, yet, where the validity of a will is questioned for want of mental capacity, or by reason of fraud and undue influence, or where the will is lost, and it becomes necessary to prove its contents, written or oral evidence of declarations of the testator before the date of the will has been admitted, in Massachusetts and in England, to show his real intention as to the disposition of his property, although there has been a difference of opinion as to the admissibility, for such purposes, of his subsequent declarations. Shailer v. Bumstead, 99 Mass. 112; Sugden v. St. Leonards, 1 Prob. Div. 154; Woodward v. Goulstone, 11 App. Cas. 469, 478, 484, 486. * * *

Upon principle and authority, therefore, we are of opinion that the two letters were competent evidence of the intention of Walters at the time of writing them, which was a material fact bearing upon the question in controversy; and that for the exclusion of these letters, as well as for the undue restriction of the defendants' challenges, the verdicts must be set aside, and a new trial had. * * *

Judgment reversed.

THROCKMORTON v. HOLT.

(Supreme Court of the United States, 1900. 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663.)

This was a proceeding in the supreme court of the District of Columbia for the purpose of proving an alleged will of the late Joseph Holt, a distinguished lawyer and for many years Judge Advocate General of the United States Army, who died at the age of eighty-seven, in Washington on August 1, 1894, after a residence of many years in that city. The proceeding resulted in the rejection of the paper on the ground that it was not the will of Judge Holt but was a forged document, and judgment refusing probate was entered upon the verdict of the jury. The proponents of the will appealed to the court of appeals of the District, but before the appeal was brought on for argument Miss Hynes, one of the legatees named in the will, withdrew her appeal. The judgment of the supreme court upon the appeal of the other proponents was subsequently affirmed by the court of appeals, and the proponents of the paper, excepting Miss Hynes, have brought the case here by writ of error.[89]

PECKHAM, J. * * * The two points above indicated in which we think the trial court fell into error require the reversal of this judgment and the granting of a new trial, but there are other questions in the case which are fully presented by the record, and which have been most ably and exhaustively argued by counsel on both sides. These questions will necessarily arise at the very threshold of the case when it comes on for trial again, and we think it is our duty to express our views in relation to them. They relate to certain evidence upon the issues of forgery and revocation.

And first, as to forgery. The paper in question was propounded as the will of Joseph Holt.

The facts set forth in the statement prefixed to this opinion show the case to be one of an extraordinary nature. There being no proof in regard to the history or whereabouts of the paper before it was received by the register of wills, and the evidence pro and con as to its genuineness having been received upon the trial, the question arises as to the admissibility of the various declarations of the deceased, and

[89] Statement condensed and part of opinion omitted.

also of his letters to different relatives living in Kentucky and other states, which it is claimed tend to show the improbability of the deceased making such a disposition of his property as is made in the paper in controversy. (They are referred to in the statement of facts above given.) The question is, in other words, Can the contestants prove by unsworn oral declarations and by letters of the deceased facts from which an inference is sought to be drawn that the disposition of the property as made in the paper is improbable, and that the paper was therefore a forgery? The decisions of the state courts as to the admissibility of this kind of evidence are not in accord. Many of them are cited in the margin.[40] Those included in class A favor the exclusion of such evidence, while those in class B favor its admission. The principle of exclusion was favored by Chancellor Kent, and also by Justices Washington, Story, Livingston, and Thompson, all of whom once occupied seats upon the bench of this court.

The cases cited in the two classes do not all, or even a majority of them, deal with the question of forgery, but many of them treat the subject of declarations of a deceased person upon a principle which would admit or exclude them in a case where forgery was the issue. It is not possible to comment upon each of the cases cited in these lists, without unduly extending this opinion. We can only refer to the two classes generally, and state what we think are the questions decided by them.

[40] Class A. Boylan v. Meeker, 28 N. J. Law, 274; Rusling v. Rusling, 36 N. J. Eq. 603; Gordon's Case, 50 N. J. Eq. 397, 424, 26 Atl. 268; Hayes v. West, 37 Ind. 21; Kennedy v. Upshaw, 64 Tex. 411; Mooney v. Olsen, 22 Kan. 69; Thompson v. Updegraff, 3 W. Va. 629; Couch v. Eastham, 27 W. Va. 796, 55 Am. Rep. 346; Dinges v. Branson, 14 W. Va. 100; Gibson v. Gibson, 24 Mo. 227; Cawthorn v. Haynes, 24 Mo. 236; Walton v. Kendrick, 122 Mo. 504, 25 L. R. A. 701, 27 S. W. 872; Comstock v. Hadlyme Ecclesiastical Soc., 8 Conn. 254, 263, 20 Am. Dec. 100; Shailer v. Bumstead, 99 Mass. 112; Lane v. Moore, 151 Mass. 87, 23 N. E. 828, 21 Am. St. Rep. 430; Robinson v. Hutchinson, 26 Vt. 38, 60 Am. Dec. 298; where the evidence was received, but the inquiry was as to mental capacity, the testatrix being greatly broken and enfeebled in mind and capacity and of advanced age; Jackson ex dem. Coe v. Kniffen, 2 Johns. (N. Y.) 31, 3 Am. Dec. 390; Jackson ex dem. Brown v. Betts, 6 Cow. (N. Y.) 377; Waterman v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71, citing many cases; Johnson v. Hicks, 1 Lans. (N. Y.) 150; Marx v. McGlynn, 88 N. Y. 357; Leslie v. McMurtry, 60 Ark. 301, 30 S. W. 33; Den ex dem. Stevens v. Vancleve, 4 Wash. C. C. 262, Fed. Cas. No. 13,412; Provis v. Reed, 5 Bing. 435; 1 Redf. Wills, 4th ed. pp. 556, 557; Gillett, Ev. § 281; Schouler, Wills, 3d ed. § 317a.

Class B. Turner v. Hand, 3 Wall, Jr., 88, 92, 107, Fed. Cas. No. 14,257; Johnson v. Brown, 51 Tex. 65; Swope v. Donnelly, 190 Pa. 417, 42 Atl. 882, 70 Am. St. Rep. 637; Taylor Will Case, decided by surrogate of New York county, 10 Abb. Prac. (N. S.) 300, 306. This case was reversed sub nom. Howland v. Taylor, in the court of appeals on a question of fact, but no opinion is reported; 53 N. Y. 627; Davis v. Elliott, 55 N. J. Eq. 473, 36 Atl. 1092; claimed by respondents to be adverse to Boylan v. Meeker, which is not referred to, neither is the question itself discussed, although evidence of this nature seems to have been received, without objection; Hoppe v. Byers, 60 Md. 381; Burge v. Hamilton, 72 Ga. 568, 624; Sugden v. St. Leonards, L. R. 1 Prob. Div. 154; Collagan v. Burns, 57 Me. 449, by an equally divided court; 1 Phillim., Eccl. Rep. 447–460.

In the cases contained in class A, it is held that declarations, either oral or written, made by a testator, either before or after the date of the alleged will, unless made near enough to the time of its execution to become a part of the res gestæ, are not admissible as evidence in favor of or against the validity of the will. The exception [41] to the rule as admitted by these cases is that where the issue involves the testamentary capacity of the testator, and also when questions of undue influence over a weakened mind are the subject of inquiry, declarations of the testator made before or after, and yet so near to the time of the execution of the will as to permit of the inference that the same state of mind existed when the will was made, are admissible for the purpose of supporting or disproving the mental capacity of the testator to make a will at the time of the execution of the instrument propounded as such. These declarations are to be admitted, not in any manner as proof of the truth of the statements declared, but only for the purpose of showing thereby what in fact was the mental condition, or, in other words, the mental capacity, of the testator at the time when the instrument in question was executed.

The cases contained in class B favor generally the admission of declarations of the deceased made under similar conditions in which declarations are excluded by the cases in class A.

If declarations of the character now under consideration are admissible, when made prior to the execution of the alleged will, although not after it, then a large part of the evidence in this case as to the oral and written declarations of the deceased was properly admitted upon the issue of forgery, because such declarations may have all been made before the forgery was executed, the date of the paper not furnishing any evidence of the time when it was in fact prepared. The forger could not be permitted, by giving a date to the instrument, to fix the time subsequent to which the declarations should be excluded.

But we see no good ground for the distinction. The reasons for excluding them after the date of the will are just as potent when they were made prior thereto. When made prior to the will, it is said they indicate an intention as to a testamentary disposition of property thereafter to be made, and that such declarations may be corroborative of the other testimony as to what is contained in the will, as is said by

[41] For the use of statements to prove delusions or other mental derangement, see Shaller v. Bumstead, 99 Mass. 112 (1868); Waterman v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71 (1854). It is sometimes said that in such cases there is no hearsay use of the statements, but this is hardly accurate. In case of an alleged delusion, obviously no attempt is made to establish the truth of the fact directly asserted, but quite the contrary; yet the evidence would be wholly unavailing to establish a delusion except on the hypothesis that the speaker believed his statement to be true; the evidence that he so believed is the implication contained in an apparently serious statement. If the proposition to be established is, that T. believed a palpable absurdity, his assertion in terms of his belief would clearly be classed as hearsay. The implied assertion of his belief in another form of statement does not seem sufficiently different to exclude it from the hearsay class.

Mellish, L. J. in Sugden v. St. Leonards, L. R. 1 Prob. Div. 154, 251 [42] (a case of a lost will), or else they indicate the feeling of the deceased towards his relatives, from which an inference is sought that a testamentary provision not in accordance with such declarations would be forged. The declarations are, however, unsworn in either case, and if they are inadmissible on that ground when made subsequent to the execution of the will, they would be also inadmissible when made prior to its execution. In Den ex dem. Stevens v. Vancleve, 4 Wash. C. C. 262, 265, Fed. Cas. No. 13,412, Mr. Justice Washington said that declarations of the deceased, prior or subsequent to the execution of the will, were nothing more than hearsay, and there was nothing more dangerous than their admission, either to control the construction of the instrument or to support or destroy its validity. Judge Pennington concurred in those views.

After much reflection upon the subject, we are inclined to the opinion that not only is the weight of authority with the cases which exclude the evidence both before and after the execution, but the principles upon which our law of evidence is founded necessitate that exclusion. The declarations are purely hearsay, being merely unsworn declarations, and when no part of the res gestæ are not within any of the recognized exceptions admitting evidence of that kind. Although in some of the cases the remark is made that declarations are admissible which tend to show the state of the affections of the deceased as a mental condition, yet they are generally stated in cases where the mental capacity of the deceased is the subject of the inquiry, and in those cases his declarations on that subject are just as likely to aid in answering the question as to mental capacity as those upon any other subject. But if the matter in issue be not the mental capacity of the deceased, then such unsworn declarations, as indicative of the state of his affections, are no more admissible than would be his unsworn declarations as to any other fact.

When they are not a part of the res gestæ, declarations of this nature are excluded because they are unsworn, being hearsay only, and where they are claimed to be admissible on the ground that they are said to indicate the condition of mind of the deceased with regard to his affections, they are still unsworn declarations, and they cannot be admitted if other unsworn declarations are excluded. In other words,

[42] For such a use of a testator's statements, that is, as indicating his intention as a basis for an inference that it was probably carried out in the will, see Doe v. Palmer, 16 Q. B. 747 (1851). The main point discussed in the Sugden Case was the use of statements by the testator as to how he had disposed of his property, etc., as evidence to prove the contents of a lost will, or at least to corroborate other evidence of the contents, and this use was sanctioned. Some doubt was thrown on this feature of the case by the carefully guarded opinions in Woodward v. Goulstone, 11 A. C. 469 (H. of L. 1886). The Sugden Case has been followed in a number of recent American cases. Griffith v. Higinbotom, 262 Ill. 126, 104 N. E. 233, Ann. Cas. 1915B, 250 (1914); Mann v. Balfour, 187 Mo. 200, 86 S. W. 103 (1905); Clark v. Turner, 50 Neb. 290, 69 N. W. 843, 38 L. R. A. 433 (1897).

there is no ground for an exception in favor of the admissibility of declarations of a deceased person as to the state of his affections, when the mental or testamentary capacity of the deceased is not in issue. When such an issue is made, it is one which relates to a state of mind which was involuntary and over which the deceased had not the control of the sane individual, and his declarations are admitted, not as any evidence of their truth but only because he made them, and that is an original fact from which, among others, light is sought to be reflected upon the main issue of testamentary capacity. The truth or falsity of such declarations is not important upon such an issue (unless that for the purpose of showing delusion it may be necessary to give evidence of their falsity), but the mere fact that they were uttered may be most material evidence upon that issue. The declarations of the sane man are under his control, and they may or may not reflect his true feelings, while the utterances of the man whose mind is impaired from disease or old age are not the result of reflection and judgment, but spontaneous outpourings arising from mental weakness or derangement. The difference between the two, both as to the manner and subject of the declarations, might be obvious. It is quite apparent therefore that declarations of the deceased are properly received upon the question of his state of mind, whether mentally strong and capable or weak and incapable, and that from all the testimony, including his declarations, his mental capacity can probably be determined with considerable accuracy. Whether the utterances are true or false cannot be determined from their mere statement, and they are without value as proof of their truth, whether made by the sane or insane, because they are in either case unsworn declarations. * * *

If not admissible generally, it is as we think inadmissible even as merely corroborative of the evidence denying the genuine character of the handwriting. It is open to the same objection in either case as merely unsworn declarations or hearsay.

We are therefore of opinion that the court below erred in admitting this evidence upon the issue of forgery, and that the error was of a most important and material nature. * * *

Judgment reversed.[43]

Mr. Justice HARLAN, Mr. Justice WHITE, and Mr. Justice MCKENNA agreed with the opinion only upon the first and second grounds discussed and dissented from the others.

Mr. Justice BROWN concurred in the result.

[43] Contra: State v. Ready, 78 N. J. Law, 599, 75 Atl. 564, 28 L. R. A. (N. S.) 240 (1910), forgery of a will.

For the use of testator's declarations to rebut a charge of fraud or undue influence, see Compher v. Browning, 219 Ill. 429, 76 N. E. 678, 109 Am. St. Rep. 346 (1906).

GREENACRE v. FILBY et al.

(Supreme Court of Illinois, 1916. 276 Ill. 294, 114 N. E. 536, L. R. A. 1918A, 234.)

CARTWRIGHT, J.[44] The defendant in error, Louise C. Greenacre, recovered judgment for $3,065 and costs in the circuit court of Kane county against the plaintiffs in error, Otto F. Filby and Adolph J. Wiest, keepers of dramshops at Hinckley, in De Kalb county, and the Aurora Brewing Company, owner of the premises where the dramshops were kept, for injuries to her means of support by the death of her husband, Frank Greenacre, alleged to have been caused by his intoxication. The Appellate Court for the Second District affirmed the judgment, and the record has been brought to this court by writ of certiorari.

Frank Greenacre, the husband of the plaintiff, was a buyer and shipper of live stock at Hinckley, in De Kalb county. At about 11:52 in the night of November 15, 1913, the "Oriental Limited," a fast passenger train of the Burlington Railroad, which did not stop at Hinckley, passed through the village going west, and as the train was going around a curve east of the depot the engineer saw Greenacre lying across the track. The engine was a short distance away, so that it was impossible to stop the train and Greenacre was run over and killed. The questions of fact in dispute at the trial were whether Greenacre was so intoxicated as to be unable to exercise care and caution for his own safety, and whether he was on the track in consequence of such intoxication or went upon the track with the intention of committing suicide. These questions were determined by the judgment of the Appellate Court unless prejudicial error was committed by the trial court. * * *

The defendants offered witnesses to testify to declarations of Greenacre at different times during the two years before his death as tending to prove an intention to commit suicide at the time he was killed, for the purpose of showing that he was on the railroad track with a suicidal intention. The witnesses were examined out of the presence of the jury, and their testimony was rejected. * * *

The argument against the ruling of the court is, that the circumstances proved were such that Greenacre might have been on the track either in consequence of his intoxicated condition or with an intention to commit suicide, and that his declarations, made at different times before that, were admissible as proof that he then had an intention to commit suicide. It is true that the state of mind of a person, like the state or condition of the body, is a fact to be proved like any other fact, whenever it is relevant to the issue to be tried. It is necessarily shown by some external manifestation, either by an appearance of anger, fear, hatred, or some other mental emotion, or

[44] Part of opinion omitted.

some declaration showing the fact. If the offered testimony of declarations made by Greenacre at other times, neither connected with or explanatory of any act nor preliminary to or in preparation for any act, was admissible as proof of an intention to commit suicide at the time he was killed, then it was a legitimate means of proof to show what Greenacre said about it. On the question here presented this court, in Siebert v. People, 143 Ill. 571, 32 N. E. 431, upon a full consideration of the question and authorities, adopted the rule that declarations of a deceased person that he had intended to take his own life, when not a part of the res gestæ nor accompanied by any act which they might serve to explain and which do not characterize any transaction, are not admissible in evidence.

It is argued that the decision in the Siebert Case as to the admissibility of the evidence was caused or influenced by the fact that the arsenic found in the stomach of the deceased was administered at a time when it was impossible for him to procure or take it himself. That fact was considered by the court on the issue of fact, but, of course, it did not determine the admissibility of evidence, and the legal question whether the evidence was competent was stated by the court and determined upon a full consideration of the authorities and the law. The court adopted the rule of Commonwealth v. Felch, 132 Mass. 22, although it was said that the decision had been overruled in Commonwealth v. Trefethen, 157 Mass. 185, 31 N. E. 961, 24 L. R. A. 235. The decision in the Siebert Case was indorsed in Howard v. People, 185 Ill. 552, 57 N. E. 441, where it was held that there was no error in excluding conversations with the deceased as to when, where, and by whom the act causing her death was committed. It is true that the questions called for answers tending to prove the fact in controversy, but that is equally true of the evidence offered in this case. The argument for its admission is that the declarations were so related to the event that they tended to prove the fact of suicide and were admissible on account of their relevancy to that alleged fact. In Clark v. People, 224 Ill. 554, 79 N. E. 941, it was held that declarations of the deceased, made over a year before her death, of her intention, under certain circumstances, to commit such an act as was committed which caused her death, were not competent, and the decisions in the Siebert Case and the Howard Case were approved.

It is again urged that the court there found that it was not probable or possible that the deceased did cause her own death, but that was also upon consideration of the question of guilt or innocence, and not concerning a rule of the law of evidence. It was not decided in these cases that declarations of intention are never competent, and it had already been decided in Riggs v. Powell, 142 Ill. 453, 32 N. E. 482, where a widow held a note indorsed by her deceased husband which she claimed as a gift, that it was competent to prove his declarations in reference to providing for his wife, to show that such a gift as was claimed might probably have been made because the gift

was consistent with the avowed purpose and feeling of the husband. Afterward, in Towne v. Towne, 191 Ill. 478, 61 N. E. 426, it was deemed competent to prove declarations by the owner of a certificate in a benefit society concerning the beneficiaries, showing that he did not know of the mistake in the certificate. It was said that the declarations were not competent evidence of the fact that the certificate was made out as he said it was, but it was material to know whether he knew of the mistake or acquiesced in it, and his declarations on that subject were competent evidence. In Treat v. Merchants' Life Ass'n, 198 Ill. 431, 64 N. E. 992, which was an action on a life policy, it was claimed that the insured committed suicide, and it was held error to refuse to permit the agent who took the application to testify that the insured, immediately after signing it and before the policy was delivered, asked if the company paid losses on suicide, and, on the answer that it did not, made some remark about canceling the application. The statement was made while engaged in the transaction and was considered competent to show what was in the mind of the insured at the time he made the contract by taking out the insurance. In Nordgren v. People, 211 Ill. 425, 71 N. E. 1042, it was charged that the accused gave his wife a bottle of whisky and strychnine, and it was held competent to prove that she kept whisky and strychnine in her room, and, as an explanation of her act, that she made declarations when despondent tending to show her intention to commit suicide. The declarations were not regarded competent as original evidence that she committed suicide, but as explanatory of the act of keeping in her room bottles of whisky and strychnine poison. * * * The decisions in this state are in harmony and we are satisfied with the rule established by them.

Evidence that when Greenacre was going home he declared his intention to go home, kiss his wife and babies, and go to sleep was competent and was admitted as showing his last declared intention in connection with his act.[45] If in every case where one since deceased considered at any time the question to be or not to be, with an in-

[45] Foster v. Shepherd, 258 Ill. 164, 101 N. E. 411, 45 L. R. A. (N. S.) 167, Ann. Cas. 1914B, 572 (1913), presented a similar problem. In order to account for the presence of the deceased at the place where he was killed, plaintiff claimed that he was on his way to spend the night at the home of his mother, and for this purpose offered statements of his intention so to do, made during the same evening about three hours before his death. The court held that such statements were not admissible, saying: "Counsel for defendant in error now insist that this testimony was competent as a part of the res gestæ, and cite authority to the effect that proof may be offered to show statements made by a deceased person at the time of his departure or starting upon a journey, in reference to his destination. This is the law, but in order to be considered as a part of the res gestæ the statement made must be immediately connected with the act of departure. Chicago & Eastern Illinois Railroad Co. v. Chancellor, 165 Ill. 438, 46 N. E. 269 (1897). In this case the statement was made about eight o'clock in the evening, whereas Ralph Foster did not finally leave his store until at least half-past ten o'clock, and in the meantime he was in various parts of the village of Lovington. The statement was not competent as a part of the res gestæ."

clination or decision toward the negative, his declarations neither connected with any act nor preliminary to or preparatory for any act could be proved, it would open a limitless field of inquiry as to the circumstances under which the declarations were made and whether in normal conditions or at times of exceptional misfortune, discouragement, and despondency. It would raise all sorts of psychological questions of mental states and intentions at different times and changes of intention from external conditions. * * *

Judgment affirmed.

PEOPLE v. HILL.

(Court of Appeals of New York, 1909. 195 N. Y. 16, 87 N. E. 813.)

HAIGHT, J.[46] The defendant, Pacy Hill, has been convicted of the crime of murder in the first degree committed at the city of Olean, Cattaraugus county, on the 18th day of March, 1908, by inflicting two bullet wounds, one in the hand and the other in the breast of Chloa Hancock, from the effects of which she died on the 21st day of March thereafter.

The facts constituting the crime are without substantial controversy. * * *

The defense interposed was that of insanity. The claim of the defendant's counsel is, in substance, that his father was subject to epileptic seizures; that one of his sisters was weakminded; and that he himself had been given opium in his infancy, and that the drug had been used by him to some extent up to the time of his becoming 12 years of age, and that he had had a number of epileptic seizures. The evidence upon this branch of the case was chiefly by his relatives, and was sharply controverted also by his relatives. The medical experts also clashed upon the subject. The defendant's expert, Dr. Putnam, reached the conclusion that at the time of the shooting the defendant was in an epileptoid state, the psychic equivalent of epilepsy or double consciousness; that persons in that state act automatically. They go about, eat, buy a railroad ticket, go from one town to another, and when they emerge from that condition they have no recollection of what had occurred or where they are. While in that condition they have no motive nor normal consciousness of the things they may do or the acts they may commit, and consequently they are irresponsible, and are unable to know the nature or quality of their acts or that they were wrong. * * *

Our attention has been called to a number of exceptions that were taken by the defendant upon the trial. We have examined them all with care, but shall here discuss only those which we regard as most material. Upon the examination of Dr. Putnam, the defendant's coun-

[46] Part of opinion omitted.

sel sought to show by him the statements that were made by the defendant at the time that he examined him, which was long after the alleged homicide, for the purpose of determining whether or not he was insane. He had testified that he had a talk with the defendant about the conversations he had with the chief of police immediately following the shooting, and was then asked the question: "Did he tell you whether or not he had any remembrance of them?" This he answered in the affirmative, and was then asked the question: "What did he tell you?" To this the district attorney interposed an objection upon the ground that the defendant's own statements in his own behalf were not competent even as a basis of expert testimony, and the objection was sustained. In another place the declarations of the defendant were fully given, and therefore the exclusion of them here may not be material, but we have concluded to examine the question. It will be observed that they pertain to what he had stated with reference to his recollection after the shooting had occurred, not before.

In the case of People v. Hawkins, 109 N. Y. 408, 410, 17 N. E. 371, Danforth, J., in delivering the opinion of the court, says: "The prisoner's declaration in November as to his condition in September was not competent as evidence of his actual condition at that time, nor could it be the basis of a scientific opinion as to whether he was sane or insane at that period. Had the question related to his condition at the time of the interview, the result might be quite different. Everything said or done at a given period serves to disclose the mental state of the actor, but his narration as to what he said or did, or of his feelings or bodily ailments upon a former occasion, furnishes no foundation for an opinion as to his actual state or condition at that time. It is of no higher grade than the declarations of third persons as to a past transaction, and in like manner is inadmissible." In the case of People v. Strait, 148 N. Y. 566, 42 N. E. 1045, we had occasion to examine the subject again and the authorities thereon, both in this and in other states and we there reached the conclusion that a physician may acquire facts from his own observations in the examination of a person, and that there was much in the action, conduct, and appearance of a person that aids the physician in forming a conclusion as to his sanity. The facts so acquired the physician may himself give in evidence, at least so far as they can be described; but an expert witness cannot be permitted to give an opinion as to the mental condition of a person at the time of the commission of a criminal act, based upon a statement not in evidence, made by a party in his own behalf after the commission of the act, which pertains to his past conduct. See, also, People v. Furlong, 187 N. Y. 198, 79 N. E. 978. It would thus seem to appear that the declarations of the defendant made to the physician as to his recollections of transactions after the alleged homicide, but long before the time of the interview with the physician, were not competent. * * *

Judgment affirmed.

STATE v. ILGENFRITZ et al.

(Supreme Court of Missouri, 1915. 263 Mo. 615, 173 S. W. 1041, Ann. Cas. 1917C, 366.)

WILLIAMS, C.[47] Under an indictment charging them jointly with the murder of Jacob W. Davis, defendants were tried in the circuit court of Adair county and found guilty of murder in the second degree. The punishment of defendant Ilgenfritz was assessed at 15 years and that of defendant Lottie Davis at 10 years. Defendants duly perfected an appeal to this court. * * *

II. The defendants offered to prove by witness Williams, the sheriff of Adair county, at the time of the tragedy, that, either on Friday preceding the killing, or on the day of the killing, deceased stated that he intended to kill himself and wife, and that deceased repeated the threat in the presence of the witness two or three times. The state objected to the offer on the ground that the evidence was hearsay and therefore immaterial. The court sustained the objection and excluded the offer, and defendants saved an exception. This ruling is assigned as error. There was no evidence of self-defense in the case. Neither was there evidence that this threat to kill Mrs. Davis had been communicated to her. It therefore could not be said, as insisted by appellants, that it became relevant as explaining Mrs. Davis' failure to go outside of her home after the shots were fired, to ascertain just what had occurred. The court therefore did not err in excluding the deceased's threats to kill his wife.

But the point concerning the admissibility of the threats of deceased to commit suicide presents a more serious question, and one that leads us into the realm of conflicting authorities.

The cause of deceased's death was the difficult question to be determined by the triers of the facts. The evidence offered pro and con was wholly circumstantial. There was circumstantial evidence tending to corroborate the theory of the state, at least with reference to the implication of defendant Ilgenfritz in the killing. There was also circumstantial evidence corroborating the defense's theory of suicide. It may be conceded therefore that, under such conditions, any competent evidence tending to corroborate the theory of suicide would be very material and relevant to the issues involved. Was the testimony, under the circumstances, admissible? Upon careful consideration, we have reached the conclusion that it was. At the outset we are met by the following authorities which hold the contrary view: State v. Punshon, 124 Mo. 448, loc. cit. 457, 27 S. W. 1111; State v. Fitzgerald, 130 Mo. 407, loc. cit. 429, 32 S. W. 1113; State v. Punshon, 133 Mo. 44, loc. cit. 52, 34 S. W. 25; State v. Bauerle, 145 Mo. 1, loc. cit. 25,

[47] Part of opinion omitted.

46 S. W. 609; Siebert v. People, 143 Ill. 571, loc. cit. 584, 32 N. E. 431; Nordgren v. People, 211 Ill. 425, loc. cit. 433, 71 N. E. 1042.

On the other hand, the following authorities hold that such evidence, under the present circumstances, is admissible: Commonwealth v. Trefethen, 157 Mass. 180, loc. cit. 188, 31 N. E. 961, 24 L. R. A. 235; People v. Conklin, 175 N. Y. 333, loc. cit. 343, 67 N. E. 624; State v. Beeson, 155 Iowa, 355, loc. cit. 362, 136 N. W. 317, Ann. Cas. 1914D, 1275; Shaw v. People, 3 Hun, 272, loc. cit. 276; Nordan v. State, 143 Ala. 13, loc. cit. 26, 39 South. 406; Blackburn v. State, 23 Ohio St. 146, loc. cit. 165, 166; Boyd v. State, 14 Lea (Tenn.) 161, loc. cit. 175; State v. Kelly, 77 Conn. 266, loc. cit. 268, 58 Atl. 705; 3 Current Law, p. 1654; 5 Columbia Law Review, 157; 1 Wigmore on Evidence, par. 143; 3 Bishop's New Criminal Procedure, par. 631 (5); 1 Wharton's Criminal Evidence, par. 237a.

The cases which hold such evidence inadmissible do so on the theory that the threats of suicide are hearsay. The only case in this state which undertakes to discuss the point at any length is the case of State v. Fitzgerald, 130 Mo. 407, loc. cit. 429, 32 S. W. 1113. An examination of that opinion, however, will disclose that such evidence was admitted in that case, and the entire discussion is based upon a supposed case. The decision of the point was therefore not necessary to a determination of that case, and the ruling was obiter dictum. This case appears to have been cited by the later cases without further discussion. The conclusion stated in the Fitzgerald Case was that threats of suicide in such cases are not admissible unless they were a part of the res gestæ or dying declarations, or unless at the time made they were accompanied by an attempt to carry the threat into execution. As to why such threats, when accompanied by unsuccessful attempts at execution, would then lose their hearsay nature and become proper evidence, the authorities taking that view do not give a satisfactory explanation, and it is indeed difficult to discover any logical reason therefor.

It appears that the error in the logic of the opinions holding such threats inadmissible occurs in assuming that such threats are merely hearsay. The probability of suicide would be stronger if it could be shown that deceased had a suicidal intent or design. The existence of such an intent or design would therefore become a material fact bearing upon the issues involved. This intent or design is a mental condition and could be evidenced only by deceased's acts or words. All authorities would perhaps agree in saying that any unsuccessful attempt at self-destruction would be admissible as original evidence of the existence of suicidal intent. We see no distinction between such acts and any "verbal acts" which also indicate the same mental state or condition. It might be said that the verbal act was not worthy of belief because it could be made when the declarant had no such intention. As much could also be said concerning an act amounting to an unsuc-

cessful attempt at suicide, for it is not impossible that such acts could be feigned. But since the greater probability is that both are but the direct result of the mental state, their exclusion should not be based upon a mere possibility of error. And even though it be conceded, arguendo, that the verbal acts were less trustworthy than the acts amounting to an attempt of suicide, yet, as was well said in the case of Commonwealth v. Trefethen, supra, 157 Mass. loc. cit. 188, 31 N. E. 964, 24 L. R. A. 235, "this affects only the weight of the evidence," and not its admissibility.

Suicidal threats are verbal acts, not narrative in character and therefore hearsay, but are the direct result of the action of the mind having the suicidal intent or design, and, in cases like the present, should be admitted as original evidence of the condition of the mind from which they spring. This is the theory of the case of Commonwealth v. Trefethen, supra, the leading case holding such evidence admissible. In that case the testimony excluded was the threat of deceased that she was going to drown herself. The court set aside the verdict on the ground that the exclusion of such evidence was error. In the course of its opinion, the court said:

"Although evidence of the conscious voluntary declarations of a person as indications of his state of mind has in it some of the elements of hearsay, yet it closely resembles evidence of the natural expression of feeling which has always been regarded in the law, not as hearsay, but as original evidence. 1 Greenl. Ev. 102. And, when the person making the declarations is dead, such evidence is often not only the best, but the only, evidence of what was in his mind at the time. On principle, therefore, we think it is clear that, when evidence of the declarations of a person is introduced solely for the purpose of showing what the state of mind or intention of that person was at the time the declarations were made, the declarations *are to be regarded as acts from which the state of mind or intention may be inferred in the same manner as from the appearance of the person or his behavior, or his actions generally.* In the present case the declaration, evidence of which was offered, *contained nothing in the nature of narrative,* and was significant only as showing the state of mind or intention of the deceased." (Italics ours.)

The above case has been many times cited with approval by the courts and text-writers above cited, and, after careful research into the subject, we have reached the conclusion that it states the correct rule regarding the admissibility of such evidence. It therefore follows that the above-cited Missouri cases, in so far as they conflict with what is herein decided, should be no longer followed. * * *

Judgment reversed.[48]

[48] Compare the treatment of the question of threats by a third person in State v. Taylor, 136 Mo. 66, 37 S. W. 907 (1896); State v. Barrington, 198 Mo. 23, 95 S. W. 235 (1906).

(B) As to Physical Condition

CALDWELL v. MURPHY.

(Court of Appeals of New York, 1854. 11 N. Y. 416.)

The plaintiffs obtained a verdict for damages in the court below on account of personal injuries due to the negligence of the defendant.[49]

DENIO, J. * * * In answer to a question to a witness by the plaintiff's counsel as to the condition of the plaintiff's health since the accident, the witness answered: "He has invariably complained." The defendant requested to have this answer stricken out; but the court refused to strike it out, and the defendant excepted. It appeared by the other testimony of this witness that he had attended upon and taken care of the plaintiff from the time of the accident for about ten or eleven days, and had assisted him in rising from his bed and getting down stairs, and had seen him repeatedly since. It was also proved by a physician that he was injured internally, as was shown by bloody discharges from his bowels. I am of opinion that the evidence objected to did not fall within the rule which excludes the declarations of a party in his own favor. It is one of the natural concomitants of illness and of physical injuries for the sick or injured person to complain of pain and distress. A complaint, it is true, may be simulated, but it is generally real. I think such evidence is admissible from the necessity of the case, and that it may safely be left to the jury in connection with the other evidence touching the alleged sick or injured person's condition. In a somewhat similar case Lord Ellenborough said: "If inquiries of patients by medical men, with the answers to them, are evidence of the state of health of the patients at the time, this must be evidence. What were the complaints, what the symptoms, what the conduct of the parties themselves at the time, are always received in evidence upon such inquiries and must be resorted to from the very nature of the thing." Aveson v. Kinnaird, 6 East, 188. See, also, the cases cited in Cowen & Hill's Notes, p. 587, note 447; 1 Greenl. Ev. § 102, and the cases referred to in the notes.

The charge of the judge responded accurately to the several requests for instructions, so far as the evidence raised the questions suggested by the defendant's counsel; and, upon the whole, I am of opinion that no error was committed upon the trial. The judgment should be affirmed.

Judgment affirmed.[50]

[49] Statement condensed and part of opinion omitted.

[50] Under the same theory complaints by a third person who would not have been a competent witness have been received—e. g., Aveson v. Kinnaird, 6 East, 188 (1805), wife's statements in an action by the husband; Marr v. Hill, 10 Mo. 321 (1847), statements by a slave in an action for breach of warranty of soundness.

INHABITANTS OF ASHLAND v. INHABITANTS OF MARLBOROUGH.

(Supreme Judicial Court of Massachusetts, 1868. 99 Mass. 47.)

Action to recover the expense of supporting W. H. Maynard, a pauper.

Among other evidence offered, and admitted against the objection of the defendants, one witness, not a physician, testified that Maynard, while in his employment before enlisting, said one day that "he had seen Dr. Jackson, who told him he had got a bad thing on him, and that his kidneys were diseased;" and that, another day after Maynard had been discharged from the service, the witness asked him what ailed him, and he said "his old complaint before he went into the army;" and another witness, who also was not a physician, testified that Maynard, before enlisting, "did not appear like a well man."

The jury returned a verdict for the plaintiffs; and the defendants alleged exceptions.[51]

CHAPMAN, J. The question in issue between the parties was, whether Maynard who enlisted into the service of the United States on the 2d of July 1861, became disabled by disease contracted in the service, or whether he had the disease before he enlisted. One species of the evidence which was offered to prove that he was diseased before he enlisted was his own language. The principle which applies to such evidence is stated in Bacon v. Charlton, 7 Cush. 586.[52] Evi-

[51] Statement condensed.

[52] In this case evidence had been admitted to the effect that plaintiff made exclamations of pain on the way home from the place of the accident, and that he complained of pain in the injured parts for three or four days. In approving this ruling, Bigelow, J., observed: "Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Any thing in the nature of narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations and expressions as usually and naturally accompany, and furnish evidence of, a present existing pain or malady. Of course, it will always be for the jury to judge whether such expressions are real or feigned, which can be readily ascertained by the manner of them, and the circumstances under which they are proved to have been made. The ruling of the court below on this point was strictly in conformity with the rules of law, and was properly guarded and limited. 1 Greenl. Ev. § 102; Aveson v. Lord Kinnaird, 6 East, 188 [1805]. These remarks as to the limitation of the rule are not intended to apply to the statements made by a patient to a medical man, to which a different rule may be applicable."

This dictum was commented on with approval in Barber v. Merriam, 11 Allen, 322 (1865), though it does not appear that any statements of past condition were admitted in that case.

The dictum was repeated by Endicott, J., in Roosa v. Boston Loan Co., 132 Mass. 439 (1882), in the following form: "While a witness not an expert, can testify only to such exclamations and complaints as indicate present existing pain and suffering, a physician may testify to a statement or a narrative given by his patient in relation to his condition, symptoms, sensations and feelings, both past and present."

Whether this accurately represents the accepted rule in Massachusetts is not clear. Compare Fleming v. Springfield, 154 Mass. 520, 28 N. E. 910, 26 Am. St. Rep. 268 (1891).

dence of the usual and natural expression of present feelings or emotions is admissible, though it consist wholly or partly of words. But such evidence is not to be unnecessarily extended, and is not to include narration of what is past. A physician, who is called as an expert, may testify to the statements which a sick or injured person made to him as his patient, for the purpose of obtaining his professional aid, as to the character and seat of his injuries and sensations, and describing his condition and symptoms. Barber v. Merriam, 11 Allen, 322. But a physician's testimony cannot include a recital of past events which his patient made to him. Chapin v. Marlborough, 9 Gray, 244, 69 Am. Dec. 281; Emerson v. Lowell Gaslight Co., 6 Allen, 146, 83 Am. Dec. 621.

A person who is not an expert may testify to the acts and appearance of another which indicate disease or disability, or the contrary; but may not give opinions on the subject.

Upon the principles above stated, the evidence of Maynard's statement as to what Dr. Jackson had told him; and as to his having had a complaint before [53] he went into the army; and the opinion of a witness who was not an expert that he did not appear like a well man; were inadmissible.

It is not necessary to state the application of these principles to every particular of the evidence offered, for upon a new trial the evidence may be varied; and the principles stated are sufficient guides in the admission or exclusion of evidence.

Exceptions sustained.

TRAVELERS' INS. CO. OF CHICAGO v. MOSLEY.

(Supreme Court of the United States, 1869. 8 Wall. 397, 19 L. Ed. 437.)

Mr. Justice SWAYNE [54] delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the Northern District of Illinois. The action was upon a policy of insurance. It insured Arthur H. Mosley against loss of life, or personal injury by any accident within the meaning of the instrument, and was issued to Mrs. Arthur H. Mosley, the wife of the assured, for her benefit. The declaration was in assumpsit. The defendant pleaded the general issue, and the cause was tried by a jury. The plaintiff

[53] Bellows, J., in Taylor v. Grand Trunk Ry. Co., 48 N. H. 304, 2 Am. Rep. 229 (1869): "Tested by these rules the statement of Miss Taylor that she had not had any rest was not strictly admissible. It is true, as suggested by plaintiff's counsel, that there is included in the expression the idea that she was then unable to sleep, and so far it would not be objectionable; but it relates also to time that was past, and if admitted it would be difficult to tell where to stop. Still it does not seem to be at all material, and on that ground we should hesitate to set aside the verdict for that cause."

[54] Statement and part of opinion of Swayne, J., and opinion of Clifford, J., omitted.

recovered. During the trial, a bill of exceptions was taken by the plaintiff in error, by which it appears that the contest between the parties was upon the question of fact, whether Arthur H. Mosley, the assured, died from the effects of an accidental fall down stairs in the night, or from natural causes.

The defendant in error was called as a witness in her own behalf, and testified, "that the assured left his bed Wednesday night, the 18th of July, 1866, between 12 and 1 o'clock; that when he came back, he said he had fallen down the back stairs, and almost killed himself; that he had hit the back part of his head in falling down stairs; * * * she noticed that his voice trembled; he complained of his head, and appeared to be faint and in great pain."

To the admission of all that part of the testimony which relates to the declarations of the assured, about his falling down stairs, and the injuries he received by the fall, the counsel of the defendants objected. The court overruled the objection, and the defendants excepted.

William H. Mosley, son of the assured, testified, in behalf of the plaintiff, "that he slept in the lower part of the building, occupied by his father; that about 12 o'clock of the night before-mentioned, he saw his father lying with his head on the counter, and asked him what was the matter; he replied, that he had fallen down the back stairs and hurt himself very badly." The defendants objected to both the question and answer. An exception to their admission followed.

The same witness testified further, "that on the day after the fall, his father said he felt very badly, and that if he attempted to walk across the room, his head became dizzy; on the following day, he said he was a little worse, if anything." The admission of this testimony also was excepted to by the defendants.

This statement presents the questions which we are called upon to consider. They are, whether the court erred in admitting the declarations of the assured, as to his bodily injuries and pains, and whether it was error to admit such declarations, to prove that he had fallen down the stairs.

It is to be remarked, that the declarations of the former class all related to present existing facts at the time they were made.

Those of the latter class were made immediately, or very soon after the fall; the declarations to his son, before he returned to his bedroom; those to his wife, upon his reaching there.

Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. Those expressions are the natural reflexes of what it might be impossible to show by other testimony. If there be such other testimony, this may be necessary to set the facts thus developed in their true light, and to give them their proper effect. As independent explanatory or corroborative evidence, it is often indispensable to the due administration of justice. Such declarations are regarded as verbal acts, and are as competent as any other testimony,

when revelant to the issue. Their truth or falsity is an inquiry for the jury.

In actions for the breach of a promise to marry, such evidence is always received to show the affection of the plaintiff for the defendant while the engagement subsisted, and the state of her feelings after it was broken off; and in actions for criminal conversation, to show the terms upon which the plaintiff and his wife lived together before the cause of action arose. Upon the same ground, the declarations of the party himself are received to prove his condition, ills, pains, and symptoms, whether arising from sickness, or an injury by accident or violence. If made to a medical attendant, they are of more weight than if made to another person. But to whomsoever made, they are competent evidence. Upon these points, the leading writers upon the law of evidence, both in this country and in England, are in accord. 1 Greenleaf on Evidence, § 102; 1 Phillips on Evidence (last ed.) p. 183; 1 Taylor on Evidence, 478, § 518.

There is a limitation of this doctrine that must be carefully observed in its application.

Such evidence must not be extended beyond the necessity upon which the rule is founded. It must relate to the present, and not to the past. Anything in the nature of narration must be excluded. It must be confined strictly to such complaints, expressions, and exclamations, as furnish evidence of "a present existing pain or malady." Bacon v. The Inhabitants, etc., 7 Cush. (Mass.) 586. Examined by the standard of these rules, the testimony to which this exception relates was properly admitted.

Judgment affirmed.[55]

ROCHE v. BROOKLYN CITY & N. R. CO.

(Court of Appeals of New York, 1887. 105 N. Y. 294, 11 N. E. 630, 59 Am. Rep. 506.)

PECKHAM, J. The only question in this case arises upon the admission of the testimony of a third party that the plaintiff, some days after the happening of the accident which caused her injury, complained that she was suffering pain in her injured arm. The witness did not testify that on these occasions the plaintiff screamed or groaned, or gave other manifestations of a seemingly involuntary nature and indicative of bodily suffering, but he proved simple statements or declarations made by plaintiff, that she was at the time of making them suffering pain in her arm. The plaintiff was herself sworn, and proved the injury and the pain. The condition of the arm the night of the accident was also proved; that it was very much swollen and black

[55] That the complaints, statements, etc., need not be made at or close to the time when the injury was received, see Mississippi Cent. R. Co. v. Turnage, 95 Miss. 854, 49 South. 840, 24 L. R. A. (N. S.) 253 (1909), annotated.

all around it, and subsequently red and inflamed, and continued swollen and inflamed more or less for a long time. The defendant challenges the evidence of complaints of pain thus made, on the ground that it was incompetent, and the argument made was that the evidence as to the injury and its extent could not be thus corroborated by mere hearsay.

Prior to the time when parties were allowed to be witnesses, the rule in this class of cases permitted evidence of this nature. Caldwell v. Murphy, 11 N. Y. 416; Werely v. Persons, 28 N. Y. 344, 84 Am. Dec. 346. These cases show that the evidence was not confined to the time of the injury, or to mere exclamations of pain. The admissibility of the evidence was put, in the opinion of Judge Denio, in 11 N. Y., supra, upon the necessity of the case, as being the only means by which the condition of the sufferer as to enduring pain could, in many instances, be proved. Substantially the same class of evidence was admitted in England, and for the same reason. See cases cited in 11 N. Y. In Massachusetts,[56] too, the same rule was applied. Bacon v. Charlton, 7 Cush. (Mass.) 581; cited and approved in Roosa v. Boston Loan Co., 132 Mass. 439.

After the adoption of the amendment to the Code, permitting parties to be witnesses, the question under discussion was somewhat mooted in Reed v. Railroad, 45 N. Y. 574, by Allen, J., in the course of his opinion, although the precise point was not before the court. The question there under discussion was as to the correctness of permitting the plaintiff to prove his declarations made at the time he was doing some work, to a third person, as to the state of his health. That is not exactly like the case of complaints, made, not as to a state of health, but as to a then present existing pain at the very spot alleged to have sustained injury, and proved so by other evidence; still the remarks of Judge Allen, on this kind of evidence in general, bear strictly upon the matter herein discussed. He reviewed in his opinion some of the above cases and others, and claimed that the courts had admitted the evidence from the necessity of the case, as being the only method by which the condition of the party could be shown fully and completely, not only as to appearances, but also as to suffering. But there was no agreement by the court upon that branch of the case, the judgment going upon another ground.

The case of Hagenlocher v. Brooklyn R. R., 99 N. Y. 136, 1 N. E.

[56] In Cashin v. New York, N. H. & H. R. Co., 185 Mass. 543, 70 N. E. 930 (1904), in holding that it was proper to admit the following statement by the plaintiff, "God Almighty, Joe, if I could only get rid of these headaches," the court said: "* * * That part of the answer which ends with the word 'headaches,' when taken in connection with the statement that at the time of the exclamation the plaintiff had his hands upon his head, may be regarded as an exclamation and ejaculation of present pain. And it is none the less so even if it also carries an idea of similar past pain. So far as it was an ejaculation of present pain it was admissible and was therefore rightly admitted, but it was not to be considered as any evidence whatever of similar prior pain."

536, decides that, even since the Code, evidence of exclamations indicative of pain made by the party injured is admissible. The case does not confine proof of these exclamations to the time of the injury. The question was asked of the plaintiff's mother: "How long after injury was your daughter confined in the bed? Answer. She was for about four weeks. Question. What expressions did she make, or what manifestations, showing that she suffered pain?" This shows there was no confinement of the evidence to the time of the injury. The evidence given, however, was of screams when the plaintiff's foot was touched, and of her exclamations of pain when even the sheet was permitted to touch the foot. The evidence was permitted on the ground that it was of a nature which substantially corroborated the plaintiff as to her condition. Having thus admitted evidence of this kind since the adoption of the Code amendment permitting parties to be witnesses, the question is whether there is such a clear distinction between it and evidence of simple declarations of a party that he was then suffering pain, but giving no other indications thereof, as to call for the adoption of a different rule. It seems to us that there is. Evidence of exclamations, groans, and screams is now permitted, more upon the ground that it is a better and clearer and more vigorous description of the then existing physical condition of the party by an eyewitness than could be given in any other way. It characterizes and explains such condition. Thus, in the very last case cited, it was shown that the foot was very much swollen, and so sore that the sheet could not touch it. How was the condition of soreness to be shown better than by the statement that, when so light an article as a sheet touched the foot, the patient screamed with pain? It was an involuntary and natural exhibition and proof of the existence of intense soreness and pain therefrom. True, it might be simulated, but this possibility is not strong enough to outweigh the propriety of permitting such evidence as fair, natural, and original corroborative evidence of the plaintiff as to his then physical condition. Its weight and propriety are not, therefore, now sustained upon the old idea of the necessity of the case.

But evidence of simple declarations of a party, made some time after the injury, and not to a physician for the purpose of being attended to professionally, and simply making the statement that he or she is then suffering pain, is evidence of a totally different nature, is easily stated, liable to gross exaggeration, and of a most dangerous tendency, while the former necessity for its admission has wholly ceased. As is said by Judge Allen in Reed v. Railroad, supra, the necessity for giving such declarations in evidence, where the party is living and can be sworn, no longer existing, and that being the reason for its admission, the reason of the rule ceasing, the rule itself, adopted with reluctance and followed cautiously, should also cease. With the rule as herein announced there can be no fear of a dearth of evidence as to the extent of the injury, and the suffering caused thereby. The

party can himself be a witness, if living, and, if dead, the suffering is of no moment, as it cannot be compensated for in an action by the personal representative under the statute, and the exclamations of pain, the groans, the sighs, the screams, can still be admitted. But we are quite clear that the bald statement, made long after the injury, by the party, that he suffers from pain, ought not to be admitted as in any degree corroborative of his testimony as to the extent of his pain. For these reasons, the evidence of Mr. McElroy, as to the plaintiff's declarations of existing pain, when they were walking in the street together, long after the accident, should not have been received. It was error, also, to permit the same witness to prove declarations of the plaintiff that her arm pained her very much, even though at the same time she showed her arm, and it was swollen and red. The appearance of the arm he could describe, but her declaration that it pained her very badly is mere hearsay, and should not have been permitted.

The judgments of the general term and circuit should be reversed, and new trial granted; costs to abide event.[57]

All concur, except DANFORTH, J., dissenting.

NORTHERN PAC. R. CO. v. URLIN.

(Supreme Court of the United States, 1894. 158 U. S. 271, 15 Sup. Ct. 840, 39 L. Ed. 977.)

This was an action brought by Alfred J. Urlin, in the Circuit Court of the United States for the District of Montana, against the Northern Pacific Railroad Company, to recover for personal injuries received by him when traveling as a passenger in one of its trains. * * *

The case proceeded to trial before the court and a jury, and resulted in a verdict for the plaintiff in the sum of $7,500, and the jury also returned certain special findings which had been submitted to them at the request of the defendant. Judgment was entered upon said verdict and special findings. During the trial several exceptions were taken by the defendant, which were allowed and signed by the judge, and which are brought for review to this court by a writ of error.[58]

Mr. Justice SHIRAS. * * * The third assignment is strenuously pressed on our attention in the brief of the plaintiff in error. It arises out of the refusal of the court below to suppress certain portions of the depositions of Drs. Mills and De Witt because of incompetency, and as merely hearsay. .

This objection is founded upon the witnesses having been permitted to testify to statements made by the defendant, at various times, to

[57] For some comment on the distinction taken between statements and exclamations, see separate opinion of Canty, J., in Williams v. Great Northern Ry. Co., 68 Minn. 55, 70 N. W. 860, 37 L. R. A. 199 (1897).

[58] Statement condensed and part of opinion omitted.

the physicians in respect to his feelings, aches, and pains, and it is contended that such statements were made too long after the occurrence of the injury to be part of the res gestæ, but were merely narrations of past incidents; and it is further urged that, whatever reason there may have formerly been, when a party could not himself testify to his sensations, for liberality in admitting such statements, now that he is a competent witness, such reason no longer operates.

An inspection of the depositions shows that the statements objected to were mainly utterances and exclamations of the defendant when undergoing physical examinations by the medical witnesses. As one of the principal questions in the case was whether the injuries of the defendant were of a permanent or of a temporary character, it was certainly competent to prove that, during the two years which had elapsed between the happening of the accident and the trial, there were several medical examinations into the condition of the plaintiff. Every one knows that when injuries are internal, and not obvious to visual inspection, the surgeon has to largely depend on the responses and exclamations of the patient when subjected to examination.

"Whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof of its existence, and whether they were real or feigned is for the jury to determine. So, also, the representations by a sick person of the nature, symptoms, and effects of the malady under which he is suffering at the time are original evidence. If made to a medical attendant, they are of greater weight as evidence, but, if made to any other person, they are not, on that account, rejected." 1 Greenl. Ev. (14th Ed.) § 102.

In Fleming v. City of Springfield, 154 Mass. 520, 28 N. E. 910, 26 Am. St. Rep. 268, where such a question arose, it was said:

"The testimony of Dr. Rice was properly admitted. The statement made by the plaintiff purported to be a description of his symptoms at the time it was made, and not a narrative of something that was past, and it may be fairly inferred that it was made for the purpose of medical advice and treatment. At any rate, although it was only a day or two before, or possibly during the trial, it does not appear that such was not the case.

"The declarations of a party himself, to whomsoever made, are competent evidence, when confined strictly to such complaints, expressions, and exclamations as furnish evidence of a present, existing pain or malady, to prove his condition, ills, pains, and symptoms, whether arising from sickness, or from an injury by accident or violence. If made to a medical attendant, they are of more weight than if made to another person." * * *

Affirmed.

WEST CHICAGO ST. RY. CO. v. KENNELLY.

(Supreme Court of Illinois, 1897. 170 Ill. 508, 48 N. E. 996.)

CRAIG, J.[59] This was an action brought by Mary Kennelly to recover damages for a personal injury alleged to have been sustained by reason of the negligence of the West Chicago Street-Railroad Company. * * *

It was claimed on the trial that, as a result of the accident, plaintiff received an injury on one of her hips, and her right ankle was badly sprained. On the other hand, it was claimed on the part of the defendant that the injuries were, in a great measure, from other causes. * * *

For the purpose, it may be presumed, of showing that plaintiff was in good health before the accident, the witness Devennee was asked, "Did you hear her complain of any injuries?" To the question the witness answered, "No, sir; I did not." While it may be conceded that the declarations of the plaintiff made to the witness was not competent evidence to prove her physical condition, yet we are inclined to the opinion that it was not error to allow the witness to state the fact that she heard no complaint. The witness resided near the plaintiff, visited her almost daily for three or four months before the accident, and the fact that during that time she heard no complaint from the plaintiff in regard to her condition may be regarded at least as slight evidence tending to prove her condition. The weight, however, to be given to such evidence, was a question for the jury. The same witness was asked how she found the plaintiff the morning after the accident, to which she replied, "She was complaining awful bad." It is said in the argument "that the plaintiff could not make testimony for herself by stating her feelings to a lay witness. What she may have told the witness was entirely incompetent to be by her repeated as evidence."

Conceding that statements made by the plaintiff to the witness in regard to her condition were incompetent, it does not follow that the answer to the question was erroneous. The witness was not asked to give any declaration made by the plaintiff as to her condition, nor did the witness state what the plaintiff had said to her. It was no doubt proper to show whether the plaintiff was quite free from pain, and resting easy, or, on the contrary, that she was restless, and complaining; and proof of the fact that plaintiff was complaining cannot be regarded as proof of her declarations. It was a mere exclamation, which was proper to be given. The same witness was asked the following question: "Where would she complain of pain at the time after she was hurt?" to which the witness, over the objections of the defendant, answered: "She complained of her side, and under the spine, in the back, and this ankle. She screamed with the ankle awfully." We

[59] Part of opinion omitted.

do not think this evidence was competent. It was the mere declaration of the plaintiff, not made to a physician or expert, and can only be regarded as hearsay. Statements of pain and sufferings, past and present, when not made to a physician or medical expert for the purpose of enabling him to form an opinion with a view to treatment or other legitimate purpose, unless made at the time of the injury, so as to constitute a part of the res gestæ, are inadmissible.

The rule, however, is different where statements have been made to a physician called upon to treat a person who may have received an injury, as was properly said in Railroad Co. v. Sutton, 42 Ill. 440, 92 Am. Dec. 81. A physician, when asked to give his opinion as to the cause of a patient's condition at a particular time, must necessarily, in forming his opinion, be, to some extent, guided by what the sick person may have told him in declaring his pains and sufferings. This is unavoidable; and not only the opinion of the expert, founded in part upon such data, is receivable in evidence, but he may state what his patient said in describing his bodily condition, if said under circumstances which free it from all suspicion of being spoken with reference to future litigation, and give it the character of res gestæ. The same rule is declared in Quaife v. Railway Co., 48 Wis. 524, 4 N. W. 658, 33 Am. Rep. 821, and Barber v. Merriam, 11 Allen (Mass.) 322; Railroad Co. v. Carr (opinion present term) 170 Ill. 478, 48 N. E. 992. But, while this evidence was incompetent, we do not regard its admission sufficient ground for reversing the judgment. Upon looking into the record, it will be found that the same witness whose testimony is objected to was present when the plaintiff was examined by the physician on the day she was injured, and heard the same statement made by the plaintiff, and these statements were testified to by the witness in her evidence. The physician also testified to the same things without objection. The evidence, therefore, being properly before the jury, if the court had excluded the evidence objected to by the defendant, nothing would have been gained by its exclusion. The error was, therefore, one which did no harm, and hence is no ground for reversing the judgment. No other question which calls for a consideration has been raised in the argument.

The judgment of the appellate court will be affirmed.

BOSTON & A. R. CO. v. O'REILLY.

(Supreme Court of the United States, 1894. 158 U. S. 334, 15 Sup. Ct. 830, 39 L. Ed. 1006.)

In October, 1890, Patrick J. O'Reilly, in the circuit court of the United States for the district of Massachusetts, brought an action against the Boston & Albany Railroad Company for personal injuries received while riding as a passenger on one of that company's trains.

The trial resulted in a verdict for the sum of $15,000, and to the judgment entered for that amount a writ of error was sued out of this court.[60]

Mr. Justice SHIRAS, * * * The fourth, eighth, and ninth specifications alleged error in the court permitting the nurse and physician to testify that the plaintiff told them, some time after the accident, that a piece of nail had come out of his knee, and in permitting the physician to point out upon the plaintiff's knee the scar of the hole out of which the plaintiff had told him the nail had come. These matters could not fairly be regarded as part of the res gestæ, but were mere hearsay. Railroad Co. v. O'Brien, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299.

If the record disclosed no other error, the admission of this evidence might have been passed by as immaterial. Still, it is impossible to say that the defendant's case was not injuriously affected by the admission of the evidence; and, while an appellate court will not disturb a judgment for an immaterial error, yet it should appear beyond a doubt that the error complained of did not and could not have prejudiced the rights of the party duly objecting. Deery v. Cray, 5 Wall. 807, 18 L. Ed. 653; Gilmer v. Higley, 110 U. S. 47, 3 Sup. Ct. 471, 28 L. Ed. 62.

We do not deem it necessary to notice other exceptions taken to the rulings of the court below.

The judgment is reversed, and the cause remanded, with directions to set aside the verdict and award a new trial.

Judgment reversed.[61]

[60] Statement condensed and part of opinion omitted.

[61] And so in case of statements of the cause of the injury or condition. Chapin v. Marlborough, 9 Gray (Mass.) 244, 69 Am. Dec. 281 (1857); Morrissey v. Ingham, 111 Mass. 63 (1872); Roosa v. Boston Loan Co., 132 Mass. 439 (1882); Com. v. Sinclair, 195 Mass. 100, 80 N. E. 799, 11 Ann. Cas. 217 (1907).

CRONIN v. FITCHBURG & L. ST. RY. CO.

(Supreme Judicial Court of Massachusetts, 1902. 181 Mass. 202, 63 N. E. 335, 92 Am. St. Rep. 408.)

Tort for injuries alleged to have been caused by a collision of an electric car of the defendant with a wagon in which the plaintiff was driving on September, 27, 1898. Writ dated June 12, 1899.

At the trial in the Superior Court before Bond, J., Dr. Frank C. Richardson of Boston was called as a witness by the plaintiff and qualified as an expert who had made a specialty of nervous diseases. He testified in regard to an examination of the plaintiff made by him on May 18, 1901, as follows: "I obtained from him his statement of his sufferings at the time of his accident." Against the objection of the defendant, he further testified in regard to that examination as follows: "He complained of suffering considerable pain in the right leg, of backache on slight exertion, severe pain in the left side of the head, muscular weakness; that he tired easily; that his sleep was restless and troubled; that he could not sleep more than two hours at a time during a night; that he was nervous, excitable, emotional, easily startled; that he could not concentrate his mind on anything for more than a few minutes; that he had periods of tremor of the whole body, muscular twitchings and mild hysterical attacks."

The witness further testified in regard to an examination made by him upon October 28, 1901, as follows, the defendant objecting: "I examined him at my office in the presence of Dr. Goray last evening; he stated that he could see no change in his suffering from last spring; that he still had pain in his head, pain in his leg; that the pain in his leg had largely given way to numbness; that he had not attempted to work because even ordinary exertion, as in work about the house, tires him; that his sleep is restless and troubled; that he cannot concentrate his mind any better than last spring; that he still has attacks of trembling and muscular twitching."

The foregoing evidence was given in direct examination, and to the admission of all of it the defendant excepted. The witness afterwards gave his opinion as to the physical condition of the plaintiff.

On cross-examination the witness testified in part that he had made two, and only two, examinations of the plaintiff; that both of these examinations were made at the request of the plaintiff's counsel, for the purpose of testifying for the plaintiff in this case; that the only other time when the plaintiff came under his professional observation was when the witness was present in May, 1901, in the court house, when Dr. Thompson made an examination for the defendant, while the first trial was in progress; that the witness had never been

the physician of the plaintiff, and had never prescribed for him in any way, nor given him professional advice, nor had been asked to do so.

It appeared from the docket record, that the first trial of this case in the Superior Court was on May 20, 1901, and the second trial on October 28, 1901.

The jury returned a verdict for the plaintiff in the sum of $6,733; and the defendant alleged exceptions.

BARKER, J. It is plain that the statement by a party to a cause of his bodily and nervous symptoms, made long after the occurrence of the accident to which he attributes them, and for purposes connected with the preparation for trial of a suit in which his condition of health is material, and not made to a physician for the purpose of obtaining advice or treatment,[62] are not admissible in evidence in his own favor as proof of the truth of the matters stated. It is equally plain that every person admitted as an expert to testify to his opinion may state in his testimony the grounds and reasons for that opinion, and that the party calling the expert may put in evidence those grounds and reasons in the direct examination of the expert, and before calling upon him to give his opinion to the jury. The statement of these rules as to the examination of witnesses called as experts, made by Chief Justice Bigelow in Barber v. Merriam, 11 Allen, 322, 324, has since the decision of that case been considered as law in this commonwealth, and has governed trials. So well established is this doctrine that the expert, upon direct examination, and before giving his opinion in evidence, may testify to the matters which form the grounds and reasons of that opinion, that in Koplan v. Gaslight Co., 177 Mass. 15, 21, 58 N. E. 183, this court overruled, without discussion, an exception to testimony so given, and which, save as showing the grounds of the opinion about to be given by the witness, would have been inadmissible.

In the present case there is no doubt that the statements of the plaintiff were hearsay, and of that particularly dangerous and objectionable type—declarations of an interested party, made after suit brought, and for the very purpose of preparing evidence to be used in his own favor at the trial. But no such rule applies to them as that which excludes private conversations between husband and wife, or communications between attorney and client. They may be admitted in evidence if offered by the adverse party, either as admissions or as contradictions of the testimony of the person who makes them. It follows that they may be admitted as the grounds and reasons of an

[62] For the view that statements made for the purpose of enabling the physician to testify are not admissible for any purpose, see Greinke v. Chicago City R. Co., 234 Ill. 564, 85 N. E. 327 (1908); O'Dea v. Michigan Cent. R. Co., 142 Mich. 265, 105 N. W. 746 (1905).

See, also, People v. Hill, 195 N. Y. 16, 87 N. E. 813 (1909), ante, p. 709.

For a collection of the cases on this point, see note to Shaughnessy v. Holt, 21 L. R. A. (N. S.) 826 (1908).

opinion given in evidence, or to be so given, by an expert. Being admissible for that purpose, the exception to their admission was not well taken.

Exceptions overruled.[63]

(C) As to Other Facts

THOMPSON et ux. v. TREVANION.

(Nisi Prius, 1694. Skin. 402.)

Ruled upon evidence, that a mayhem may be given in evidence, in an action of trespass of assault, battery, and wounding, as an evidence of wounding per HOLT, Chief Justice; and in this case he also allowed, that what the wife said immediate upon the hurt received, and before that she had time to devise or contrive any thing for her own advantage, might be given in evidence; quod nota; this was at Nisi Prius in Middlesex for wounding of the wife of the plaintiff.[64]

[63] State v. Blydenburg, 135 Iowa, 264, 112 N. W. 634, 14 Ann. Cas. 443 (1907). apparently goes on the same ground, that the history of the case as stated by the patient is admissible only to explain, or show the basis of, the physician's opinion. Compare Com. v. Sinclair, 195 Mass. 100, 80 N. E. 799, 11 Ann. Cas. 217 (1907), to the effect that a patient's statement that an operation had been performed by another physician was not admissible, even for this limited purpose.

[64] There is a singular dearth of English cases on this point. The question must have arisen many times at trials, but the cases did not get into the books. In Aveson v. Kinnaird, 6 East, 188 (1805), the following reference to the principal case appears: "His Lordship (Lord Ellenborough) also referred to the case of Thompson et uxor v. Trevanion, Skin. 402 [1694], where, in an action by the husband and wife for wounding the wife, Lord C. J. Holt allowed what the wife said immediately upon the hurt received, and before she had time to devise any thing for her own advantage, to be given in evidence as part of the res gestæ."

In Rex v. Foster, 6 C. & P. 325 (1834), which was tried before Park and Patteson, JJ., and Gurney, B., statements by the injured person as to the cause of the injury were received on the authority of Aveson v. Kinnaird.

In Reg. v. Beddingfield, 14 Cox, C. C. 341 (1879), Cockburn, C. J., rejected similar statements of the injured person on the ground that the act was then complete, though the statements were made almost immediately afterwards. In the controversy which this case produced, as to which see 14 Am. Law Rev. 817, no additional authorities were cited. In Reg. v. Gibson, L. R. 18 Q. B. D. 537 (1887), it was assumed without argument that it was error to admit the statement of a third person, immediately after the prosecuting witness was struck, to the effect that the person who threw the stone went into a certain house. There is nothing in the report to indicate the reason for this assumption.

POOL v. BRIDGES.

(Supreme Judicial Court of Massachusetts, 1826. 4 Pick. 378.)

This was trover for a quantity of wool, yarn and bocking, which the defendant, as a deputy sheriff, attached and took away as the property of one Scholfield, who absconded. The plaintiff proved that a quantity of South American wool was delivered by him to Scholfield to be manufactured. One Ayer testified, that the plaintiff called on Scholfield about a week before he absconded, in order to ascertain what progress he had made in manufacturing his wool, and that Scholfield then showed him some wool, yarn and bocking, which he said were the plaintiff's and which the plaintiff examined; and he further testified, that the wool, yarn and bocking thus shown were the same that were afterwards attached by the defendant.

The defendant objected to the admission of this evidence; and if, in the opinion of the whole Court, it was improperly admitted, the verdict, which was for the plaintiff, was to be set aside and a new trial granted; otherwise judgment was to be entered on the verdict.

PARKER, C. J.. delivered the opinion of the Court.

The only question is, whether the testimony of Ayer, in relation to the declaration of Scholfield tending to show that the goods attached were the property of the plaintiff, was admissible. If a mere declaration, certainly it is not evidence, for Scholfield is alive, and though probably out of the country, proof of his sayings would be rejected on the general rule respecting hearsay evidence. There are however exceptions to the general rule, depending sometimes upon nice discrimination, which without close consideration would seem to violate the rule itself. The cases of pedigree and some others recognised in the books are well known and easily applied; Roscoe's Dig. Crim. Ev. (Amer. Ed.) 22, n. 1; 2 Stark. Ev. (5th Amer. Ed.) 604 et seq. but where declarations are admitted as part of the res gestæ, there is hardly any distinct rule as to what will constitute the res gestæ which will support such declarations.

The case before us is of this difficult nature. The property in question is supposed to have been in the possession and under the control of Scholfield. It appears also, that it was so situated, in regard to other property of the same kind belonging to Scholfield himself or to other persons, that none but Scholfield could distinguish them. If he had been heard to say that the particular parcel in question belonged to the plaintiff, without their being engaged in any transaction relating to the property this would be mere declaration and hearsay. But if he was then employed in any act respecting the goods, such as separating different parcels for the purpose of distinguishing what belonged to one person and what to another, what he said while he was doing it would be considered as a part of the transaction and admissible in evidence. It would be like his labelling the goods with the name

of the owner, which though in one sense a declaration yet would be construed an act indicative of proprietorship in the goods. It gives some importance to such declarations, that they are made in the ordinary course of transactions, without reference to any controversy or any counter claim of property, and also that the declarations are against the interest of the party. Now the declarations of Scholfield have these circumstantial supports; they were made at a time when there was no expectation of a dispute about the property, and they were against the interest of Scholfield.

Was there any transaction of which they may be considered to be a part? We think there was. The plaintiff went to Andover to inquire into the state of the wool which he had put into the possession of Scholfield to be manufactured. Scholfield showed him certain portions in different stages of process, as his property. This was an act or transaction, and Scholfield's declaration made a part of it; and this act is not distinguishable from the actual separation of a parcel from the common mass, putting it aside with the plaintiff's name upon it; for this substantially would be but the declaration of Scholfield, and yet it cannot be doubted but that it might be proved. See Tompkins v. Saltmarsh, 14 Serg. & R. (Pa.) 275; Gorham v. Canton, 5 Greenl. (Me.) 266, 17 Am. Dec. 231; Little v. Libby, 2 Greenl. (Me.) 242, 11 Am. Dec. 68; Brackett v. Wait, 6 Vt. 425; Roscoe's Dig. Crim. Ev. 20, 21; 1 Stark. Ev. (5th Amer. Ed.) 36; Davis v. Spooner, 3 Pick. 288; Van Deusen v. Turner, 12 Pick. 533.

We consider it of importance, that it was proved by unquestionable evidence, that the plaintiff had wool in the possession of Scholfield, and that the only question was whether the particular parcel attached was part of his property.

Judgment according to verdict.[65]

PATTEN v. FERGUSON.

(Superior Court of Judicature of New Hampshire, 1847. 18 N. H. 528.)

Trespass, quare clausum fregit. Plea, the general issue. The principal question in controversy related to the boundary line between the lands of the parties. Evidence was introduced on both sides to show acts of ownership of the premises in dispute between the lines in controversy, by each of the parties, and their grantors. Among the rest the plaintiff introduced a witness who testified that in the year 1809 he assisted one Gillis in burning a coal-pit upon the premises in dispute, the wood for which was cut upon the land in dispute immediately preceding the burning, and that Gillis at that time told him that he

[65] Quære, whether the court would have applied the same rule if the action had been between two persons who had left goods with the absconding bailee?

had the wood for the coal-pit of one Joseph Patten, now deceased, under whom the plaintiff claims.

To the admission of this evidence the defendant objected, on the ground that the statements of Gillis thus stated were inadmissible. But the court overruled the objection, and admitted the evidence.

A verdict having been returned for the plaintiff, the defendant moved for a new trial.

PARKER, C. J. The ruling in this case gives to the declaration of Gillis an effect, or rather admissibility, as evidence, which is not ordinarily given to the mere declarations of third persons, respecting the rights or titles of the parties to the suit. The declarations went before the jury as evidence, to some extent, that Patten, under whom the plaintiff claims, had title. As the mere declaration of a third person, it is clearly inadmissible. But it is argued that the declaration is evidence, because Gillis was on the land at the time, making coal, and that the declaration is therefore admissible as part of the res gestæ. If the fact was material, and the declaration tended to illustrate it, this would be so; but the fact that Gillis was on the land making coal is of no importance in the case. It is not used to show a title in him by either party. Neither claims any thing under him. He was on the land without pretence of title. The fact of itself is entirely immaterial, and inadmissible for that reason. It does not serve to give significance to this fact, or to explain or illustrate it in any way, so as to render it important, that he said that he had the wood for the coal-pit from one person to another. If he cut the wood by the authority of a purchase from Patten, and it is supposed that this is material as showing an exercise of ownership by Patten, that fact may be proved by the testimony of Gillis, but not by his mere declaration without the sanction of an oath, and with no opportunity for a cross-examination.

The principles which govern this case are well stated in Downs v. Lyman, 3 N. H. 486, cited by the plaintiff, although the case is not an authority for him, because there the fact to which the declaration related was, of itself, when rightly understood, of some consequence. Here it is admitted that neither the fact nor the declaration, standing alone, are evidence; and when put together it is the declaration which is significant, and not the fact. The fact was of no importance, standing alone; and the declaration, standing alone, was incompetent. When they are united, the unimportant fact is used as a vehicle to introduce the incompetent declaration.

New trial granted.

HILL v. COMMONWEALTH.

(General Court of Virginia, 1845. 2 Grat. 594.)

DUNCAN, J.,[66] delivered the opinion of the majority of the court.

The prisoner was indicted for the murder of Robert R. Smith; and was found guilty by the petit jury of murder in the first degree; and sentence of death was pronounced by the court. * * *

The proof to which we will now refer as exclusive of the dying declarations, is as follows: On the evening of the 13th of September last, (the evening of the homicide,) the decedent, who resided 18 miles from Suffolk, being on a visit to his estate adjoining, or near to the town of Suffolk, came to the town, and was at the Washington Hotel. The prisoner who resided in the town of Suffolk, casually met him there: friendly salutations passed between them: a mixed conversation took place in the company; (there being several persons present;) when about the hour of 7 o'clock, the prisoner asked the decedent to walk with him, as he wished to say something to him. The decedent complied, and they walked off together towards Bayly's storehouse; which is about 50 feet from the end of the porch of the tavern from which they started: and Bayly's store is in view of persons stationed in the end of the porch. No person seems to have observed the parties after they started on their walk. The prisoner had with him a sword cane. After the lapse of between 5 and 10 minutes, the decedent was seen to approach the tavern, staggering. He fell before he got to the porch. Some of the company who were in the porch went to his aid, carried him into the porch, and laid him down. He was pulseless, and his countenance was pale and deathlike. Some of the persons present thought he was dead. He lay in this situation some minutes, when he revived a little, turned himself over and vomited. Remedies were applied to restore sensibility, and in about 10 minutes he was sufficiently restored to be able to speak; and upon being asked what ailed him, "he put his hand to his left breast, and said, 'Here it is, here it is.'" "Hunter Hill asked me to walk out, and stabbed me here." (See Duke's evidence, page 8 of the record.) His clothes were opened, and a wound discovered on the left breast, opposite the region of the heart. * * * But if we connect with these circumstances, the first declaration of the decedent, "Here it is, here it is," placing his hand on his left breast, "Hunter Hill asked me to walk out, and stabbed me here"—as part of the res gestæ—the fact of the killing by the prisoner is proved beyond all doubt; and the circumstances before referred to shew the quo animo with which it was done. That this declaration is part of the res gestæ, remains now to be shewn.

There can be no doubt that the situation and condition of the decedent after he received the wound; his staggering as he approached the

[66] Statement and part of opinion omitted.

tavern; his falling; his pulseless and insensible state; his vomiting; the coldness of his extremities; his physical condition; the remedies resorted to; all he said and did up to the period of his death, except his declaration as to the commission of the act, are all parts of the res gestæ: and why not his declarations as to the commission of the act? The reason is, that he may have fabricated or made up a story. But on the one hand, if under the circumstances of the case he could not have had time to make up a story, and that the declarations were made when the lis mota did not exist, then they may be received as part of the res gestæ. On the other hand, if made after time sufficient had been allowed to fabricate a story, or the lis mota may be supposed to exist, they are not to be considered as part of the res gestæ. In this case the decedent was stabbed to the heart; he immediately attempted to return to the tavern; he fell, recovered to his feet, staggered, fell again, and fainted; and remained insensible for about 10 minutes, when, and after the application of stimulants, he revived so as to be able to speak; and immediately made the declaration referred to. Where was the time within which he could have arranged his thoughts, and fabricated a story? A priori a stab in the heart would instantaneously suspend the powers of reflection; and we have seen its physical effect upon the deceased. All the time then from receiving the stab until he revived from his fit of fainting he was clearly not in a condition to arrange his ideas and fabricate a story: and the declaration was immediate upon his revival. In Rex v. Foster, 25 Eng. C. L. R. 421, the statements of a deceased who had been run over by a cabriolet, made recently after receiving the injury, were allowed as part of the res gestæ. So in Skinner 402, referred to in a note to Rex v. Foster, Holt, judge, permitted the statements of the wife made recently after being wounded by her husband, and "before she had time to devise anything for her own advantage," to be given as part of the res gestæ.

All that is necessary, according to these cases, to make the declaration part of the res gestæ, is that it should be made recently after receiving the injury, and before he had time to make up a story, "or to devise any thing for his own advantage." Tested by this rule, the statement referred to is clearly admissible. * * *

Writ of error refused.

LUND et ux. v. INHABITANTS OF TYNGSBOROUGH.

(Supreme Judicial Court of Massachusetts, 1851. 9 Cush. 36.)

This was an action on the case, tried in this court before Fletcher, J., in which the plaintiffs sought to recover damages for an injury alleged to have been received by the female plaintiff, in consequence of a defect in a highway in the town of Tyngsborough, which the defendants were legally bound to keep in such condition that the same

might be safe and convenient for travellers, with their horses, teams, and carriages, at all seasons of the year. The alleged defect consisted in a hole left open at the end of and extending around the mouth of a culvert, unguarded by any railing or covering.

[To prove the extent of the plaintiff's injuries, certain evidence was admitted, the nature of which sufficiently appears in the opinion. The defendant alleged exceptions.]

FLETCHER, J.[67] * * * The only remaining exception is that taken to the admission in evidence of several answers in the deposition of Lydia Kendall. In these answers, the witness states that the physician, who was called to Mrs. Lund after she received the injury for which this suit was instituted, said that it was a very serious injury, and it would be three months, if not longer, before she would have the use of her limb; and that he further said, her limb was not broken; "he said it was worse injured than though the bone was broken; that the ligaments were torn from the bone, and broken." It does not appear by the report how long it was after the accident happened when these declarations were made; it only appears that they were made at the time when the doctor was called to Mrs. Lund, and examined her after she was injured. The object of introducing these declarations, was to show the nature and extent of the injury. The defendants objected to the admission of the answers of the witness, containing these declarations of the physician; but they were admitted, and to this admission exception is now taken. The ground of the exception is, that the declarations of the doctor were hearsay merely, and, as such, were not admissible. The fact, which appears in the case, that the doctor had deceased at the time of the trial does not affect the legal principle. It is no sufficient reason for receiving hearsay, that the person is dead; and, therefore, that is the best evidence which can be produced. It may be unfortunate for the party to have lost his evidence but that furnishes no good reason for the admission of incompetent testimony. * * *

But it is maintained, on the part of the plaintiffs, that these declarations should be regarded as a part of the res gestæ, and thus admissible as original evidence. This is the main question in this case.

It is a well established principle of the law, that declarations which form a part of the res gestæ and are to be considered as a part of the transaction, do not come under the head of hearsay, but are admissible as original evidence.

This is a settled general rule; but, like other general rules, its application to particular cases is often attended with much doubt and difficulty. But it is wholly impracticable to bring this class of cases within the limits of any clearly defined and positive rules. There are, however, certain principles and tests, which are simple and intelligible,

[67] Part of opinion omitted.

by which the admission of this kind of evidence must be determined. Its admission is not left to the discretion of the presiding judge, as has been sometimes supposed; but is governed by principles of law, which must be applied to particular cases as other principles are applied, in the exercise of a judicial judgment; and errors of judgment in this case, as in other cases, may be examined and corrected. If it were matter of discretion merely, there would, of course, be no fixed rules and no uniformity of decisions; and the exercise of this discretion would not be subject to exception and revision and correction.

In a branch of the law of evidence of so high importance, and under which questions are so constantly arising in practice as that in regard to the admission of declarations not made under oath, nor in presence of the parties in interest, it is extremely desirable that the law should be as clearly defined, and its principles as fully illustrated and explained, as may be practicable. Questions of this nature have frequently arisen in this court; but the decisions have been confined to the particular cases in hand, without any extended examination of the general subject.

It is proposed, in the present case, to consider the subject somewhat more at large, and to endeavor to set forth and illustrate, with some particularity, the principles and tests by which this class of questions must be determined.

If a declaration has its force by itself, as an abstract statement, detached from any particular fact in question, depending for its effect on the credit of the person making it, it is not admissible in evidence. Such a declaration would be hearsay. As where the holder of a check went into a bank, and, when he came out, said he had demanded its payment; this declaration was held inadmissible to prove a demand, as being no part of the res gestæ. This statement was mere narrative, wholly detached from the act of demanding payment, which was the fact to be proved. But when the act of a party may be given in evidence, his declarations, made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. The credit which the act or fact gives to the accompanying declarations, as a part of the transaction, and the tendency of the contemporary declarations, as a part of the transaction to explain the particular fact, distinguish this class of declarations from mere hearsay.

Such a declaration derives credit and importance, as forming a part of the transaction itself, and is included in the surrounding circumstances, which may always be given in evidence to the jury with the principal fact. There must be a main or principal fact or transaction, and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporary with it, and derive some degree of credit from it.

The res gestæ are different in different cases; and it is not, perhaps, possible to frame any definition which would embrace all the various cases, which may arise in practice. It is for the judicial mind to determine, upon such principles and tests as are established by the law of evidence, what facts and circumstances, in particular cases, come within the import of the terms. In general, the res gestæ mean those declarations and those surrounding facts and circumstances, which grow out of the main transaction, and have those relations to it which have been above described.

The main transaction is not necessarily confined to a particular point of time, but may extend over a longer or shorter period, according to the nature and character of the transaction. Thus, where a debtor leaves his house to avoid his creditors, which is an act of bankruptcy, and goes abroad and continues abroad, the act of bankruptcy continues during the continuance abroad for this purpose.

So declarations, to be admissible, must be contemporaneous with the main fact or transaction; but it is impracticable to fix, by any general rule, any exact instant of time, so as to preclude debate and conflict of opinion in regard to this particular point.

Perhaps the most common and largest class of cases in which declarations are admissible, is that in which the state of mind or motive with which any particular act is done is the subject of inquiry. Thus, where the question is as to the motives of a debtor in leaving his house and going and remaining abroad, so as to determine whether or not an act of bankruptcy has been committed, his declarations when leaving his house and while remaining abroad, as to his motives for leaving his house and for remaining abroad, are admissible in evidence. Such declarations, accompanying the act, clearly belong to the res gestæ. They are calculated to elucidate and explain the act, and they derive a degree of credit from the act. * * *

The authorities upon the subject of admitting evidence as belonging to the res gestæ are numerous, but it will be sufficient to refer to some of them. 1 Greenl. Ev. § 108; 1 Starkie Ev. § 28; 1 Phillips, p. 231 (4th Amer. from 7th London Ed.); Cowen & Hill's note, part I, pp. 585, 586; Noyes v. Ward, 19 Conn. 250; Rawson v. Haigh, 2 Bing. 99; Ridley v. Gyde, 9 Bing. 349; Hadley v. Carter, 8 N. H. 40; Carter & Wife v. Buchannon, 3 Ga. 513; Plumer v. French, 2 Foster (22 N. H.) 450; Scaggs v. Mississippi, 8 Smedes & M. (Miss.) 722; Enos v. Tuttle, 3 Conn. 247; Pool v. Bridges, 4 Pick. 378; Allen v. Duncan, 11 Pick. 308; Commonwealth v. McPike, 3 Cush. 181, 50 Am. Dec. 727; Haynes v. Rutter, 24 Pick. 242; Trial of Drakard, 21 Howell's St. Tr. 542; Gray v. Goodrich, 7 Johns. (N. Y.) 95.

It remains to apply the settled principles of the law to the particular case now under consideration. The declarations of the doctor who was called to Mrs. Lund after the accident, and made an examination, were offered, to show the extent and nature of the injury she had received. There was no question in regard to the examination; that

act, of itself, detached from the declarations, was wholly unimportant and immaterial. There was, therefore, in legal contemplation, no main act with which the declarations could be connected. The declarations, though made at the time, were, in no proper sense, a part of the examination. They merely announced the results, the opinion of the doctor, the conclusion at which he arrived. These declarations might have been made with precisely the same effect, at any subsequent time, a day or a week after the examination.

The declarations were mere abstract statements, wholly detached from any main act or fact admissible in evidence, and depending for their effect entirely on the credit of the doctor. They were the expression of a professional opinion, and had their weight wholly as such. Such declarations are mere hearsay, and were clearly improperly admitted in evidence; and, for that reason, a new trial must be granted.

Verdict set aside, and new trial granted.[68]

LUBY et ux. v. HUDSON RIVER R. CO.

(Court of Appeals of New York, 1858. 17 N. Y. 131.)

Appeal from the Supreme Court. The action was for alleged negligence in running a railroad car drawn by horses against the plaintiff Mrs. Luby, in one of the streets of New York city. At the trial the plaintiffs called as a witness one Mason, a policeman, and after proving by him that he was on duty near the spot where the accident occurred, and was called upon by the persons assembled around the injured woman, he was permitted, under exceptions by the defendant's counsel, to testify that he arrested the driver of the car which run against Mrs. Luby. He was also permitted, under like exception, to testify that upon arresting the driver as he was getting off the car, and out of the crowd which surrounded it, he asked him why he did not stop the car, to which the driver replied that the brake was out of order. The plaintiff had a verdict and judgment was entered thereupon, and was, upon appeal, affirmed by the Supreme Court at general term in the first district. The defendant appealed to this court.

COMSTOCK, J. Mason, the police officer, was allowed to testify, against the objection of the defendant, that he arrested the driver of the car, and that the driver, on being arrested, assigned as a reason why he did not stop the car that the brakes were out of order. This took place directly after the accident, the citizens having stopped the car and the driver having got outside of the crowd which had gather-

[68] See, also, Wright v. Tatham, ante, p. 435.

ed about. We think it was erroneous to receive the evidence, and that the judgment must be reversed on this ground.

First. In regard to the arrest. That fact was irrelevant to the case, and we cannot tell what influence it may have had upon the minds of the jury. It is true that the jury ought not to attach any importance to the circumstance in trying the issue before them, but this only proves that this fact ought not to have been shown for their consideration. It certainly has some tendency to prove that at the very time of the transaction the defendant's driver was considered by the officer and others as guilty of culpable negligence. The question of his negligence was in issue and on trial; and how far the jury were aided in their conclusion by the manner in which the driver was treated by a police officer, or others who witnessed or were near the transaction, it is impossible for us to say. There is no pretense for saying that this evidence was necessary or proper, for the purpose of identifying the occasion. Indeed I can see no reason why the police officer was called as a witness at all, unless for the irrelevant purpose of proving the arrest and what the driver then said.

Second. The declarations of an agent or servant do not in general bind the principal. Where his acts will bind, his statements and admissions respecting the subject-matter of those acts will also bind the principal, if made at the same time and so that they constitute a part of the res gestæ. To be admissible, they must be in the nature of original and not of hearsay evidence. They must constitute the fact to be proved, and must not be the mere admission of some other fact. They must be made, not only during the continuance of the agency, but in regard to a transaction depending at the very time. 1 Greenl. Ev. § 13; Thallhimer v. Brinckerhoff, 4 Wend. 396, 21 Am. Dec. 155; Bank of Monroe v. Field, 2 Hill, 445; Story on Agency, §§ 135, 136; Fairlie v. Hastings, 10 Ves. 128; Barker v. Binninger, 14 N. Y. 271.

In this case it seems to have been thought material on the part of the plaintiff to prove that the brake of the defendant's car was out of order. Whether this was or was not the direct object of introducing the declaration of the driver, such declaration at all events proved the fact, if the jury saw fit to credit his statement. But the fact, if true, could not be proved in this manner. The declaration was no part of the driver's act for which the defendants were sued. It was not made at the time of the act, so as to give it quality and character. The alleged wrong was complete, and the driver, when he made the statement, was only endeavoring to account for what he had done. He was manifestly excusing himself and throwing the blame on his principals. I do not by any means suggest that the conduct of the servant himself, as it was proved on the trial, was not so negligent as to justify the verdict; but the error was in allowing the jury, if they so pleased, to regard another material fact as proved by a mere declaration of the agent—a fact which may possibly have exercised a de-

cisive influence upon the result. What effect the jury gave to the evidence we cannot tell. I see no way of getting over this difficulty.

Judgment reversed and new trial ordered.[69]

TRAVELERS' INS. CO. OF CHICAGO v. MOSLEY.

(Supreme Court of the United States, 1869. 8 Wall. 397, 19 L. Ed. 437.)

Mr. Justice SWAYNE.[70] * * * The other exception requires a fuller examination.

Was it competent to prove the fall by the declarations of the assured made under the circumstances disclosed in the bill of exceptions?

In Thompson and Wife v. Trevanion, Skinner, 402, the action was for the battery and wounding of the wife. Lord Chief Justice Holt "allowed, what the wife said immediately upon the hurt received, and before that she had time to contrive or devise anything for her own advantage, to be given in evidence." The reporter adds: "Quod nota. This was at nisi prius, in Middlesex, for wounding the wife of the plaintiff." This case was referred to by Lord Ellenborough with approbation in the case before him of Aveson v. Kinnaird, 6 East, 197. In that case, Lawrence, Justice, in answer to the objection, that such evidence was hearsay, said: "It is in every day's experience in actions of assault, that what a man has said of himself, to his surgeon, is evidence to show what he has suffered by the assault." Id. 191.

The King v. Foster, 6 Carrington & Payne, 325, was an indictment for manslaughter, for killing the deceased by driving a cab over him. A wagoner was called as a witness for the prosecution. He stated that he saw the cab drive by at a very rapid rate, but did not see the accident, and that immediately after, on hearing the deceased groan, he went to him and asked him what was the matter. The counsel for the prisoner objected, that what was said by the deceased, in the absence of the prisoner, could not be received in evidence.

Gurney, Baron, said that what the deceased said at the instant, as to the cause of the accident, was clearly admissible.

Park, Justice, said that it was the best possible testimony that, under the circumstances, could be adduced to show what knocked the deceased down. Mr. Justice Patterson concurred. The prisoner was convicted.

In the Commonwealth v. McPike, 3 Cush. (Mass.) 181, 50 Am. Dec. 727, the indictment, as in the preceding case, was for manslaughter.

[69] Accord: Ruschenberg v. Southern Electric R. Co., 161 Mo. 70, 61 S. W. 626 (1900) like principal case.

See, also, Vicksburg & M. R. Co. v. O'Brien, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299 (1886), excluding statement of engineer as to the rate of speed at the time of the accident.

[70] For the facts of this case, see ante, p. 716. Part of opinion of Swayne, J., is omitted.

The defendant was charged with killing his wife. It appeared that the deceased ran up stairs from her own room, in the night, crying murder, and bleeding. Another woman, into whose room she was admitted, went, at her request, for a physician. A third person, who heard her cries, went for a watchman, and, on his return, proceeded to the room where she was. He found her on the floor, bleeding profusely. She said the defendant had stabbed her. The defendant's counsel objected to the admission of this declaration in evidence. The objection was overruled. The Supreme Court of Massachusetts held, that the evidence was properly admitted. It was said that the declaration was "of the nature of res gestæ," and that the time when it was made was so recent, after the injury was inflicted, as to justify receiving it upon that ground.

It is not easy to distinguish this case and that of The King v. Foster, in principle, from the case before us, as regards the point under consideration.

In Aveson v. Kinnaird, it was said by Lord Ellenborough, that the declarations were admitted in the case in Skinner, because they were a part of the res gestæ.

To bring such declarations within this principle, generally, they must be contemporaneous with the main fact to which they relate. But this rule is, by no means, of universal application. In Rawson v. Haigh, 2 Bing. 99, a debtor had left England and gone to Paris, where he remained. The question was, whether his departure from England was an act of bankruptcy, and that depended upon the intent by which he was actuated. To show this intent, a letter written in France, a month after his departure, was received in evidence. Upon full argument, it was held that it was properly received. Baron Park said: "It is impossible to tie down to time the rule as to the declarations. We must judge from all the circumstances of the case. We need not go the length of saying, that a declaration, made a month after the fact, would, of itself, be admissible; but if, as in the present case, there are connecting circumstances, it may, even at that time, form a part of the whole res gestæ."

Where a peddler's wagon was struck and the peddler injured by a locomotive, the Supreme Court of Pennsylvania said: "We cannot say that the declaration of the engineer was no part of the res gestæ. It was made at the time—in view of the goods strewn along the road by the breaking up of the boxes—and seems to have grown directly out of and immediately after the happening of the fact." The declaration was held to be "a part of the transaction itself." Hanover Railroad Co. v. Coyle, 55 Pa. 402.

In the complexity of human affairs what is done and what is said are often so related that neither can be detached without leaving the residue fragmentary and distorted. There may be fraud and falsehood as to both; but there is no ground of objection to one that does not exist equally as to the other. To reject the verbal fact would not un-

frequently have the same effect as to strike out the controlling member from a sentence or the controlling sentence from its context. The doctrine of res gestæ was considered, by this court, in Beaver v. Taylor, 1 Wall. 637, 17 L. Ed. 601. What was said in that case need not be repeated. Here the principal fact is the bodily injury. The res gestæ are the statements of the cause made by the assured almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted and were in progress. Where sickness or affection is the subject of inquiry, the sickness or affection is the principal fact. The res gestæ are the declarations tending to show the reality of its existence, and its extent and character. The tendency of recent adjudications is to extend rather than to narrow, the scope of the doctrine. Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results. There is none which rests on a more solid basis of reason and authority. We think it was properly applied in the court below.

In the ordinary concerns of life, no one would doubt the truth of these declarations, or hesitate to regard them, uncontradicted, as conclusive. Their probative force would not be questioned. Unlike much other evidence, equally cogent for all the purposes of moral conviction, they have the sanction of law as well as of reason. The want of this concurrence in the law is often deeply to be regretted. The weight of this reflection, in reference to the case under consideration, is increased by the fact, that what was said could not be received as "dying declarations," although the person who made them was dead, and hence, could not be called as a witness.

Judgment affirmed.[71]

NEW JERSEY STEAMBOAT CO. v. BROCKETT.

(Supreme Court of the United States, 1886. 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049.)

Mr. Justice HARLAN.[72] * * * The whole case was thus fairly placed before the jury upon the issue as to whether the defendant's servants, in executing its regulation as to deck passengers, used unwarrantable force,[73] and thereby caused the injuries of which the plaintiff complains.

[71] See the dissenting opinion of Justice Clifford, urging the distinction that in other cases there was independent proof of the principal fact (the accident), while here the statement was the only evidence to establish such fact.

[72] Statement and part of opinion omitted.

[73] It appeared that the plaintiff, a deck passenger, had gone to sleep on some freight in a part of the boat where such passengers were not allowed. According to his contention, the employés of the boat assaulted him without warning and violently removed him, inflicting serious injuries; according to the defense, the plaintiff refused to leave this part of the boat, and resisted the attempt to remove him, and his injuries resulted from an accidental overturning of some boxes in the struggle.

One objection made by the defendant to the admission of evidence deserves to be noticed. The plaintiff in his evidence described the manner in which, as is contended, he was dragged by the watchman from the boxes. After stating that he was thrown to the floor, and was being roughly pushed by the watchman, he proceeded: "Then I saw another man coming with the uniform of the boat on, and the cap, and he said: 'All such men as you ought to be killed.' I says, 'What do you want to kill me for?' He says, 'You farmers are so stingy, you are too stingy to buy a state-room, and you ought to be killed.' I said, 'You ought not to call me stingy.' Then he said, 'Have you looked at your ticket?' I think he had 'third assistant mate' on his cap; the cap had a yellow cord, the same as the officers of the boat wore." It appeared in proof that the person here referred to was one of the mates of the Richmond. The defendant objected, at the trial, to the competency of the statements of the mate. The objection was overruled, and an exception taken.

It is now insisted that the defendant is not responsible for the brutal language of its servants, and that the declarations of the mate to the plaintiff were not competent as evidence against the carrier. We are of opinion that these declarations constitute a part of the res gestæ. They were made by one servant of the defendant while assisting another servant in enforcing its regulation as to deck passengers. They were made when the watchman and the mate, according to the evidence of the plaintiff, were both in the very act of violently "pushing" him, while in a helpless condition, to that part of the boat assigned to deck passengers. Plainly, therefore, they had some relation to the inquiry whether the enforcement of that regulation was attended with unnecessary or cruel severity. They accompanied and explained the acts of the defendant's servants out of which directly arose the injuries inflicted upon the plaintiff. Vicksburg & M. R. Co. v. O'Brien, 119 U. S. 99, 105, 7 Sup. Ct. 118, 30 L. Ed. 299; Ohio & M. R. Co. v. Porter, 92 Ill. 437, 439; Toledo & W. Ry. Co. v. Goddard, 25 Ind. 190, 191. As bearing upon this point, it may be stated that the jury were instructed that the case, as presented, did not authorize vindictive or punitive damages, and that in no event could they award the plaintiff any larger amount than would reasonably compensate him for the injuries received; thus guarding against undue weight being given to the harsh words of the company's servants, apart from their acts. * * *

Judgment affirmed.

BARKER v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Missouri, 1894. 126 Mo. 143, 28 S. W. 866.)

BARCLAY, J.[74] This is an action to recover damages for personal injuries sustained by plaintiff by reason of his alleged unlawful ejection from defendant's train. * * *

Plaintiff's testimony was to the effect that he was ejected from the rear platform of the last car of one of defendant's passenger trains by the conductor and brakeman, one dark night, about 10 or 11 o'clock, in September, 1890, without cause, while the train was in motion, and in a dangerous place. On the other hand, defendant's evidence accounted for his ejection by his refusal to pay fare, insulting conduct on his part towards fellow passengers, particularly women; negatived all unnecessary force, and any unlawful act by defendant's agents, and especially that he was ejected while the train was in motion. During plaintiff's case, one of his witnesses was allowed to testify that he (the witness) was in the smoking car when a stop occurred. After that stop, the witness started back to the rear of the train. He met a man on the way, who told him of the fact that plaintiff had been ejected. Witness then entered the last car, from the rear end of which plaintiff had been put off, and his testimony then goes on thus: "I went right in. I rushed in the car, and asked Mr. Howe if he put that man off, and he said he did. I asked him to stop and get him. I told him I was afraid he was hurt, and he just remarked that he ought to have broke his darned neck, or damned neck; I couldn't say for certain which it was." This testimony was objected to as incompetent, irrelevant, and calculated to mislead the jury; but the objection was overruled, and defendant duly excepted. The court remarked, in making the ruling: "The declarations of Captain Howe are competent."

The witness above quoted testified, on his direct examination, that this conversation with the conductor, Mr. Howe, took place about 8 or 10 feet from the front door of the rear passenger car, and that the train "had stopped some time before that." On his cross-examination, he further said, on this point (in answer to a question as to the interval of time between the stopping of the train and his start from the smoking car), that, to the best of his knowledge, it was 8 or 10 minutes. This statement is thought by some of my learned colleagues to have been intended by the witness to refer to some other "stop" than that at which plaintiff was put off. At all events, it is clear that the conversation with the conductor was not later than these 8 or 10 minutes after the ejectment. It may have been earlier; but it was plainly after the fact, and after the conductor had finished the act, and had gone to the other end of the car, where he met Mr. Johnson, the witness. The whole

[74] Part of opinion of Barclay, J., and dissenting opinion of Macfarlane, J., omitted.

evidence does not bring that conversation into any other relation to the act of plaintiff's ejection than is indicated by the facts given above.

The question, then, is, was the conversation admissible? The main ground on which plaintiff seeks to justify its admission is that it formed a part of the res gestæ. On that ground my learned Brother MACFARLANE has sustained its admissibility, though, it seems to me, he apparently experiences some difficulty in reaching that result. In Missouri it is too well settled by precedents to admit of doubt that no such conversation could be given in evidence with the force of an admission by defendant. Price v. Thornton (1846) 10 Mo. 135; Rogers v. McCune (1854) 19 Mo. 558; McDermott v. Railroad Co. (1881) 73 Mo. 516, 39 Am. Rep. 526; Adams v. Railroad Co. (1881) 74 Mo. 553, 41 Am. Rep. 333; Aldridge v. Furnace Co. (1883) 78 Mo. 559; Devlin v. Railway Co. (1885) 87 Mo. 545. The conductor was employed to represent the company in the management and control of its train. The company was answerable for his actions within the fair scope of that employment. But the company was certainly not bound by any declaration of his motives which did not accompany or form part of some act or transaction within the apparent line of the service for which he was employed.

But it is needless to again go over the ground which the last group of decisions covers. Under those cases it is plain that, if the conversation between the witness and the conductor in this case has any proper standing as evidence, it cannot be as an admission, but must be as a part of that essential or descriptive matter belonging to the main transaction itself which the law calls "res gestæ," for want of any English term equally expressive. It is far from my present purpose to attempt any sort of definition of "res gestæ." Definitions are, no doubt, useful and necessary to impart general conceptions of the subjects with which jurisprudence deals; but they do not always suffice to solve the difficulties met in the practical administration of law. In the case at hand, the trainmen ejected the plaintiff from the train a few minutes, at least, before the conversation in question took place. The former act is the fact with which the conversation must be connected as a circumstance, to bring the conversation properly into the res gestæ.

The conversation had two distinct bearings as a piece of evidence: First, it embraced an implied admission that the conductor had put the plaintiff off the train; and, secondly, it indicated motive,—that is to say, hostility to plaintiff. Proof of the former we might overlook as harmless, having no prejudicial effect on defendant's rights; for both sides admitted that plaintiff was ejected from the train. La Duke v. Township of Exeter (1893) 97 Mich. 450, 56 N. W. 851, 37 Am. St. Rep. 357. But upon the question of the conductor's motive of hostility to plaintiff in ejecting him the conversation was vitally material, and could not justly be considered harmless, in view of the issue of exemplary damages which the court saw fit to submit to the jury. The plaintiff was not entitled (as against the present defendant) to prove

that motive as against the company by a declaration of the conductor after the fact, as the Missouri cases already mentioned show.

The interval of time after the main fact is not, of itself, of controlling importance, though entitled to weighty consideration in determining what are res gestæ. The testimony indicates that the conversation of the witness with the conductor had no connection whatever with the scene out of which the alleged cause of action arises. Nor was the conductor's statement in any way connectible with that scene as a circumstance of it. It was an entirely independent event, notwithstanding it occurred within a comparatively short time after the act in which plaintiff played a part. But, so far as concerns any relation between the ejection of plaintiff and the conversation, the latter might as well have occurred eight or ten days, as two or three or ten minutes, afterwards. Mere thoughts or feelings engendered by an occurrence do not, in my opinion, form of themselves a sufficiently substantial connecting link between a fact and the subsequent talk of an eyewitness about it to make that talk a part of the res gestæ of the fact. The suggestion to that effect in the learned opinion of my Brother MACFARLANE does not, with due respect, seem to me maintainable, in its application to the case at bar. Without attempting to declare any general rule as to what matters constitute res gestæ, and confining the ruling to the immediate facts of this case, it would seem to me very clear (were it not for the contrary opinion of some of my associates) that the conductor's declaration is no part of the res gestæ in the case before us. In my opinion the court should have excluded it.

2. Nor can it matter, in the result, that the defendant's counsel, on cross-examination, asked the witness to repeat his account of the interview with the conductor. That course did not amount to a waiver of the right to urge the exception already saved to the ruling of the court in admitting that interview. Counsel might properly conform to that ruling for the purposes of the trial, without thereby waiving the right to review the admission of incompetent evidence that had come in, over his objection. After that evidence was before the jury, he might then combat it or meet it, as best he might, without waiving the exception already taken. Tobin v. Railroad Co. (Mo. Sup. 1891) 18 S. W. 996; Martin v. Railroad Co. (1886) 103 N. Y. 626, 9 N. E. 505.

In my opinion, the judgment should be reversed, and the cause remanded, for the reasons above given. It is so ordered.

GANTT, SHERWOOD, and BURGESS, JJ., concur. BLACK, C. J., and BRACE and MACFARLANE, JJ., dissent.

EASTMAN v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts, 1896. 165 Mass. 342, 43 N. E. 115.)

Tort, for personal injuries occasioned to the plaintiff while in the defendant's employ as a freight conductor. At the trial in the Superior Court, before Blodgett, J., there was evidence tending to show that the plaintiff, while in the exercise of due care, and in the performance of his duties, stepped onto the railroad track in Newburyport, in front of a coal car, for the purpose of unsetting a brake; that after he had effected this he turned to step off the track, caught his foot in an unblocked guard-rail, was thrown down and run over by one or more wheels of the car, on account of which it was necessary to amputate his leg; that after the accident the train was divided, and the plaintiff, who remained on the ground for a few minutes, was then removed to the side of the track, and was afterwards taken to the hospital in Newburyport; and that while he was so lying on the ground, or about the time when he was taken up, he made a statement to one Holland as to how the accident happened.

Holland, who was a brakeman and saw the accident, testified that he got to the plaintiff within a minute after the accident. "Q. Before he got up, and while he was there, did he state to you how it occurred? A. Not before I got to him. Q. When you got there, I say. A. No, sir. Q. Did he at any time make a statement of how it happened? A. He did. Q. Now, I want to know when that was. A. Well, it wasn't more than,—time flies very quick,—it wasn't more than five minutes after I split the cars and took him out. Q. Not more than five minutes? A. No, sir, I don't think it was. Q. Was it before you had taken him up, or after you had taken him up? A. I think it was about the time we were taking him up. Q. Now I want to refresh your memory a little. I want to know, now, if you told me, in the court room yesterday,—in the ante room yesterday,—that he made the statement to you within a half minute after the accident happened? A. No, sir; I don't think I did. I might have said it, but I don't think I did. Half a minute after it happened is a very short time. Q. Now, you put it how long after it happened? A. About five minutes, I should judge. Time flies very quick. Q. You say it was about the time he was taken up from the track? A. Yes, about the time we were taking him out."

The witness would have testified that the plaintiff stated that the accident was caused by catching his foot in an unblocked guard-rail, and was asked what the statement of the plaintiff was, but it was excluded, and plaintiff excepted. The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

ALLEN, J. The statements by the deceased were simply a narrative of what had happened, and were not admissible as part of the res

gestæ. Lane v. Bryant, 9 Gray, 245, 69 Am. Dec. 282; Com. v. Hackett, 2 Allen, 136; Com. v. McLaughlin, 5 Allen, 507; Williamson v. Railroad Co., 144 Mass. 148, 10 N. E. 790.

Exceptions overruled.[75]

STATE v. HUDSPETH.

(Supreme Court of Missouri, 1900. 159 Mo. 178, 60 S. W. 136.)

BURGESS, J.[76] At the June term, 1898, of the criminal court of Jackson county, the defendant was convicted of murder in the second degree, and his punishment fixed at 10 years' imprisonment in the penitentiary, for having theretofore at said county shot to death, with a double-barrel shotgun, one Joseph W. Kessner. * * *

The witness Kettle, immediately after coming to where deceased was lying, went to Buckner, about four miles away, for a doctor. He used a buggy and horse belonging to Mrs. Harris, at Lake City. The horse was already harnessed to the buggy, which was standing in the street. He drove to Buckner and back as fast as the horse could go,—"got all he could get out of him." Witness thought it took him about 50 minutes to go to Buckner and back. Defense offered to show by Kettle that as soon as he returned from Buckner he went into Vancleave's store, where Kessner was still lying, and that Kessner then said to Mrs. Kessner or Mary Hudspeth, "If you hadn't taken that gun away from me, it would have been different." This offer was excluded by the court, and defendant excepted. * * *

It is argued that the court erred in excluding the testimony of the witness Kettle as to the statement of deceased made at the place of the shooting, and in excluding the testimony of Samuel Way as to the statement or declaration of deceased to Joseph Hudspeth, made at the place of the shooting, and immediately upon his seeing said Joseph. The statement of the deceased which defendant proposed to prove by Kettle was made about 50 minutes after he was shot, and the statement of deceased which defendant proposed to prove by Samuel Way was made about 1 hour after deceased was shot. The question is, were these statements admissible as part of the res gestæ? When this case was here before, we ruled that a similar statement claimed to have been made by the deceased in the presence of other parties immediately after the shooting was admissible in evidence, as part of the res gestæ; and it must follow that proof of the statements of deceased to the same effect made to other persons 50 minutes or an hour after the shooting was also admissible for the same reason, un-

[75] Compare Eby v. Travelers' Ins. Co. of Hartford, Conn., 258 Pa. 525, 102 Atl. 209 (1917), admitting a patient's statements made about 15 minutes after a fit of coughing, and as soon as he could speak, to the effect that he had swallowed some bristles which came loose from his toothbrush.

[76] Parts of opinion omitted.

less the time which elapsed after the shooting until those statements were made rendered proof of them inadmissible. As a rule, the statements of neither parties nor bystanders, made after the event, are admissible in evidence, but this is not so when the statements are part of the res gestæ, and "it is not, however, necessary that said declarations, to be part of the res gestæ should be precisely coincident with the act under trial. It is enough if they spring from and are made under circumstances which preclude the idea of design.

The test is, were the declarations the facts talking through the party, or the party's talk about the facts. Instinctiveness is the requisite, and when it is obtained the declarations are admissible." Whart. Cr. Ev. (8th Ed.) § 691. The same author says: "Nor are there any limits of time within which the res gestæ can be arbitrarily confined. They vary in length in each particular case." Whart. Cr. Ev. § 262. In State v. Gabriel, 88 Mo. 631, on a trial under indictment for larceny of sheep, where the transaction was made up of a variety of incidents extending over a period of several days, and was not at an end until the sheep were branded as his own by the defendant, all acts and words which occurred or were related during that period of time tending to show that defendant branded the sheep by mistake or inadvertence, and not with a larcenous motive, were held to be competent evidence in his behalf. In Stagner v. State, 9 Tex. App. 440, it was held that statements made by the injured party 20 minutes after he was shot were so intimately connected with the wounding as to negative the idea of manufactured testimony, and were admissible as part of the res gestæ. So, in the case of Castillo v. State, 31 Tex. Cr. R. 145, 19 S. W. 892, 37 Am. St. Rep. 794, it was held that the statements made by the injured party in a few minutes after she was assaulted, and also statements made about a half hour thereafter, while she was lying upon a bench, suffering, bleeding, and prostrated, describing her assailant to another witness, were competent and admissible for the same reason. In 1 Bish. New Cr. Proc. (4th Ed.) § 1087, it is said: "If, after an encounter which will end in death, the defendant or the wounded man makes a statement while the heat of it is on, though after the lapse of a period not definable in minutes, yet before there has been time to reflect and plan, it is admissible."

The statements which defendant proposed to prove were in almost the exact language of the statements claimed on the first appeal to have been made by deceased to Mary Hudspeth immediately after the shooting, which were held to be admissible. When the statements under consideration were made, the deceased was lying in the same place and in the same position as then. The heat of passion was still on, and the circumstances connected with the event uppermost in his mind. They were voluntary, spontaneous, and uninfluenced by persuasion, by suggestion, or other consideration, and, we think, admissible as part of the res gestæ. They tended to show a determination on the part

of deceased to have killed defendant if the gun had not been taken from him, and, when taken into consideration with his repeated threats to kill defendant, were of much importance to defendant in determining the question as to who was the aggressor at the time the fatal shot was fired. * * *

Judgment reversed.

PEOPLE v. DEL VERMO.

(Court of Appeals of New York, 1908. 192 N. Y. 470, 85 N. E. 690.)

WILLARD BARTLETT, J.[77] The indictment in this case charged the defendant with the crime of murder in the first degree, committed at the city of Rome, in Oneida county, on the 30th day of June, 1906, upon the body of one Tony Page by means of a knife, with which a fatal stab wound was inflicted in the abdomen, causing the death of the victim on the following day. The defendant pleaded not guilty and testified as a witness in his own behalf, denying the infliction by him of any stab wound whatever upon the body of the deceased, and giving evidence which, if it had been believed by the jury, would have led them to the conclusion that the injury which caused the death of Tony Page was self-inflicted by means of a knife with which Page had endeavored to assault the defendant.

[It appeared without controversy that the defendant, the deceased, Tony Page, and several others had been drinking in various saloons during the evening, and that about midnight they started down the street together talking, when some words were passed between deceased and defendant.] [78] Tony Page responded with an opprobrious epithet, at which the defendant laughed, and they all walked on a distance of about two blocks further, when Bochicecheo saw the defendant start to run and exclaimed: "What is the matter with that fellow?" Tony Page responded: "Maybe he saw something about the store." As he said this he walked forward four or five steps and dropped to the sidewalk. Bochicecheo asked him, "What is the matter?" and he answered, "Del Vermo stabbed me with a knife." Bochicecheo helped him into his home through the back yard, where his wife met him, and in response to her inquiry as to what was the matter he again said: "Del Vermo stabbed me with a knife." Page was then placed on a couch and a physician was summoned by telephone. The patient was found to be suffering from a stab wound in the abdomen, which was between seven and eight inches deep, and had penetrated the intestines, severed the mesentery artery, and punctured the liver. He died as the result of this wound at 3 o'clock a. m. on July 1, 1906. * * *

[77] Parts of opinion omitted.

[78] This part of the opinion has been condensed.

The next exceptions in the order of their importance which call for our consideration are those relating to the admissibility of the statement of the deceased immediately after he was wounded to the effect that Del Vermo had stabbed him, and his subsequent statements, which were received as dying declarations. The first statement does not appear to have been offered or received as a dying declaration at all, but was admitted rather as a part of the res gestæ in the broadest sense of that term. I think that it must be deemed to have been properly received under the exception to the general rule excluding hearsay evidence, which is treated by Prof. Wigmore under the convenient term of "spontaneous exclamations." 3 Wigmore on Evidence, § 1745. That exception may be stated as follows: Evidence is admissible of exclamatory statements declaratory of the circumstances of an injury, when uttered by the injured person immediately after the injury, provided that such exclamations be spontaneously expressive of the injured person's observation of the effects of a startling occurrence, and the utterance is made within such limit of time as presumably to preclude fabrication.

It will be observed that this exception contemplates and permits proof of declarations by an injured person made after the event, so that it cannot fairly be said that the words spoken really constituted a part of the thing done. In some jurisdictions this has been regarded as a fatal objection to the reception of such evidence. See Parker v. State, 136 Ind. 285, 35 N. E. 1105; State v. Estoup, 39 La. Ann. 219, 1 South. 448; State v. Hendricks, 172 Mo. 654, 73 S. W 194. In most of the states, however, the doctrine is accepted. It was clearly sanctioned by this court by what was said in Waldele v. N. Y. C. & H. R. R. R. Co., 95 N. Y. 274, 279, 280, 47 Am. Rep. 41, in approval of the decision of the Supreme Judicial Court of Massachusetts in Commonwealth v. Hackett, 2 Allen, 136. In this Massachusetts case, which was an indictment for murder, the evidence tended to show that the defendant suddenly approached the deceased, one Gillen, in the nighttime, stabbed him in the abdomen, and ran away. When the blows were inflicted, Gillen cried out, "I am stabbed." A witness for the government testified that upon hearing this exclamation, and within 20 seconds after it was made, he went to Gillen and heard Gillen say: "I'm stabbed—I'm gone—Dan Hackett has stabbed me." The admission of this testimony was sustained on the ground, as stated in the opinion of Bigelow, C. J., that the remark of the deceased "was an exclamation or statement contemporaneous with the main transaction, forming a natural and material part of it, and competent as being original evidence in the nature of res gestæ. * * * They were uttered after the lapse of so brief an interval and in such connection with the principal transaction as to form a legitimate part of it, and to receive credit and support as one of the circumstances which accompanied and illustrated the main fact which was the subject of inquiry before the jury."

Strictly speaking, the spontaneous declaration there under consideration did not really form part of the res gestæ, as being itself a verbal act contemporaneous with the principal occurrence; for the exclamation was uttered after the act of stabbing had been wholly completed and after the assailant had fled, although it is true that the time which had elapsed was very short. The decision, therefore, is clearly an authority for the admissibility of proof of such exclamations relative to an injury, provided they are of the character and are made under the conditions which have already been stated, although they are subsequent in point of time to the infliction of the injury. If they are the impulsive or instinctive outcome of the act, they need not be strictly contemporaneous in order to render them admissible. * * *

The distinction between spontaneous declarations and other declarations deemed part of the res gestæ was clearly pointed out by the present Chief Judge of this court when he was a member of the Appellate Division in the Second Department in the case of Patterson v. Hochster, 38 App. Div. 398, 56 N. Y. Supp. 467, where he said: "Declarations admitted as part of the res gestæ may be divided into three classes: The first is where they constitute a part of the transaction itself which is sought to be proved. The second is where they tend to qualify, explain, or characterize the acts which they accompany. The third is where the declarations are made at the time of the transaction, but relate solely to the acts and conduct of others. The textbooks and decided cases justify the admission of all these declarations on the same ground as being part of the res gestæ. But it is apparent that, logically and on principle, the admission of declarations of the third class must stand on a different ground from that which supports the admission of the two other classes. If a man, being wounded, calls out, 'John has stabbed me,' the declaration in no way qualifies or explains the act of the person who stabbed him. In reality, testimony to the declaration is pure hearsay, and is admissible in evidence only upon the great improbability that the spontaneous utterance of the instant should be false." * * *

Judgment affirmed.[79]

[79] Compare Greener v. Gen. Electric Co., 209 N. Y. 135, 102 N. E. 527, 46 L. R. A. (N. S.) 975 (1913), excluding a statement of the injured party in answer to a question, although made almost immediately after the accident.

CHAPTER IV

OPINIONS AND CONCLUSIONS

SECTION 1.—BY ORDINARY WITNESSES

LEWIS v. FREEMAN.

(Supreme Judicial Court of Maine, 1840. 17 Me. 260.)

Assumpsit against a surety to recover the price of certain goods furnished to one Butler. The defence was that Butler had settled for them.

The witness, on being questioned by the defendant as to the admissions of the plaintiff in that conversation, testified, "that he thought the plaintiff told him, butler had paid him for what cloths he had sold and not brought back; was very confident he said so, but would not swear that he did say so." The plaintiff contended, that upon the testimony of Robinson, the jury could not legally return a verdict for the defendant on the ground that Butler had paid for the cloths.

The Judge instructed the jury, that as witnesses must use their own language in conveying their meaning, and as they express themselves with different degrees of clearness, and use different degrees of caution in the phraseology they adopt, it was for the jury to give their language a fair exposition; that if the testimony of Robinson had proved to their reasonable conviction that the plaintiff had knowingly and deliberately admitted that he had received full payment for the first load of cloths from Butler, they might thereupon find a verdict for the defendant.

Other points were made at the trial, and the jury returned a verdict on each. They found on this, "that Butler did on his return from his first trip deliver over to Lewis cloths and money enough to pay up for the hundred dollars worth of cloths delivered on the strength of Freeman's guaranty." The plaintiff filed exceptions.[1]

SHEPLEY, J. If the instructions respecting the testimony of Robinson were correct; and the jury were authorized by that testimony to find, that the plaintiff had been paid, it will not be necessary to consider the other points made in the case.

The argument is, that there was no testimony to prove an admission of payment, because the witness said he "would not swear, that he did

[1] Statement condensed.

say so"; and that his testimony is not strengthened by the expression, "that he thought the plaintiff told him Butler had paid him."

In the case of Sebor v. Armstrong & trustee, 4 Mass. 206, it was the province of the Court to decide the fact, and to give such effect to the testimony as it might deserve. The trustee must discharge himself, and the only testimony to have this effect being his declaration that he thought the paper payable to order might well be considered as unsatisfactory. And the argument in this case might be regarded as sound, if that were the only testimony before the jury upon this point. But the whole of the expressions used by the witness are to be considered, and in connexion with the conduct of the plaintiff. He says, "he thought the plaintiff told him Butler had paid for what cloths he had sold and not brought back, was very confident he said so, but would not swear that he did say so." The witness was speaking under the obligation of his oath, when he said, that he was very confident he said so, and that was speaking of his recollection of a fact with no slight assurance that he was correct; and when he adds, that he would not swear to it, the idea communicated is, that he was very confident, but not certain, that the plaintiff so stated. The witness was not giving an opinion, but stating the strength of his recollection of a fact. The circumstances stated by the witness respecting the conduct of the plaintiff and Butler, after Butler's return, tend to confirm the conviction that the plaintiff had been paid.

The jury were the proper judges of the weight of the whole testimony upon the point; and the instructions were well suited to bring their minds to a just conclusion.

Exceptions overruled.[2]

STATE v. THORP.

(Supreme Court of North Carolina, 1875. 72 N. C. 186.)

READE, J.[3] The prisoner was charged with drowning her child in a river. A witness saw her going towards the river with a child in her arms. The witness said he knew the prisoner and identified her, he knew the child also, but he was one hundred yards off and was not sure who the child in her arms was. He was then asked if he recognized the child as the deceased? Which question was objected to by

[2] And so in Clark v. Bigelow, 16 Me. 246 (1839), impression; State v. Flanders, 38 N. H. 324 (1859), impression; Snell v. Moses, 1 Johns. (N. Y.) 96 (1806), impression as to a conversation; Blake v. People, 73 N. Y. 586 (1878), that witness was not sure, but thought, etc.

[3] Statement and part of opinion omitted.

the prisoner and ruled out by the Court; for what reason we cannot conceive, as it was clearly competent. Possibly it was ruled out as being a leading question. The Solicitor then asked, "Is it your best impression that the child she had in her arms, was her son Robert Thorp?" The witness said it was. This question was objected to but was admitted. If the former question was leading, this was more so, but there is a more substantial objection to it.

It is true that in very many cases a witness may give "his impressions" or his "opinions" as to facts. Indeed memory is so treacherous, knowledge so imperfect, and even the senses so deceptive, that we can seldom give to positive assertions any other interpretation than that they are the impressions or opinions of the witness. Do you know when a certain act was done? I do. When was it? I think it was in January. Where was it? It was in Raleigh. At what place in Raleigh? I think it was at the hotel, it may have been at the capitol. Who did it? Mr. A. Was it not Mr. B.? It was one or the other and my best impressions is that it was Mr. A. All that would be proper because the witness is speaking of facts within his knowledge and as he understands them. So if in this case the witness had been asked "Did you know the deceased child? Yes. Did you see it in the person's arms? Yes. Did you recognize it as the deceased? Yes, I think it was, that is my best impression." All that would have been proper. But we think the case presented to us will bear the interpretation that the witness said, "I saw the prisoner have a child in her arms. I was so far off that I could not tell what child it was, but I knew that she had a child of her own, and I suppose she would not have been carrying any other child than her own, therefore I think it was her own child. That is my best impression." And this was clearly improper. This was but his inference from what he saw and knew. And we suppose that any bystander in the Court who heard the trial might have been called up and he would have testified that his "best impression" was that it was her child, from the evidence. A witness must speak of facts within his knowledge. He knew that the prisoner had a child of her own, and he knew that she had a child in her arms, and these facts it was proper for him to state, but he could not go further and say, "from these facts which I know I infer that the child was her own, I am not sure but that is my best impression." This may not have been the sense in which he intended to be understood, but we think it will bear that construction. And in favor of life we so construe it. He certainly did not mean to say that he recognized the child as the child of the prisoner, and yet he knew her child very well. Why did he not recognize the child as he did the prisoner? Evidently because at that distance he could not recognize one child from another in the arms of the prisoner. It was probably but little more distinct than a bundle

and he just took it to be her child, because she had it in her arms. Probably this was all he meant by his "best impression." And it was error to allow it. * * *

Venire de novo.[4]

COMMONWEALTH v. HAYES.

(Supreme Judicial Court of Massachusetts, 1884. 138 Mass. 185.)

Indictment, alleging that the defendant, on February 6, 1884, at Peabody, attempted to set fire to a building. Trial in the Superior Court, before Pitman, J., who allowed a bill of exceptions, in substance as follows:

The government introduced evidence tending to prove that, between nine and ten o'clock in the evening of the day named in the indictment, a horse and buggy were driven up to the house of Sarah P. Farnham, in Peabody, and were turned round in the yard, and stopped opposite an open shed, the buggy being twenty-nine feet from the door of the kitchen of the house when stopped. The noise of the carriage attracted the attention of Mrs. Farnham, her husband, and of their servant, one Bohan. The servant testified that, while the horse and buggy were stopped as above stated, she saw a man come from the direction of the shed and get into the buggy, and that he soon drove off. Mrs. Farnham, her husband, and Bohan all testified that, after the man left, they went into the shed with a light, and found there a cartridge of Atlas powder, a fuse, and a bottle of kerosene.

Mrs. Farnham, among other witnesses who testified to the identity of the man with the defendant, testified that she had known the defendant by sight, but had never heard him speak before said February 6; that on that day, about noon, the defendant drove into the yard in a sleigh, with another man, and stopped near the door of the house; that neither of them got out of the sleigh; that she went to the door, and the defendant said, "Does Mr. Farnham live here?" and she replied, "Yes, but is not at home;" that then he said, "Well, he lives here, don't he?" and then he drove away; that that was all she ever heard him say; that the voice was coarse, gruff, and very ugly; that, on the same evening, while the buggy was stopped in her yard as above stated, she went to the door and said twice, "Who is there?" and the person in the buggy replied to the second question only, "What do you think?" and that she did not see the person in the buggy. The district attorney then asked her who it was that spoke. This question was objected to, on the ground that she had no such means of knowledge as would render an answer competent. The judge overruled the

[4] Compare Com. v. Molnehan, 140 Mass. 463, 5 N. E. 259 (1886), to the effect that a witness might state that he thought a liquor was lager beer; Greenfield v. People, 85 N. Y. 75, 39 Am. Rep. 636 (1881), where a lay witness was permitted to state "as a fact" that certain spots were blood.

objection; and the witness answered, "I can say from the voice that it was the same man that spoke to me at noon,—I say it was William Hayes."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

BY THE COURT. The testimony of the witness Farnham, identifying the defendant by his voice, was competent. The weight of it was for the jury, but it was properly submitted to them, to be considered in connection with the other evidence of identity. Commonwealth v. Williams, 105 Mass. 62.

Exceptions overruled.[5]

LUND et ux. v. INHABITANTS OF TYNGSBOROUGH.

(Supreme Judicial Court of Massachusetts, 1851. 9 Cush. 36.)[6]

The plaintiffs offered the deposition of John Kendall, that "there was a bad place at the side of the road, where they put in a culvert. There had been a culvert put across. The condition of it was bad. At the mouth of the culvert, it was a steep right down."

The plaintiffs also offered the deposition of one George Wright, "that there was a bad place near there; a culvert that I thought a dangerous place. I should judge it was about eighteen inches deep and three feet wide, and I should think not far from six feet from the cart rut. It was a common across the road and end open."

The above answers were, on the trial, objected to by the defendants' counsel, on the ground that they conveyed an opinion. The counsel for the plaintiffs contended that they conveyed no opinion as to whether there was a defect in the road, but were simply descriptive expressions used by the witness, and qualified and explained by him.

The judge overruled the objection, and admitted the testimony.[7]

FLETCHER, J. It was maintained, on the part of the defendants, that the answers to the twelfth and thirteenth interrogatories in the deposition of John Kendall, and the answer to the seventh interrogatory in the deposition of George Wright, were improperly admitted in evidence, because they merely expressed opinions of the witnesses, who were not experts, and were not statements of any facts. But the court do not so understand the testimony. The witnesses are not ask-

[5] And so in Ogden v. People, 134 Ill. 599, 25 N. E. 755 (1890).

See, also, Com. v. Best, 180 Mass. 492, 62 N. E. 748 (1902), where a witness was permitted to testify to the identity of a wagon from its peculiar noise, and to state that the noise came from a certain direction.

For a collection of cases admitting opinions or conclusions because of the difficulty or impossibility of adequately describing the various facts observed, see State v. Pruett, 22 N. M. 223, 160 Pac. 362, L. R. A. 1918A, 656 (1916) annotated.

[6] For the nature of this action, see ante, p. 733.

[7] Statement condensed and part of opinion omitted.

ed their opinion as to the sufficiency or insufficiency of the road. But the inquiry was as to the actual condition of the road in point of fact, and as to what the witnesses knew, not what was their opinion on this subject. The answers of the witnesses describe the actual condition of the road as within their personal knowledge, and are not expressions of opinions merely.

The answers are merely descriptive—in very general terms to be sure—of the defective state of the road; but the defendants might, if they had thought proper to do so, have required the witnesses to state in detail in what particulars the road was bad; and, in the answer of the witness Wright to the eighth interrogatory, the defect in the road is particularly described. But this general form of expression does not warrant the exception that the witnesses give opinions merely, and do not state facts. This exception, therefore, is not sustained in point of fact. * * *

New trial (on other grounds).

MUSICK v. BOROUGH OF LATROBE.

(Supreme Court of Pennsylvania, 1898. 184 Pa. 375, 39 Atl. 226.)

Trespass for personal injuries.

At the trial it appeared that plaintiff, on the night of October 14, 1893, fell down the steps of an entrance to an unprotected cellarway leading from an alley twenty feet wide in the borough of Latrobe. The night was dark, and it was raining. The plaintiff lived a few miles from Latrobe, and was not familiar with the alley.

A witness, after describing the entrance to the cellar, was asked: "Was this excavation out on the alley?" A. "It is on the alley; on borough property." Q. "If a person were going in past the Potthoff building on a dark, rainy night near to the excavation, and there were no guards, signals, or other obstructions around this hole, state what your opinion is with regards to the danger of the place."

The question was objected to by the counsel for the defendant, for the reason that while the witness might detail the exact condition of the alley, he is not supposed to determine whether or not its condition amounts to negligence on the part of the borough, and that it is an hypothetical case, and an opinion by the witness which is the province of the jury to determine, and is therefore incompetent and irrelevant.

By the Court: Objection overruled, and exception for the defendant.

A. "It would be dangerous." Q. "As you described the condition of the area way the next morning after the accident, state whether or not the place would be dangerous." A. "It would be dangerous." [8]

[8] Statement condensed and part of opinion omitted.

WILLIAMS, J. The general rule is well settled that the province of a witness is to state facts, and that of the jury is to draw conclusions from them. There are some exceptions to this rule, particularly when the facts are of such a character as to make it necessary, or at least helpful, that the jury be guided in drawing their conclusions by the testimony of persons possessing superior knowledge of the subject under investigation. In such cases the opinions of expert witnesses are given to the jury as to the effect of certain given facts, or their own conclusions drawn from a personal examination of some object. Witnesses have also been allowed to express opinions upon the safe or unsafe character of machinery, or of the condition of a highway, when an oral description by witnesses would not adequately present the situation to the jury. But, if the defect or obstruction complained of is such as admits of a full and adequate description, the question whether it is dangerous or not is not a question of skill or art requiring the aid of expert testimony, but, like other questions of fact, is to be determined by the jury. They must learn the facts from the witnesses, and then draw their own conclusions as to the dangerous character of the highway, as well as to the contributory negligence of the traveler who suffers an injury. In all ordinary cases, it would be as appropriate for a witness to give his opinion about whether the plaintiff's conduct amounted to contributory negligence or not as to whether a situation fully described by him is dangerous in its character.

The first assignment of error, which complains of the admission of such testimony in this case, is sustained. * * *

Judgment reversed.[9]

SHATTUCK v. STONEHAM BRANCH R. R.

(Supreme Judicial Court of Massachusetts, 1863. 6 Allen, 115.)

Petition to assess damages for taking land for railroad purposes.

During the trial the petitioner testified in his own behalf, and was allowed, under objection, to state his opinion of the amount of damage sustained by him, by reason of the taking of the land. John Hill, a witness for the petitioner, was also allowed to testify, under objection, what he gave for a lot of land about a quarter of a mile from that of the petitioner, and how the two lots compared in value. Luther Hill, another witness for the petitioner, was allowed to testify, under objection, as to the comparative value of the land in controversy and an adjoining lot, a sale of which for a certain price had been put in evidence.[10]

[9] And so in Graham v. Pennsylvania Co., 139 Pa. 149, 21 Atl. 151, 12 L. R. A. 293 (1891), danger of a station platform; Seifred v. Pennsylvania R. Co., 206 Pa. 399, 55 Atl. 1061 (1903), danger of a grade crossing.

For a collection of cases on this point, see Duncan v. Atchison, T. & S. F. Ry. Co., 86 Kan. 112, 119 Pac. 356, 51 L. R. A. (N. S.) 565 (1911), annotated.

[10] Statement condensed and part of opinion omitted.

CHAPMAN, J. The first objection to the rulings of the officer who presided at the trial is, that he allowed the petitioner to testify to the amount of the damage done by the respondents to his estate.

It is not denied that the petitioner is by statute made a competent witness, and might testify to anything that might be stated by any other witness. It is settled in this commonwealth that where the value of property, real or personal, is in controversy, persons acquainted with it may state their opinion as to its value. Also where the amount of damage done to property is in controversy, such persons may state their opinion as to the amount of the damage. This is permitted as an exception to the general rule, and not strictly on the ground that such persons are experts; for such an application of that term would greatly extend its signification. The persons who testify are not supposed to have science or skill superior to that of the jurors; they have merely a knowledge of the particular facts in the case which jurors have not. And as value rests merely in opinion, this exception to the general rule that witnesses must be confined to facts, and cannot give opinions, is founded in necessity and obvious propriety. Vandine v. Burpee, 13 Metc. 288, 46 Am. Dec. 733; Wyman v. Lexington, etc., Railroad, 13 Metc. 326. Walker v. Boston, 8 Cush. 279; Dwight v. County Commissioners, 11 Cush. 201. The same rule is adopted in New York. Clark v. Baird, 9 N. Y. 183.

But this rule of evidence is exceptional, and is confined to the subject of the controversy. Vandine v. Burpee, ubi supra. Evidence as to other property similarly situated must be limited to facts. Evidence of actual sales of other similar land in the vicinity is competent. And much must be left to the discretion of the presiding officer in deciding what lands are similar, and the length of time within which the evidence shall be confined. These matters must vary in each particular case; and as they must be passed upon by the officer, any reasonable exercise of his discretion cannot be excepted to, unless in cases where he reports the facts upon which his decision was founded.

On these principles, the plaintiff's testimony was admissible. So also was that of John Hill, except so far as he was allowed to state his opinion of the value of his own land, and compare it with that of the plaintiff. That portion of it was admitted erroneously. The same rule should have excluded a portion of Luther Hill's testimony. It is impossible for this court to decide whether the testimony of Dike as to the purchase of land for the cemetery was admissible. It would seem to be within the discretion of the presiding officer to decide it. * * *

Verdict set aside.[11]

[11] And so in Illinois & W. R. Co. v. Von Horn, 18 Ill. 257 (1857); Snow v. Boston & M. R. R., 65 Me. 230 (1875); Brown v. Aitken, 90 Vt. 569, 99 Atl. 265 (1916), from general knowledge of the property in that locality; Montana R. Co. v. Warren, 137 U. S. 348, 11 Sup. Ct. 96, 34 L. Ed. 681 (1890). Robinson, J., in Kansas City S. B. R. Co. v. Norcross, 137 Mo. 415, 38 S.

DETROIT & M. R. CO. v. VAN STEINBURG.

(Supreme Court of Michigan, 1868. 17 Mich. 99.)

COOLEY, C. J.[12] * * * Thirty-eight exceptions appear in the record, a number of which were not insisted upon on the argument, and will not be noticed here. Four of the others were assigned to rulings of the Circuit Judge, allowing persons not shown to be experts to testify to the rate of speed the engine was running at the time the accident occurred. Each of these persons stood at the time upon the ground or the platform near the place of the accident, and saw the train pass. Two of them had been a good deal accustomed to railroad traveling; the others were not shown to have had any special opportunity to judge of the speed of passing trains beyond that possessed by people generally.

The point to which the attention of the witnesses was directed was the speed of the passing object. The motion of the train was to be compared to the motion of any other moving thing, with a view to obtaining the judgment of the witness as to its velocity. No question of science was involved, beyond what would have been, had the passing object been a man or a horse. It was not, therefore, a question for experts. Any intelligent man who had been accustomed to observe moving objects, would be able to express an opinion of some value upon it, the first time he ever saw a train in motion. The opinion might not be so accurate and reliable as that of one who had been accustomed to observe, with time piece in hand, the motion of an object of such size and momentum; but this would only go to the weight of the testimony, and not to its admissibility. Any man possessing a knowledge

W. 299 (1897): "It is difficult to lay down any fixed and definite rule as to what acquaintance with property a witness must have or as to how his information must be derived, to say just when his opinion as to the value of property shall be received and when excluded by the court. He is an exception to the rule applying to expert witnesses in general, and whether he has acquired sufficient information to qualify him to give an opinion is a question that must rest largely within the discretion of the trial court. If through the general avenues of information to which the average business man resorts to inform himself of values for the proper conduct of his business, and to guide his sales and purchases of the character of property in controversy, the witness has derived his information, he is qualified to testify, and it is then for the jury, in view of the manner of the acquisition of the information detailed to them by the witness, to say what consideration will be given his estimate. It was no error to permit this testimony to go to the jury for what it was worth."

See, also, Brady v. Brady, 8 Allen (Mass.) 101 (1864).

A large number of the cases on opinion as to the rental value of property are collected in the notes to Carey Coal Co. v. Bebee Concrete Co., 44 L. R. A. (N. S.) 499 (1913). Obviously some witnesses may not have sufficient general knowledge of the value of land or chattels to enable them to form an intelligent opinion; in case of some varieties of property, only a limited class of persons would have such knowledge. Miller v. Smith, 112 Mass. 470 (1873), race horse.

[12] Statement and part of opinion omitted.

of time and of distances would be competent to express an opinion upon the subject. The case of Sisson v. Cleveland & Toledo R. R. Co., 14 Mich. 489, 90 Am. Dec. 252, which was urged upon us as in point, has no analogy. The question there related to the capacity of an engine, about which none but an expert could be supposed to have knowledge; but this relates to matter of common observation.

In order to establish the negligence of the defendants, the plaintiff sought to show that the velocity at which the train was moving at the time the accident occurred, was so great that it would have carried it considerably by the usual place of stopping; and having put in evidence to show the rate of speed, a witness was then asked, "At what rate of speed should the train have been running to stop at the usual stopping place?" This question was objected to, because the witness was not shown to be an expert. This question evidently stands upon a different ground from the last, and can only be answered by a person of experience in the running of trains and in checking their speed. I am inclined to think, however, that the witness had given evidence which showed that he had had such opportunities as entitled him to speak as an expert. He had been traveling as a mail agent regularly for two years on the cars, and unless greatly defective in observation or capacity, ought to be able to express an intelligent opinion. To constitute an expert, it cannot be necessary that one should be connected with the management of the train. If he is in position to witness the result of the management, and to observe the effect when the means of checking the train are applied, he may be as competent to express a satisfactory opinion as the conductor, the brakeman, or possibly, even the engineer. If there was any error in this ruling, or in the subsequent admission of similar evidence from another witness, whose opportunities for observation had been similar, it was in allowing the witnesses to answer the question before they had testified that their observation had been such as to entitle them to express opinions.[13]

* * *

SYDLEMAN v. BECKWITH.

(Supreme Court of Errors of Connecticut, 1875. 43 Conn. 9.)

LOOMIS, J.[14] On the trial of this case the plaintiff, to prove that the horse sold him by the defendant was not safe, kind and gentle, as it was warranted to be, offered certain witnesses, who, after they had testified particularly to their knowledge of facts and of the conduct

[13] Accord: Bracken v. Pennsylvania R. Co., 222 Pa. 410, 71 Atl. 926, 34 L. R. A. (N. S.) 790 (1909), annotated; Dugan v. Authurs, 230 Pa. 299, 79 Atl. 626, 34 L. R. A. (N. S.) 778 (1911), annotated, speed of an automobile; Tecklenburg v. Everett Ry., Light & Water Co., 59 Wash. 384, 109 Pac. 1036, 34 L. R. A. (N. S.) 784 (1910), annotated, street car.

[14] Statement omitted.

of the horse on various occasions, were asked this question: "From your knowledge of the horse was he in your opinion a safe, kind horse?" The counsel for the defendant objected to this question, but the court admitted the evidence in connection with the facts. Was this ruling correct?

The general rule is that witnesses must state facts and not their individual opinions, but there are exceptions to the rule as well established as the rule itself. Besides the case of experts where the subject matter requires special study, skill and experience, the opinions of common observers in regard to common appearances, facts and conditions have been received as evidence in a great variety of cases.

Thus, such opinions have been received in questions of identity as applied to persons, animals, handwriting, and sounds, and in estimating the size, weight, distance and color of objects. State v. Shinborn, 46 N. H. 497, 88 Am. Dec. 224. Also to show the direction of force as evidenced by its effects. The Clipper v. Logan, 18 Ohio, 375. That certain blood stains came from below upward. Commonwealth v. Sturtivant, 117 Mass. 122, 19 Am. Rep. 401. That certain footprints corresponded with certain boots. Commonwealth v. Pope, 103 Mass. 440. That certain hairs were human. Commonwealth v. Dorsey, 103 Mass. 412. That a place in a highway was bad and dangerous. Lund and Wife v. Inhabitants of Tyngsborough, 9 Cush. (Mass.) 36. That a highway or bridge is safe. Ellsworth, J., in Dunham's Appeal from Probate, 27 Conn. 198. That a heap of stones in a highway was an object calculated to frighten horses of ordinary gentleness. Clinton v. Howard, 42 Conn. 294. That effluvia from a certain privy and pigsty necessarily rendered the plaintiff's house uncomfortable as a place of abode. Kearney v. Farrell, 28 Conn. 319, 73 Am. Dec. 677. That a certain dam was sufficient to withstand the force of a certain stream of water. Porter v. Pequonnoc Manufacturing Co., 17 Conn. 253. That a person was intoxicated. People v. Eastwood, 14 N. Y. 562. That one appeared sad. Culver v. Dwight, 6 Gray (Mass.) 444. That a person was of a certain age. De Witt v. Barly, 17 N. Y. 344; Morse v. State, 6 Conn. 9. That one is sane or insane. Grant v. Thompson, 4 Conn. 209, 10 Am. Dec. 119; Kinne v. Kinne, 9 Conn. 103, 21 Am. Dec. 732; Dunham's Appeal from Probate, 27 Conn. 192. That a person evinced a change in intelligence or a want of coherence in remarks. Barker v. Comins, 110 Mass. 477; Nash v. Hunt, 116 Mass. 237. That persons appeared attached to each other. McKee v. Nelson, 4 Cow. (N. Y.) 355, 15 Am. Dec. 384. That a horse appeared well and free from disease. Spear v. Richardson, 34 N. H. 428. That a horse's feet were diseased. Willis v. Quimby, 31 N. H. 485. That a horse had a sulky disposition. Whittier v. Franklin, 46 N. H. 23, 88 Am. Dec. 185.

These exceptions to the general rule are allowed on the ground of necessity, where the subject of inquiry is so indefinite and general as not to be susceptible of direct proof, or where the facts on which the

witness bases his opinion are so numerous or so evanescent that they cannot be held in the memory and detailed to the jury precisely as they appeared to the witness at the time.

To render opinions of common witnesses admissible it is indispensable that the opinions be founded on their own personal observation and not on the testimony of others, or on any hypothetical statement of facts, as is permitted in the case of experts. In some of the cases it is held that the opinion can only be received in connection with facts stated by the witness. In other cases this is not required; as, for instance, in questions respecting the identity of persons. A witness well acquainted with another usually identifies him without conscious mental effort in the way of comparison or inference. In the absence of striking peculiarities of form or feature the identification may be, and often is, by the mere expression of countenance, which cannot be described. And the witness may be correct in his opinion, and yet be unable to give a single feature, or the color of the hair, or the eyes, or any particulars as to the dress. In such cases the distinction between opinion and fact is so very nice that it might perhaps have been as well to consider such identification as a fact, like any other direct perception of the senses.

Where the disposition of a person or of an animal (as in this case) is to be ascertained, the fact to be proved, being latent, can be ascertained only by symptoms and outward manifestations. If these happen to be very striking they may remain in the memory and can be stated, but in many cases they are very slight in each particular instance, and only the impression of an indefinite number of such appearances remains, resulting in an opinion that the quality or disposition in question exists.

In all cases it is important, with a view to confirm the opinion, that the witness should be able to state such facts as will show presumptively that his opinion is well founded. But it is not quite correct to say that the opinion of a witness is entitled to consideration only so far as the facts stated by him sustain the opinion, unless the proposition is understood to include among the facts referred to, the acquaintance of the witness with the subject-matter and his opportunities for observation. The very basis upon which, as we have seen, this exception to the general rule rests, is that the nature of the subject-matter is such that it cannot be reproduced or detailed to the jury, precisely as it appeared to the witness at the time.

We think the defendant was not aggrieved by the ruling of the court in admitting the evidence objected to, and his motion for a new trial is therefore denied.

In this opinion the other judges concurred.[15]

[15] And so in Simoneau v. Keene Electric Ry. (N. H.) 100 Atl. 551 (1917).

GAHAGAN v. BOSTON & L. RY. CO.

(Supreme Judicial Court of Massachusetts, 1861. 1 Allen, 187, 79 Am. Dec. 724.)

Tort for an injury to the plaintiff's intestate while passing along a highway in Cambridge, by being crushed between the cars of the defendants, whereby his death was caused. * * *

Another ground relied upon by the plaintiff was, that the flagman at the crossing was a careless and intemperate person, and for that cause unsuitable to be employed in that capacity, and it appeared that he had since been in the house of correction as a common drunkard. The defendants denied that the flagman was an intemperate person, and, for the purpose of showing that he was not so while in their employ, asked different witnesses, against the objection of the plaintiff, whether, during a series of years, when they had often been at the crossing, the flagman was attending to his duty, and whether they ever saw any indication of intemperance in his conduct, and if he appeared to be a man competent to his place. These questions were asked witnesses not as experts or having any peculiar skill.[16]

HOAR, J. * * * The plaintiff's evidence was not as to the conduct or condition of the flagman at the time of the accident, but was offered to prove that the defendants were negligent in employing an intemperate and incompetent person. This raised directly the question as to his general habits and behavior, and it was therefore right to allow the defendants to show that he was careful, attentive and temperate. Robinson v. Fitchburg & Worcester R. R. Co., ubi supra [7 Gray, 92]. This was a fact which could be proved by witnesses who had seen his conduct, and could testify to the facts which they had observed. It did not require that they should be experts. * * *

Judgment on the verdict.[17]

REG. v. ROWTON.

(Court of Criminal Appeal, 1865. 10 Cox, Cr. Cas. 25.)

COCKBURN, C. J.[18] The question in this case is, whether the answer given by a witness, who was called to rebut the general evidence to good character which had been given in favour of the prisoner, and who was asked what the defendant's general character for de-

[16] Statement condensed and part of opinion omitted.

[17] But see Langston v. Southern Electric R. Co., 147 Mo. 457, 48 S. W. 835 (1898); Johnson v. Caughren, 55 Wash. 125, 104 Pac. 170, 19 Ann. Cas. 1148 (1909). Apparently the majority of the courts exclude such opinion, but differ considerably as to the reason.

[18] Statement, parts of opinions of Cockburn, C. J., and Earle, J., the opinions of Martin, B., and Willes, J., and the additional opinion of Cockburn, C. J., are omitted.

cency and morality and whose answer was, to the effect or in these terms, "I know nothing of the neighborhood's opinion, because I was only a boy at school; but my own opinion and the opinions of my brothers who were also pupils of his is, that his character is that of a man capable of the grossest indecency, and the most flagrant immorality;" the question is whether it was proper to leave that answer to the consideration of the jury who tried the case. I am of opinion that it was not, and the conviction therefore cannot stand. Two questions present themselves; the first, whether when evidence in favour of the character of the prisoner has been given on his behalf, evidence of bad character can be adduced upon the part of the prosecution to rebut the evidence so given. I am clearly of opinion that such evidence may properly be received. * * *

Assuming, however, that the evidence was properly received to rebut the prior evidence of good character adduced by the prisoner, the question still presents itself of whether the answer which was given to a question perfectly legitimate in its character was an answer which it was proper to leave to the jury. In the first instance it becomes necessary to consider what is the meaning of evidence to character. It is laid down in the books that a prisoner is entitled to give evidence as to his general character. What does that mean? Does it mean evidence as to his reputation amongst those to whom his conduct and position is known, or does it mean evidence of disposition? I think it means evidence of reputation only. I quite agree that what you want to get at, as bearing materially on the probability or improbability of the prisoner's guilt, is the tendency or disposition of his mind to commit the particular offence with which he stands charged; but no one ever heard of a question put deliberately to a witness called on behalf of a prisoner as to the prisoner's disposition of mind. The way, and the only way, the law allows of your getting at the disposition and tendency of his mind is by evidence as to general character founded upon the knowledge of those who know anything about him and of his general conduct. Now that is the sense in which I find the word character used and applied by all the text writers of authority upon the subject of evidence. Mr. Russell in his book, which has now become a standard work of authority, puts the admissibility or the reception of evidence to character upon this ground, that the fact of a man having had an unblemished reputation up to the time of the particular transaction in question, leads strongly to the presumption that he was incapable of committing, and therefore did not commit the offence with which he stands charged.

We are not now considering whether it is desirable that the law of England should be altered in this respect, or whether it should be competent for you to get at the tendency and disposition of a man's mind, which becomes an element in the consideration of the case, by evidence of his general disposition. It may be that it would be expedient to import into the administration of our law the practice of some other

countries and to go into the history of a man's antecedents, with the view on the part of the prosecution of showing that he is capable and therefore likely to commit the offence; or, stopping short of that, it may be expedient that if you allow the prisoner the advantage of introducing, if he pleases, the issue of character to go into the facts from which the inference as to character might be drawn in his favour. No one pretends that you can ask as to a specific fact, though every one will agree that one fact of honesty or dishonesty, as the case may be, would weigh infinitely more than the opinion of his friends or neighbors as to his general character. But that cannot, according to the practice, be done. The truth is, this part of our law is an anomaly. Although, logically speaking, it is quite clear that an antecedent bad character would form quite as reasonable a ground for the presumption and probability of guilt as previous good character lays the foundation of innocence, yet you cannot, on the part of the prosecution, go into evidence as to bad character. This allowing of evidence of good character in favour of the prisoner to be given, has grown up from a desire to administer this part of our law with mercy as far as possible. It has sprung up from a time when the law was according to the common estimation of mankind severer than it should have been.

Be that as it may, this class of evidence has engrafted itself as a sort of anomalous exception on our law, and we must deal with it as we find it, and the opinion of all who have dealt with the subject of evidence is, that it is to reputation we must confine it. It is true that in practice, whenever a witness is called to character it gives a greater cogency and force to his evidence, if the evidence be introduced by a statement of circumstances from which it may be the more apparent and readily believed that the witness has had a full and abundant opportunity to acquire information so as to be able to speak satisfactorily upon the character of the prisoner; and in practice it is very often carried beyond what, I think if we stood upon the strict letter of the law, can be altogether justified. But Mr. Phillips has truly pointed out that facts which do not come within the rule that evidence may be received of general character, are very often given in evidence in favour of prisoners. But when we come to consider the question of what, in the strict interpretation of the law, is the limit of such evidence, I must say, in my judgment, it must be restrained to this, the evidence must be of the man's general reputation and not the individual opinion of the witness. I put a question in the course of the discussion, to which I did not receive an answer which at all tended to shake my opinion upon this point; and the question was—suppose a witness acknowledges, in answer to a question put to him relative to the general character of the accused, that he knows nothing of the general character, but that he had had abundant opportunity of forming an individual opinion as to his honesty or the particular moral quality that came in question in the particular case, I take it to be clear that if that question be objected to, it could not be received in evidence.

The witness who acknowledged that he knew nothing of the general character, and had no opportunity of knowing it in the sense of reputation, would not be allowed to give an opinion as to a man's character in the more limited sense of his disposition.

Now, then, if that be the true doctrine on the subject of the admissibility of evidence to character in favour of the prisoner, the next question that presents itself is within what limits must the rebutting evidence be confined which is adduced to meet that evidence which the prisoner has brought forward? Now, I think that evidence must be of the same character and kept within the same limits; that while you can give evidence of general good character, so the evidence called to rebut it must be evidence of the same general description showing that the evidence which has been given to establish a good reputation on the one hand is not true because the man's general reputation was bad. Now, then, what is the answer in the present case? The witness, it seems, disclaims all knowledge as to the general reputation of the accused; what he says is this:—"I know nothing of the neighborhood's opinion." I take the word neighborhood to mean, "I know nothing of the opinion of those with whom the man has in the ordinary occupations of life been brought immediately into contact. I knew him and so did two brothers of mine when he was in school, and, in my opinion, his disposition,"—in that sense the word "character" comes in question when you look at the answer,—"in my opinion his disposition is such that he is capable of committing the class of offences with which he stands charged." I am strongly of opinion that the evidence is not admissible. * * *

ERLE, J. * * * With respect to the second question, I do not agree with the Lord Chief Justice. I am entirely of opinion with him that individual facts are to be excluded, and whether the answer given by the witness does comprise something in the nature of an individual fact or not, I do not stop to inquire, because it appears to me that a question of very general importance has been raised and has been argued; and as to this question of general importance I assume that the answer understood in such sense is admissible. What is the principle of admitting evidence of character? I am of opinion that the evidence is admissible for the purpose of showing the disposition of the party accused, and raising a presumption from that disposition, that he had not committed the crime imputed to him. Now, disposition cannot be ascertained directly; it is only to be ascertained by the opinion of others, and the opinion of others must be founded either on their own personal experience, or must be founded on the expression of opinion by others whose opinion, if it ought to have any avail, ought to be founded on their personal experience.

The point at issue between us is whether the Court is at liberty to receive a statement of the repute of a person founded on personal experience of the witness who attends to give in evidence his estimate of the disposition of the prisoner, an estimate of the character of the

prisoner, taking it in the sense of disposition, which long personal knowledge and acquaintance of his habits enable him to form. I am of opinion that each source of evidence is admissible: you may have the general rumour prevalent in the neighborhood where the party resides, and, according to my opinion, you may have the personal experience of those who have had abundant opportunity of forming a more real substantial guiding opinion than that which is to be gathered from the casual conversation of persons. According to my experience I never saw a witness examined to character without an inquiry into his own personal means of knowledge of that character. I have never known the evidence to go to the jury without, according to my experience, their being told to estimate the weight of the evidence entirely upon the personal experience of the witness. A witness is called to say that "this man has been in my employ for twenty years, and I have always regarded him with the highest estimation and respect, but I never heard a human being speak of him in my life."

I take it that the principle that the Lord Chief Justice has laid down would require that the presiding judge when the evidence was offered should say it is not admissible. "I know nothing but from my personal experience; I never heard a human being express an opinion of him, but I have had abundant experience of him, and he is one of the worthiest of the race he belongs to." That is personal experience. That is the point on which I differ. To my mind that personal experience enables the witness to say "my repute of him is such as I express," and that personal experience gives cogency to the evidence; whereas a witness saying "I have heard some persons say—I have heard generally a report in favour of the prisoner," is very slight in comparison. I think if the proposition is that general character is alone admissible, it is an impossible fact to state. There is no such think as general rumour; it lies in the collection of the sayings of a number of individuals; you cannot ask who spoke that as an individual fact, but it is a general inference supposed to be from hearing a number of separate and specific statements in favour of the party. I think that the notion that general character is alone admissible, is not strictly accurate, if you come to limit it to separate individuals. If a witness was asked what individual has he ever heard give a particular opinion—an opinion of a particular fact, that would be wholly inadmissible.

I attach considerable weight to this distinction, because in my opinion the best character is that which is the least talked about. If the discussion is whether the party is honest or not, if the answer is we believe him honest, so far from that amounting to evidence in favour of his honesty superior to that of a man whose honesty was never thought of being questioned, I should say that it should have a different effect to that. I know that is a wide and general question. I must say that I have attempted to give expression to the arguments of Mr. Taylor, which commanded my assent upon this branch of the argument, and I have stated how my experience has been with respect to

asking for the personal experience of the witness. When I look to the case of Rex v. Davidson, 31 St. Tr. 189, 190, which was cited by the learned counsel for the prosecution, I am strongly confirmed in saying that in my opinion Lord Ellenborough held, and Mr. Holroyd and the other counsel in that case were all of them of opinion, that the personal experience of a witness, or an opinion founded upon his personal experience, was admissible in evidence. There were eleven witnesses to character called in the case of Rex v. Davidson, and though I have not looked at the book for some time, according to my experience of that case, five or six out of the eleven gave very considerable evidence of their personal experience so as to show the means they had of founding an opinion upon personal experience. Lord Moira was the first witness called, and he stated that the prisoner had been employed in India and in other places for a great many years, and when he came to a statement of a specific transaction, then it was that Lord Ellenborough interfered, and said particular facts are never admissible. I find out of the eleven witnesses each of them was asked what were their means of knowledge of the matter, and what was their opinion, and the question put was, "In your opinion is he capable of committing a crime of this description."

I can only say from the numerous reports the practice appears to be very strongly in favour of my opinion, that witnesses are frequently stopped by an attempt to introduce an individual fact. Means of knowledge is the foundation of the general inference of character. Whatever difference of opinion there is between the Lord Chief Justice and myself on the second question, I entirely concur in the first question. In the particular case, the question "what was the character of the prisoner?" and the answer of the schoolboy "I knew him at school and I say his character is bad," if it had stopped there it would have fallen within my principle, and would have been admissible; it was a statement of personal experience, and he was bound to give his answer according to the general inference he had drawn from his personal experience as to the character, but he added a specific fact, "My two brothers told me something." That individual fact, in answer, would not be admissible, but in a grave case involving a very important question I cannot put it minutely on the particular answer. On the general ground I have stated I think that both questions ought to be answered in the affirmative, and that the conviction should be affirmed.

COCKBURN, C. J. I would not be thought for a moment to make any attempt to reply on anything that has fallen from the Chief Justice of the Common Pleas. I am only anxious that in consequence of one observation made, I should not for one moment be misunderstood in the judgment I have pronounced. I am ready to admit that that negative evidence to which I have referred, of a man saying, "I never heard anything against the character of the person of whose character

I come to speak," should not be excluded. I think, though it is given in a negative form, it is the most cogent evidence of a man's good character and reputation, because a man's character does not get talked about till there is some fault to be found with him. It is the best evidence of his character that he is not talked about at all. I think the evidence is admissible in that sense. I am only anxious that I should not be misunderstood.

I will just mention that upon the first point all my learned brothers agree with the judgment I have pronounced; and the LORD CHIEF BARON, my Brothers WILLIAMS, MARTIN, CHANNELL, BLACKBURN, KEATING, PIGOTT, and SHEE all concur upon the second point.

Conviction quashed.[19]

PEOPLE v. EASTWOOD.

(Court of Appeals of New York, 1856. 14 N. Y. 562.)

On the trial of the defendant on a charge of homicide.

One Green was called for the prisoner, and testified that he arrived at the scene of the affray soon after the deceased was knocked down; that he then saw Eastwood, with whom he was well acquainted, and who was his relative; that he was accustomed to see men under the influence of liquor and intoxicated; and that the prisoner appeared as though something was the matter with him. The counsel for the prisoner then put the following question to the witness: From his conduct and deportment, and other facts connected with it, state whether, in your judgment, he was to any considerable extent under the influence of intoxicating liquors? The counsel for the prosecution objected to this question on the ground that it was not competent for the witness to state his opinion; that he must be confined to a statement of the facts. The court sustained the objection, and the defendant's counsel excepted. The witness then testified to some facts tending to prove that the prisoner was intoxicated.[20]

MITCHELL, J. * * * The objection was accordingly to the form of the question, as if it sought the witness' opinion. If the opinion of the witness had been asked as to facts, not within his own observation, the objection would have been good; as to such facts, opinions can be given generally only as to matters of science or art, and by men of the particular science or art. The Court of Oyer and Terminer were probably misled by the form in which the question was put. The inquiry was not intended to bring out an opinion, but to lead the witness to answer to a fact which he saw. If the question had been (as it might have been) direct, "What was the condition of the prisoner

[19] See, also, People v. Albers, 137 Mich. 678, 100 N. W. 908 (1904); People v. Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718, 22 L. R. A. (N. S.) 650, 12 Ann. Cas. 745 (1907), where a number of the cases are collected.

[20] Statement condensed and part of opinion omitted.

as to sobriety at that time?" it probably would have been answered (as it had been before, by other witnesses) without objection. It did not become incompetent by adding the words, "in your judgment," while the judgment was restricted to what the witness saw. A child six years old may answer whether a man (whom it has seen) was drunk or sober; it does not require science or opinion to answer the question, but observation merely; but the child could not, probably, describe the conduct of the man, so that, from its description, others could decide the question. Whether a person is drunk or sober, or how far he was affected by intoxication, is better determined by the direct answer of those who have seen him than by their description of his conduct. Many persons cannot describe particulars; if their testimony were excluded, great injustice would frequently ensue. The parties who rely on their testimony will still suffer an inconvenience, for the court and the jury are always most impressed by those witnesses who can draw and act a living picture before them of what they have seen, so that if there is any controversy as to the fact, such witnesses control; if there is no controversy as to it, the general testimony answers all useful purposes. The Supreme Court was right in granting a new trial on this ground; and the judgment and order granting such new trial should be affirmed.

Judgment accordingly.[21]

STATE v. TILGHMAN.

(Supreme Court of North Carolina, 1850. 33 N. C. 513.)

PEARSON, J.[22] We have considered the several questions presented by the case as made up by his Honor, and have come to the conclusion that there is no error.

The first exception is untenable. The condition of the deceased was such as to make his declarations, competent evidence, as "dying declarations." It is not necessary, that the person should be in articulo mortis, (the very act of dying;) it is sufficient if he be under the apprehension of impending dissolution; when all motive for concealment or falsehood is presumed to be absent, and the party is in a position as solemn, as if an oath had been administered. * * *

The second exception, because of the rejection of the opinion of the wife of the deceased, that "she thought, the deceased thought, he would not die from the wounds," is also untenable. A witness is allowed to give his opinion as to the sanity of one at the time he made his will: or as to the affection of a wife towards her husband, viz.: whether she loved him or not; because a witness may have acquired a

[21] And so in City of Aurora v. Hillman, 90 Ill. 61 (1878); Com. v. Eyler, 217 Pa. 512, 66 Atl. 746, 11 L. R. A. (N. S.) 639, 10 Ann. Cas. 786 (1907), annotated.

[22] Statement and part of opinion omitted.

knowledge of the fact, from a thousand little circumstances occurring at different times which it is not possible to communicate; but the matter to which our attention is now directed is not of that character. What the deceased thought of his condition, was to be judged of by the state of his wounds, and what he then and there said and did. These circumstances it was in the power of the witness to communicate to the Court: and the Judge did right, requiring her to do so, whereby he was enabled to form an opinion, instead of allowing the witness to form one for him. * * *

No error.

CLAPP v. FULLERTON.

(Court of Appeals of New York, 1866. 34 N. Y. 190, 90 Am. Dec. 681.)

Appeal from a judgment admitting a will to probate.

On the part of the contestant, evidence was given tending to show that at the date of the will the testator was enfeebled by age, disease and infirmity; that his mental faculties were impaired; that he was loquacious and querulous; that he was forgetful of facts and events, which even an old man would be likely to remember; that he was conscious of these infirmities, and complained of them; and that the proponent, with whom he lived, had characterized him as childish, not only in conversation, but also in a letter to her sister, written the spring before the execution of the will.

To this was superadded proof by witnesses who were not claimed to be experts, but who stated the facts on which their opinions were based, that, in their judgment, he was incapable of transacting business during the last year of his life.

This proof was met by evidence of a similar character from witnesses on the part of the proponent, who, in some instances, without stating the facts on which their judgment was based, testified that his mind, in their opinion, was sound. Exceptions were taken on both sides to the admission of this description of evidence.[28]

PORTER, J. The surrogate seems to have assumed that non-professional witnesses, who did not attest the execution of the will, were competent to express an opinion on the general question of testamentary capacity. When a layman is examined as to facts, within his own knowledge and observation, tending to show the soundness or unsoundness of the testator's mind, he may characterize, as rational or irrational, the acts and declarations to which he testifies. It is legitimate to give them such additional weight as may be derived from the conviction they produced at the time. The party calling him may require it, to fortify the force of the facts, and the adverse party may demand it as a mode of probing the truth and good faith of the narration. But to render his opinion admissible, even to this extent, it must be limited

[28] Statement condensed and part of opinion omitted.

to his conclusions from the specific facts he discloses. His position is that of an observer and not of a professional expert. He may testify to the impression produced by what he witnessed; but he is not legally competent to express an opinion on the general question, whether the mind of the testator was sound or unsound.

An exception to this rule is recognized in the case of attesting witnesses. They are present at the very act of execution, and their opinions on the general question of testamentary capacity are admitted ex necessitate. It is the policy of the law to provide all possible safeguards for the protection of the heir as well as the testator. No light is excluded in reference to the res gestæ, which can be furnished by the immediate actors. The subscribing witnesses may be required to state, not only such facts as they remember, but their own convictions as to the testator's capacity; for it may well happen, that on so vital a point they may retain a clear recollection of the general result, long after the particular circumstances are effaced by lapse of time or obscured by failing memory.

In the present case, the attesting witnesses were not called upon to express their judgment; but others, not qualified to speak as experts, were permitted to testify generally, that in their opinion the testator was of sound mind. That this ruling was wrong is shown, with great clearness and force, in the opinion delivered by Judge Bockes at the General Term. If the error had occurred on the trial of an ordinary action at law, it would have called for a reversal of the judgment, in accordance with the rule on this subject, as heretofore limited and defined by the successive decisions in the case of De Witt v. Barley, 9 N. Y. 371; 17 N. Y. 340, 347.

The court below was right however in holding that the error was not fatal, if it be apparent, upon the whole case, irrespective of the evidence improperly admitted, that the testator was clearly competent, and that the will was properly admitted to probate. On appeals from the decrees of surrogates, the Supreme Court succeeds to the jurisdiction and authority of the old Court of Chancery. The review is in the nature of a rehearing in equity; and the admission of improper evidence, on the original hearing, furnishes no ground for reversing the final decision, if the facts established by legal and competent testimony are plainly sufficient to uphold it. Schenck v. Dart, 22 N. Y. 420, 421. * * *

Affirmed.[24]

[24] For a review of the intermediate New York cases, see Holcomb v. Holcomb, 95 N. Y. 316 (1884); People v. Youngs, 151 N. Y. 210, 45 N. E. 460 (1897). And so in McCoy v. Jordan, 184 Mass. 575, 69 N. E. 358 (1904).

See, also, In re Myer's Will, 184 N. Y. 54, 76 N. E. 920, 6 Ann. Cas. 26 (1906), emphasizing the point that the impression which the witness may state must have been produced by the conduct at the time. Much the same rule as to the time element appears in Queenan v. Oklahoma, 190 U. S. 548, 23 Sup. Ct. 762, 47 L. Ed. 1175 (1902). For critical comment on the doctrine of the principal case, see Hardy v. Merrill, 56 N. H. 227, loc. cit. 250, 22 Am. Rep. 441 (1875).

ATLANTA ST. R. CO. v. WALKER.

(Supreme Court of Georgia, 1893. 93 Ga. 462, 21 S. E. 48.)

BLECKLEY, C. J.[25] * * * The plaintiff, testifying as a witness in his own behalf, after stating that he had suffered pain ever since the injury, and was still suffering; that he could not lift as well as he did; and that, in lifting anything heavy, he suffered at night from it; that he suffered more in cloudy than in fair weather; that there was pain in his ankle; his leg bone ached; and that his back hurt him every time he lifted any little thing,—was allowed to give his opinion that he would feel the injury as long as he lived; that his pain and suffering would be permanent. The view of the court was that, as the question of permanency was one of opinion, the plaintiff, although no expert, was competent to give an opinion in connection with his reasons for it. In this, we think, the court was mistaken. Whether the injuries and their effects were permanent or temporary was certainly matter of opinion; but the jury, in so far as they were unaided by expert evidence, should have been allowed to form their own opinion, not from that of nonexperts, but from the facts as proved by the witnesses. The plaintiff was competent to testify to his feelings, pain, and symptoms, as well as to all the characteristics of the injury, external and internal. This was the limit of his competency, and any opinion legitimately arising out of the facts could be more safely formed by the jury than by him. Scarcely anything is less reliable than a sick plaintiff's opinion of his own case, when he is in pursuit of damages.

True, the Code, in section 3867, declares that "where the question under examination and to be decided by the jury, is one of opinion, any witness may swear to his opinion or belief, giving his reasons therefor." The class of questions here referred to must be such as lie within the range of common opinion, although they may be somewhat within the province of scientific opinion, also. A fair illustration would be the question of sanity or insanity. Any witness may give his opinion upon such questions, after stating the facts on which it is founded. But suppose the question were whether, in a given case, insanity was permanent or temporary. This would be a question for scientific experts; and no court would think of taking the opinion of an ordinary witness upon it, with or without the facts on which the opinion was founded. Such a witness would be competent, upon stating the facts, to testify to his belief of the sickness or health of any one, or that he suffered pain. But this is a very different matter from taking his opinion upon the question of when and how sickness would terminate, or whether a state of pain would be temporary or permanent.

Nonexpert opinion might be relied on to take the step from observed facts to a present state or condition, but to pass upon these same

[25] Statement and part of opinion omitted.

facts, the present state and condition included, to a probable future state and condition, might be within the competency of expert opinion only. We think this is so, in such a case as the present more especially, where a part of the facts are not objective, but wholly subjective, consisting of the feelings and sensations of the witness himself, and being accessible to no other witness. How could such testimony be answered? How could the opinion of this nonexpert be met by a conflicting opinion of another witness of his own class? No other witness could possibly know what his sufferings are or have been, so as to make them a basis of belief or nonbelief as to their permanent character, or as to whether they would be only temporary. The Code surely does not intend that internal facts—facts of mere individual consciousness—shall be used as a basis of the opinion which it contemplates as being admissible in evidence, where the question is one of opinion. Both for this reason, and because the question on which the witness in this case was permitted to give his opinion was a scientific question, we think the evidence should have been excluded. * * *

Judgment reversed.[26]

TURNER v. AMERICAN SECURITY & TRUST CO.

(Supreme Court of the United States, 1909. 213 U. S. 257, 29 Sup. Ct. 420, 53 L. Ed. 788.)

Mr. Justice MOODY[27] delivered the opinion of the court:

In this case we are asked to review, on appeal and writ of error, a judgment of the court of appeals of the District of Columbia, affirming a decree of the supreme court of the District, sitting as a probate court, which admitted to probate certain paper writings purporting to be the will and codicils thereto of Henry E. Woodbury. The decree was based upon the findings of a jury upon two issues submitted to it, namely:

"(1) At the time of the execution of the said several paper writings propounded for probate as the last will and testament of Henry E. Woodbury, deceased, was the said Henry E. Woodbury of sound and disposing mind and capable of making a valid deed or contract?

"(2) Was execution of said paper writings procured by the fraud or undue influence of Sallie Woodbury, Mena Stevens, or either of them, or any other person or persons?"

The jury found that the testator was of sound mind and that he was not unduly influenced. The questions brought here arose upon the trial of those issues and are stated in the bill of exceptions duly allowed. * * *

[26] For the use of lay opinion as to the cause of death, see Krapp v. Metropolitan Life Ins. Co., 143 Mich. 369, 106 N. W. 1107, 114 Am. St. Rep. 651 (1906).

[27] Part of opinion omitted.

The first eleven assignments of error relate to the admission or exclusion by the trial court of the testimony of lay witnesses as to their opinion for or against the mental capacity of the testator. In the view we take of these assignments of error they may be considered together, and without any statement as to the testimony of the several witnesses.

The rule governing the admission of testimony of this character which has been prescribed by this court for the courts of the United States is easy of statement and administration. Where the issue is whether a person is of sound or unsound mind, a lay witness who has had an adequate opportunity to observe the speech and other conduct of that person may, in addition to relating the significant instances of speech and conduct, testify to the opinion on the mental capacity formed at the time from such observation. Charter Oak L. Ins. Co. v. Rodel, 95 U. S. 232, 24 L. Ed. 433; Connecticut Mut. L. Ins. Co. v. Lathrop, 111 U. S. 612, 28 L. Ed. 536, 4 Sup. Ct. 533; Queenan v. Oklahoma, 190 U. S. 548, 47 L. Ed. 1175, 23 Sup. Ct. 762.

In no other way than this can the full knowledge of an unprofessional witness with regard to the issue be placed before the jury, because ordinarily it is impossible for such a witness to give an adequate description of all the appearances which to him have indicated sanity or insanity. Such testimony has been well described as a compendious mode of ascertaining the result of the actual observations [28] of witnesses. Ordinarily, and perhaps necessarily, the witness, in testifying to his opportunities for observation and his actual observation, relates more or less fully the instances of his conversation or dealings with the person whose mental capacity is under consideration, and it is, of course, competent, either upon direct or cross-examination, to elicit those instances in detail.

The order of the evidence must be left to the discretion of the trial judge; but, when sufficient appears to convince the trial judge that the witness has had an opportunity for adequate [29] observation of the

[28] Mr. Baron Park in Wright v. Tatham, 5 Cl. & F. 670, loc. cit. 735 (1838): "And though the opinion of a witness upon oath as to that fact [sanity] might be asked, it would be only a compendious mode of ascertaining the result of the actual observation of the witness, from acts done, as to the habits and demeanor of the deceased."

[29] Sherwood, J., in State v. Soper, 148 Mo. 217, 49 S. W. 1007 (1899): "It is urged on behalf of defendant that in permitting witnesses Maude Hewitt and others to give their opinions respecting the sanity of defendant without stating the facts upon which they based their opinions, the trial court erred. Ordinarily, a lay witness is required, when giving an opinion that such a person is of unsound mind, to give the facts on which he founds that opinion. Not so, however, when he gives expression to an opinion that such person is sane, for in that case the subject of the testimony would not give manifestations of certain eccentricities which usually mark the conduct of mind diseased. Ford v. State, 71 Ala. 385 (1882); 3 Rice, Ev. § 21.

It is also held that, while the court may properly exclude the opinion until a sufficient basis of fact has been stated, the admission of the opinion without sufficient showing is not necessarily prejudicial, because of the protection

person's mental capacity, and has actually observed it, then the judge may permit him to testify to his opinion. This was the course pursued by the trial judge in this case. With respect to each witness whose testimony as to opinion was admitted or excluded, the judge exercised his discretion upon the qualifying testimony.

We are asked to review that discretion, and to say that, in the case of the eleven witnesses before us, it was improperly exercised. We have no hesitation in declining to do this. No general rule can well be framed which will govern all cases, and an attempt to do that would multiply exceptions and new trials. The responsibility for the exercise of the judicial power of determining whether a given witness has the qualifications which will permit him, to the profit of the jury, to state his opinion upon an issue of this kind, may best be left with the judge presiding at the trial, who has a comprehensive view of the issue and of all of the evidence, and the witness himself before his face.

This is not to say that, in a very clear case, an appellate court ought not to review the discretion of the trial judge. For instance, if it should appear that the witness had never spoken to the testator or seen any significant act, but merely observed him driving from day to day through the streets, and the opinion of such a witness as to sanity had been received, it would be the duty of the appellate court to correct the error. On the other hand, if the witness for years had been in constant communication with the testator, had frequently conversed with him and observed his conduct from day to day, the exclusion of the opinion of the witness ought to be corrected by the appellate court. These are instances of a plain abuse of judicial discretion. * * *

Affirmed.

SECTION 2.—FROM EXPERT WITNESSES

ALSOP v. BOWTRELL.

(Court of King's Bench, 1620. 2 Croke, 541.)

Ejectment for lands in Munden, in the county of Hertford.[80]

The question was, upon evidence to the jury, whether Edmund Andrews, dying the twenty-third day of March, in the year 1610, and Anne his wife being privatement enseint, but not delivered until 5th January in the year 1611 (which was forty weeks and nine days, and

afforded by proper cross-examination. Chicago Union Traction Co. v. Lawrence, 211 Ill. 373, 71 N. E. 1024 (1904). An opinion that testator was insane, based on trivial circumstances, is not sufficient to take the question to the jury. Winn v. Grier, 217 Mo. 420, 117 S. W. 48 (1909).

[80] Part of case omitted.

then delivered of a daughter named Elizabeth), shall be reputed the father to the said Elizabeth, or that she were a bastard: for it was proved that he fell sick upon the twenty-second day of March, and died the day following of the plague; and that Edmund Andrews (father of the said Edmund who was dead), in malice to his son's wife, did much abuse her, and caused her to be dislodged from places where she was harboured, and to lie in the cold streets; and that she was so used for six weeks together before her travail; and she being brought into a woman's house who commiserated her case, having warmth and sustenance, was delivered presently within twenty-four hours of the said Elizabeth: and this being proved, and this misusage, by five women of good credit, and two doctors of physic, viz. Sir William Baddy and Doctor Mundford, and one Chamberlaine (who was a physician, and in nature of a midwife), upon their oath, they affirming that the child came in time convenient to be the daughter of the party who died; and that the usual time for a woman to go with child was nine months and ten days, viz. menses solares, that is thirty days to the month, and not menses lunares, and that by reason of the want of strength in the woman or the child, or by reason of ill usage, she might be a longer time, viz. to the end of ten months, or more; and so both ancient and modern authors and experience proves.

THE COURT held here, that it might well be as the physicians had affirmed, that ten months may be said properly to be the time mulieribus pariendo constitutum. Against this a record was produced in Trinity Term, 18 Edw. I. Roll 13, in this court, that because a wife went eleven months after the death of her husband, it was resolved, that the issue was not legitimate, being born post ultimum tempus mulieribus pariendo constitutum. But note, it is not there shewn what was ultimum tempus mulieribus pariendo constitutum. And the physicians further affirmed, that a perfect birth may be at seven months, according to the strength of the mother, or of the child himself, which is as long before the time of the proper birth; and by the same reason it may be as long deferred by accident, which is commonly occasioned by infirmities of the body, or passions of the mind: and so the Court delivered to the jury, that the said Elizabeth, who was born forty weeks and more after the death of the said Edmund Andrews, might well be the daughter of the said Edmund.[31] * * *

[31] O'Brien, J., in Young v. Johnson, 123 N. Y. 226, 25 N. E. 363 (1890): "We think that this ruling did not contravene the general rule of evidence that witnesses must state facts and not opinions. The inquiry as to the conditions under which pregnancy may occur is one peculiarly within the range of medical science and skill. The common knowledge and judgment of mankind may be greatly aided in an inquiry of this character by the opinions of learned and scientific men who have made the laws governing the complex physical organism of the human race the subject of profound research and study."

CARTER v. BOEHM.

(Court of King's Bench, 1766. 3 Burr. 1905.)

This was an assurance-cause, upon a policy underwritten by Mr. Charles Boehm, of interest, or no interest: without benefit of salvage. The insurance was made by the plaintiff, for the benefit of his brother, Governor George Carter.

It was tried before Lord Mansfield at Guildhall: and a verdict was found for the plaintiff by a special jury of merchants.

On Saturday the 19th of April last, Mr. Recorder, (Eyre,) on behalf of the defendant, moved for a new trial. His objection was, "that circumstances were not sufficiently disclosed."

A rule was made to shew cause: and copies of letters and depositions were ordered to be left with Lord Mansfield.

N. B.—Four other causes depended upon this.

The counsel for the plaintiff, viz. Mr. Morton, Mr. Dunning, and Mr. Wallace, shewed cause on Thursday the first of this month. But first,

Lord Mansfield reported the evidence—That it was an action on a policy of insurance for one year; viz. from 16th of October 1759 to 16th of October, 1760, for the benefit of the Governor of Fort Marlborough, George Carter, against the loss of Fort Marlborough in the island of Sumatra in the East Indies, by its being taken by a foreign enemy. The event happened: the fort was taken, by Count D'Estaigne, within the year.[82]

LORD MANSFIELD now delivered the resolution of the court.

This is a motion for a new trial.

In support of it, the counsel for the defendant contend, "that some circumstances in the knowledge of Governor Carter, not having been mentioned at the time the policy was underwrote, amount to a concealment, which ought, in law, to avoid the policy."

The counsel for the plaintiff insist, "that the not mentioning these particulars, does not amount to a concealment, which ought in law, to avoid the policy: either as a fraud; or, as varying the contract." * * *

There are many matters, as to which the insured may be innocently silent—he need not mention what the under-writer knows—Scientia utrinque par pares contrahentes facit.

An under-writer cannot insist that the policy is void, because the insured did not tell him what he actually knew; what way soever he came to the knowledge.

The insured need not mention what the under-writer ought to know; what he takes upon himself the knowledge of; or what he waives being informed of.

[82] Statement condensed and part of opinion omitted.

The under-writer needs not be told what lessens the risque agreed and understood to be run by the express terms of the policy. He needs not to be told general topics of speculation: as for instance—The under-writer is bound to know every cause which may occasion natural perils; as, the difficulty of the voyage—the kind of seasons—the probability of lightning, hurricanes, earthquakes, etc. He is bound to know every cause which may occasion political perils; from the ruptures of States from war, and the various operations of it. He is bound to know the probability of safety, from the continuance or return of peace; from the imbecility of the enemy, through the weakness of their counsels, or their want of strength, &c. * * *

But the defendant relied upon a letter, written to the East India Company, bearing date the 16th of September, 1759, which was sent to England by the "Pitt," Captain Wilson, who arrived in May, 1760, together with the instructions for insuring; and also a letter bearing date the 22d of September, 1759, sent to the plaintiff by the same conveyance, and at the same time, (which letters his Lordship repeated.)[88]

They relied too upon the cross-examination of the broker who negotiated the policy, "that, in his opinion, these letters ought to have been shewn, or the contents disclosed; and if they had, the policy would not have been under-written."

The defendant's counsel contended at the trial, as they have done upon this motion, "that the policy was void":

1st. Because the state and condition of the fort, mentioned in the governor's letter to the East India Company, was not disclosed.

2dly. Because he did not disclose that the French, not being in a condition to relieve their friends upon the coast, were more likely to make an attack upon this settlement, rather than remain idle. * * *

It appears by the governor's letter dated 22d September, 1759, to the plaintiff, "that he was principally apprehensive of a Dutch war." His words are—"And in case of a Dutch war, I would have it [the insurance] done at any rate." He certainly had what he thought good grounds for his apprehension. Count D'Estaigne being piloted by the Dutch, delivering the fort to the Dutch, and sending the prisoners to Batavia, is a confirmation of those grounds. And probably, the loss of the place was owing to the Dutch. The French could not

[88] The former of them notifies to the East India Company, that the French had the preceding year, a design on foot, to attempt taking that settlement by surprize; and that it was very probable that they might revive that design. It confesses and represents the weakness of the fort: its being badly supplied with stores, arms and ammunition: and the impracticability of maintaining it (in its then state) against an European enemy.

The latter letter (to his brother) owns that he is "now more afraid than formerly, that the French should attack and take the settlement; for, as they can not muster a force to relieve their friends at the coast, they may, rather than remain idle, pay us a visit. It seems, that they had such an intention, last year." And therefore he desires his brother to get an insurance made upon his stock there.

have got up the river without Dutch pilots: and it is plain, the whole was concerted with them. And yet, at the time of underwriting the policy, there was no intimation about the Dutch.

The reason why the counsel have not objected to his not disclosing the grounds of this apprehension, is, because it must have arisen from political speculation, and general intelligence; therefore, they agree, it is not necessary to communicate such things to an underwriter.

Lastly—Great stress was laid upon the opinion of the broker.

But we all think, the jury ought not to pay the least regard to it. It is mere opinion; which is not evidence. It is opinion after an event. It is opinion without the least foundation from any previous precedent or usage. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the Court and jury were to determine the cause: and therefore it is improper and irrelevant in the mouth of a witness. * * *

Rule discharged.

FOLKES v. CHADD et al.

(Court of King's Bench, 1782. 3 Doug. 157.)

The trustees for the preservation of Wells harbor being of opinion, that a bank which had been erected above twenty years, for the purpose of preventing the sea overflowing some meadows which had descended to the plaintiff, contributed to the choking and filling up of that harbor, by stopping the back-water, threatened to cut it down, on which the plaintiff applied to the Court of Chancery for an injunction. The Court thereupon directed an action of trespass to be brought against the defendants for cutting the bank, directing the trespass to be admitted at the trial; and that the only point in dispute should be, whether the mischief which the bank did to the harbor was a justification for the cutting, that thus the merits of the question might be decided by a jury. The action was first tried at the last Lent Assizes for the county of Norfolk, when the evidence of a Mr. Milne, an engineer, was received, as to what, in his opinion, was the cause of the decay of the harbor, and to show that, in his judgment, the bank was not the occasion of it. The plaintiff, on that trial, obtained a verdict, and in Easter Term last a new trial was granted, on the ground that the defendants were surprised by the doctrine and reasoning of Mr. Milne, and the parties were directed to print and deliver over to the opposite side the opinions and reasonings of the engineers whom they meant to produce on the next trial, so that both sides might be prepared to answer them. Accordingly they went to trial at the last Summer Assizes, when the defendants offered evidence to show, that other harbors on the same coast, similarly situated, where there were no embankments, had begun to fill up and to be choked about the same time as Wells harbor. They also called

Mr. Smeaton, an eminent engineer, to show that, in his opinion, the bank was not the cause of the mischief, and that the cutting the bank would not remove it. The receiving this evidence was objected to, as the inquiring into the site of other harbors was introducing a multiplicity of facts which the parties were not prepared to meet. It was also objected that the evidence of Mr. Smeaton was a matter of opinion, which could be no foundation for the verdict of the jury, which was to be built entirely on facts, and not on opinions. Gould, J., who tried the cause, rejected the evidence. Partridge having obtained a rule for a new trial, on the ground that the Judge had improperly rejected the evidence.

LORD MANSFIELD delivered the opinion of the Court.—This case comes before the Court under the same circumstances as if it were an indictment for the continuance of a nuisance, and it is a question, therefore, whether the demolition of the bank would contribute to restore the harbor. The Court will not compel the removal of a nuisance where it does not appear to be a prejudice, but will set a small fine. Nor would the Court of Chancery, in this case, compel the pulling down of a bank for a damage which might be compensated by a shilling.

The facts in this case are not disputed. In 1758 the bank was erected, and soon after the harbor went into decay. The question is, to what has this decay been owing? The defendant says, to this bank. Why? Because it prevents the back-water. That is a matter of opinion:—the whole case is a question of opinion, from facts agreed upon. Nobody can swear that it was the cause; nobody thought that it would produce this mischief when the bank was erected. The commissioners themselves look on for above twenty years, until a property has been acquired which would be good by the statute of limitations. It is a matter of judgment, what has hurt the harbor. The plaintiff says that the bank was not the occasion of it. On the first trial, the evidence of Mr. Milne, who has constructed harbors, and observed the effect of different causes operating upon them, was received; and it never entered into the head of any man at the bar that it was improper; nor did the Chief Baron, who tried the cause, think so. On the motion for the new trial, the receiving Mr. Milne's evidence was not objected to as improper; but it was moved for on the ground of that evidence being a surprise; and the ground was material, for, in matters of science, the reasonings of men of science can only be answered by men of science. The Court considering the evidence as proper, directed the opinions to be printed, and to be exchanged. Under the persuasion of this being right, the parties go down to trial again, and Mr. Smeaton is called. A confusion now arises from a misapplication of terms. It is objected that Mr. Smeaton is going to speak, not as to facts,[34] but as to opinion. That opin-

[34] Senator Verplanck, in Mayor, etc., of City of New York v. Pentz, 24 Wend. (N. Y.) 668 (1840): "* * * Opinion is admitted when a jury is incompe-

ion, however, is deduced from facts which are not disputed—the situation of banks, the course of tides and of winds, and the shifting of sands. His opinion, deduced from all these facts, is, that, mathematically speaking, the bank may contribute to the mischief, but not sensibly. Mr. Smeaton understands the construction of harbors, the causes of their destruction, and how remedied. In matters of science no other witnesses can be called. An instance frequently occurs in actions for unskilfully navigating ships. The question then depends on the evidence of those who understand such matters; and when such questions come before me, I always send for some of the brethren of the Trinity House. I cannot believe that where the question is, whether a defect arises from a natural or an artificial cause, the opinions of men of science are not to be received. Handwriting is proved every day by opinion; and for false evidence on such questions a man may be indicted for perjury. Many nice questions may arise as to forgery, and as to the impressions of seals; whether the impression was made from the seal itself, or from an impression in wax. In such cases I cannot say that the opinion of seal-makers is not to be taken. I have myself received the opinion of Mr. Smeaton respecting mills, as a matter of science. The cause of the decay of the harbor is also a matter of science, and still more so, whether the removal of the bank can be beneficial. Of this, such men as Mr. Smeaton alone can judge. Therefore we are of opinion that his judgment, formed on facts, was very proper evidence. As to the evidence respecting the situation of other harbors on the same coast, we think that if there were no embankments it was admissible in illustration of Mr. Smeaton's opinion; but as to harbors in which there were embankments, we think it was improper, since litem lite resolvit.

Rule absolute.

tent to infer without the aid of greater skill than their own, as to the probable existence of the facts to be ascertained, or the likelihood of their occurring from the facts actually proved before them. Indeed it would be more logically accurate to say that mere opinion, even of men, professional or expert, is not admissible as such: but that facts having been proved, men skilled in such matters may be admitted to prove the existence of other more general facts or laws of nature, or the course of business, as the case may be, so as to enable the jury to form an inference for themselves. Thus the existence of certain appearances in the dead body having been proved, the chemist testifies that such appearances invariably or generally indicate the operation of some powerful chemical agent. His scientific opinion is in fact his testimony to a law of nature. All these are testimonies to general facts which the jury can ascertain in no other way, and which when proved afford them the means of drawing their own conclusions from the whole mass of testimony taken together."

EASTERN TRANSPORTATION LINE v. HOPE.

(Supreme Court of the United States, 1877. 95 U. S. 297, 24 L. Ed. 477.)

Mr. Justice HUNT [35] delivered the opinion of the court.

Hope, the plaintiff in the Circuit Court, sought to recover damages for the loss of his barge, which the defendants undertook to tow from Jersey City to New Haven, through Long Island Sound.

The barge was lost before reaching her destination; and the jury to which the case was submitted found a verdict for the plaintiff for $2,125.30 damages. This was based upon the theory of the negligence of the defendants in the performance of their duty.

With the general question of negligence we have nothing to do. The finding of the jury is conclusive upon that subject. It is only the specific allegations of error in the rulings or charges of the judge at the trial that we are called upon to consider.

These allegations are as follows: It is said that the court erred, first, in overruling the objection of defendant's counsel to the following question, asked of Patrick McCarty, a witness, by the counsel for the plaintiff: "With your experience, would it be safe or prudent for a tug-boat on Chesapeake Bay, or any other wide water, to tug three boats abreast, with a high wind?"

The witness had testified that for many years he had been the captain of a tug-boat, and was familiar with the making up of tows; that he was a pilot, and had towed vessels on Long Island Sound, although he was not familiar with the Sound, but that he was familiar with the waters of the Chesapeake Bay.

The witness was an expert, and was called and testified as such. His knowledge and experience fairly entitled him to that position. It is permitted to ask questions of a witness of this class which cannot be put to ordinary witnesses. It is not an objection, as is assumed, that he was asked a question involving the point to be decided by the jury. As an expert, he could properly aid the jury by such evidence, although it would not be competent to be given by an ordinary witness. It is upon subjects on which the jury are not as well able to judge for themselves as is the witness that an expert as such is expected to testify. Evidence of this character is often given upon subjects requiring medical knowledge and science, but it is by no means limited to that class of cases. It is competent upon the question of the value of land, Clark v. Baird, 9 N. Y. 183; Bearss v. Copely, 10 N. Y. 93; or as to the value of a particular breed of horses, Harris v. Panama Railroad Co., 36 N. Y. Super. Ct. 373; or upon the value of the professional services of a lawyer, Jackson v. New York Central Railroad Co., 2 Thomp. & C. (N. Y.) 653; or on the question of negligence in moving a vessel, Moore v. Westervelt,

[35] Statement and part of opinion omitted.

22 N. Y. Super. Ct. 558; or on the necessity of a jettison, Price v. Hartshorn, 44 N. Y. 94, 4 Am. Rep. 645. In Walsh v. Washington Marine Insurance Co., 32 N. Y. 427, it was decided that the testimony of experienced navigators on questions involving nautical skill was admissible. The witness in that case was asked to what cause the loss of the vessel was attributable, which was the point to be decided by the jury. The court sustained the admission of the evidence, using this language:

"We entertain no doubt that those who are accustomed to the responsibility of command and whose lives are spent on the ocean, are qualified as experts to prove the practical effect of cross-seas and heavy swells, shifting winds and sudden squalls."

The books give a great variety of cases in which evidence of this character is admissible, and we have no doubt of the competency of the evidence to which this objection is made. * * *

Affirmed.[86]

SPOKANE & I. E. R. CO. v. UNITED STATES.

(Supreme Court of the United States, 1916. 241 U. S. 344, 36 Sup. Ct. 668, 60 L. Ed. 1037.)

Mr. Chief Justice WHITE[87] delivered the opinion of the court:

The United States brought this suit against the railroad company to recover penalties for fifteen alleged violations of the safety appliance act. The violations consisted in hauling in interstate commerce on October 23, 1911, twelve cars which were not provided with hand holds or grab irons at the ends, as required by the act, and three cars which were not equipped with automatic couplers. * * *

The fifteen cars here in question were passenger cars, and on the day named were used in passenger trains which were run from the station in Spokane to the city limits, and thence over the company's right of way to Cœur d'Alene. Twelve of them (those which it was charged were not equipped at the ends with grab irons or hand holds) were cars regularly used on the interurban lines, and were rounded at the ends and equipped with radial couplers to enable the trains to make sharp turns, As the swinging of these couplers from one side to the other across the ends of the cars would break off grab irons of the type ordinarily used on the ends of cars, they were not used. It was claimed, however, that the requirements of the safety appliance act with respect to hand holds or grab irons were in substance complied with by a different, and what was asserted to be an equivalent, appliance; that

[86] And so in Texas & P. R. Co. v. Watson, 190 U. S. 287, 23 Sup. Ct. 681, 47 L. Ed. 1057 (1903), operation of a locomotive.

[87] Part of opinion omitted.

is, openings in the top of the buffer or sill extending across the ends of the cars, just above the couplers. To support this claim the company offered testimony of experienced railroad men to the effect "that the hand holds or grab irons in the buffers or sills of such cars were sufficient to protect men who might be required to go between the cars in coupling or otherwise handling them, that they were sufficient to accomplish purposes intended to be accomplished by the provisions of the safety appliance act requiring hand holds or grab irons to be placed upon the ends of cars used in interstate commerce, and that they were better than those commonly used upon cars engaged in interstate commerce." The United States objected to the introduction of the testimony, and it was excluded on the ground "that it was not a question for expert testimony, but was a matter of common knowledge." During the trial (at whose request it does not appear) the jury were taken to inspect the openings in some of the cars. * * *

It is contended that error was committed in rejecting the testimony of experts offered by the railroad company as to the protection afforded to employees by the openings in the buffers at the ends of the twelve cars. Without stopping to point out the inappositeness of the many authorities cited in support of the contention, we think the court was clearly right in holding that the question was not one for experts, and that the jury, after hearing the testimony and inspecting the openings, were competent to determine the issue, particularly in view of the full and clear instruction given on the subject, concerning which no complaint is made.

Affirmed.[38]

Mr. Justice McREYNOLDS took no part in the consideration and decision of this case.

KEMPSEY v. McGINNISS.

(Supreme Court of Michigan, 1870. 21 Mich. 123.)

The questions for review in this court arise upon the rulings of the circuit judge on the admission and rejection of evidence as to the testamentary capacity of the testator.

Dr. William Mottram was called by the appellant and contestant, and after testifying to facts within his personal observation, as to the condition of the testator, stated that he heard Dr. Abbott testify, and recollected the description he gave of Patterson, and that he heard Eckard testify, except a part of the cross-examination. He was then asked:

Question. "Assuming the testimony of the witness as true in reference to the condition of Patterson during the days they mentioned,

[38] See good exposition to the same effect in Hamann v. Milwaukee Bridge Co., 127 Wis. 550, 106 N. W. 1081, 7 Ann. Cas. 458 (1906), excluding opinion that it was dangerous to unload heavy machinery in a certain way.

what, in your opinion, was his capacity to make a will, or as to his being of sound and disposing mind?"

This question was objected to by the appellees as incompetent and irrelevant. The court sustained the objection. To which ruling and decision the counsel for appellant duly excepted.

Question. "Assuming the testimony of Eckard in regard to the conditior of Patterson during the latter part of Thursday and Thursday night, and Friday and Friday night, including his conversation and what he did, to be true; and assuming the testimony of Dr. Abbott in regard to his condition and symptoms from Friday morning to the time you went there, to be true, including your own observation on Saturday, what is your opinion as to Patterson being of sound disposing mind and memory on Friday morning, so as to be able to transact business continuously and understandingly from nine till eleven o'clock?"

This question was objected to by the counsel for appellees on the ground of irrelevancy and incompetency, and it was argued that the answer to the question would take the question at issue from the jury, and that an expert cannot be allowed to give an opinion upon facts that were not under his own observation. The court sustained the objection.[89]

CHRISTIANCY, J. * * * No controversy arises upon the questions touching mental capacity put to any of the witnesses testifying from their personal observation alone. But the contestants offered in evidence the opinions of several professional witnesses who had not seen the testator during his illness; and upon the proper mode of conducting such an examination some of the main questions in the case arise.

We consider it too well settled to require the citation of authorities, that, upon questions of this kind, the opinions of men skilled in that particular science, in other words, physicians, are admissible in evidence, though not founded upon their own personal observation of the facts of the particular case. But, if the question had not already been closed by authority, I should be much inclined to doubt the propriety of receiving the opinions of merely medical witnesses, under such circumstances, to anything more than physical facts, such as the physical effects of the disease; as I think it may well be doubted whether the skill of ordinary physicians in metaphysics, or their judgment upon merely mental manifestations, has been shown by experience to be of any greater value than that of intelligent men in other departments of life. The question, however, seems to be settled in their favor upon authority.

But in the case of such professional witnesses, as well as in that of unprofessional witnesses—who are allowed to give their opinions only from personal observation—the facts upon which the opinion is found-

[89] Statement condensed and part of opinion omitted.

ed must be stated, and the jury must be left to determine whether the facts stated, as well as the opinions based upon them, are true or false. And it is obvious that when such opinions are given without personal knowledge or observation, such opinions must be based either upon facts observed and stated by other witnesses who knew them, or upon a state of facts assumed for the purpose as a hypothetical case, which the jury may find from the evidence.

But as the jury are to pass upon the credibility of all witnesses and the weight of the evidence, and to determine all matters of fact involved in the case, no witness can have the right to usurp the power of the jury, or to determine any of these questions for them, nor even to give an opinion upon the weight or credibility of any of the testimony. No question, therefore, can be put to the witness which calls upon or allows him to decide upon the truth or falsehood of any evidence in the case. If, therefore, there be any conflict between the witnesses as to the facts upon which a professional opinion is sought, it is manifest the professional witness cannot, though he has heard the testimony, be asked to base his opinion upon that testimony, upon the hypothesis of its truth; because, to reach his conclusion, he must necessarily pass upon the credibility of the witnesses and the weight of the evidence. In the case of any such conflict, therefore, the only proper mode of interrogating the professional witness, is by stating and enumerating in the question itself, the facts to be assumed. And when his opinion is asked upon a case (such as the physical or mental effects of a disease upon a certain person, under certain circumstances and exhibiting certain symptoms), as stated by other witnesses, when there is no conflict, he is to assume, without undertaking to decide, the truth of their statements, and to base his opinion only upon the facts thus assumed, leaving the jury to determine whether such assumed facts are true or false.

Now, it is manifest that this is but giving an opinion upon a hypothetical case, as much as if the facts testified to by the other witnesses had been expressly and hypothetically assumed and enumerated in the question itself. And it would seem, from the nature of the case, to be impracticable to frame any proper question for eliciting the opinion, which is not in the nature of a hypothetical case, being based upon an assumed state of facts which the jury may, or may not, find to be true. And as a collection or state of facts assumed, whether few or many, constitute in the aggregate, the basis on which the opinion is asked; if it does not appear that the opinion would be the same, with any of those facts omitted, it necessarily follows that, if the jury should negative or fail to find any one of the assumed facts, the opinion expressed cannot be treated as evidence, but must be rejected by the jury.

From these considerations it necessarily follows that the jury should know just what facts are assumed, and enter into the collection or state of facts upon which the witnesses' opinions are based. Otherwise

they cannot know whether they ought to treat the opinions as evidence at all; since they can form no opinion whether such assumed facts, or the opinions based upon them, are true or false.[40]

If one or more witnesses have stated, in the presence and hearing of the professional witness, the facts observed (such as the symptoms of the person in question, and his various physical and mental manifestations), and the witness is asked his opinion upon the hypothesis that all the facts stated by the witness or witnesses named are true, the jury, having heard all the evidence alluded to, know what facts are assumed by the witness in giving his opinion. But if the witness be asked his opinion of a case, assuming the testimony of certain specified witnesses to be true, and it appears that he did not hear the whole of their testimony, and it does not definitely appear what facts stated by them he has heard, and what he did not hear, the jury cannot know upon what state of facts he forms his opinion, nor whether the facts he has assumed are true, nor whether his opinion would have been the same if he had heard the whole; and his opinion cannot, therefore, safely be received as evidence.

This disposes of two questions put to Dr. Mottram, the rejection of which was excepted to by the contestant; both of which were based upon the assumed truth of the testimony of Eckard and Dr. Abbott. It appears from the statement of Dr. Mottram himself that he did not hear the whole of Eckard's testimony, and it does not appear what particular facts stated by him he did, and what he did not hear.

It is also necessary, in questions of this kind, to bear in mind the respective provinces of the court, the jury and the witnesses. The court are to decide all questions of law, the jury those of fact. Witnesses are sworn, not to enlighten the court upon matters of law, but the jury (and to some extent the court) upon matters of fact. And, in this particular class of questions, the professional witness is allowed to state his opinions as inferences of fact, notwithstanding that, in doing this, he gives his opinion upon the existence, or non-existence, of the same resultant fact or facts which the jury are to find by their verdict. (Though some authorities require the questions to be so framed as to avoid even this result. See, for instance, Rex v. Wright, R. and R. Cr. Cas., 456; Sills v. Brown, 9 C. and P., 601; Farar v. Warfield, 8 Mart., N. S. (La.) 695, 696; Jameson v. Drinkald, 12 Moore, 148; Earl of Farrar's Case, 19 Howell, 943; Regina v. Francis, 4 Cox, C. C. 57. And see 4 Cox, 451.

But the jury are bound to take the law from the court, and to find

[40] And so in Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458 (1844); Woodbury v. Obear, 7 Gray (Mass.) 467 (1856).

It is doubtful whether it is ever proper to base a question on the assumed truth of a large amount of testimony, without reciting the substance of it. People v. McElvaine, 121 N. Y. 250, 24 N. E. 465, 18 Am. St. Rep. 820 (1890). The state of facts assumed must obviously be such as the jury might find to be true, though the court may relax the rule on the cross-examination of an adverse expert. Railway v. Fishman, 169 Ill. 196, 48 N. E. 447 (1897).

the facts from the evidence. By a special verdict, which they may always render, they merely find the facts, and leave the court to apply the law; by a general verdict, which they are not bound to find, they merely apply the law given them by the court to the facts found by themselves—giving, in this way, the combined result of law and fact.

To what extent and in what manner the mind of the testator was affected by the disease, or what was his mental condition, was a question of fact, upon which it was competent for the professional witnesses to express their opinions. But what degree of mental capacity is necessary to enable a testator to make a valid will, to what extent and with what degree of perfection he must understand the will and the persons and property affected by it, or to what extent his mind must be impaired to render him incapable, is a question of law exclusively for the court, and with which the witnesses have nothing to do. And it is a question of law of no little difficulty, which calls for the highest skill of competent jurists, and upon which the ablest courts are not entirely agreed. * * *

It may be urged in reply to this, that the confusion arising from allowing witnesses to answer questions involving their opinion of the legal capacity of a party to make a will, may be cleared up by a cross-examination, ascertaining what, in his opinion, constitutes such capacity, and that any error in this respect may be corrected by the court in his charge, or otherwise. But it seems to be much wiser, wherever it is practicable, to exclude the improper question, and avoid the confusion altogether, than to admit it first, and then undertake to get rid of its effects, an experiment which is never wholly successful.

I am aware there are many cases in which, upon similar questions, interrogatories have been allowed to be put to witnesses for their opinion, involving, as well their opinion upon the question of law (legal capacity), as upon the question of fact (what the capacity was). In most of them, however, the point I am discussing was not directly raised. And, upon principle, I can see no ground upon which such a course can be justified, when the nature of the case does not render it necessary, and it can, as in the present case, be just as well avoided. * * *

Reversed (on other grounds).

PEOPLE v. YOUNGS.

(Court of Appeals of New York, 1896. 151 N. Y. 210, 45 N. E. 460.)

O'BRIEN, J.[41] The defendant was convicted of murder in the first degree, and appeals to this court for a new trial. There is no dispute whatever with respect to the fact that on the 14th day of December, 1895, at the place charged in the indictment, the defendant shot and

[41] Part of opinion omitted.

killed his wife with a revolver, having deliberately fired two shots at her, both of which took effect, and one of them inflicting a mortal wound producing death. The facts and circumstances attending the commission of the act are fully disclosed by the record, but it is not necessary to repeat them here at much length. The defense was insanity, or at least the existence, at the time of the commission of the act by the defendant, of such mental disturbance or defect of reason as to render him irresponsible for his act. * * *

It appears by the record that certain medical experts were called as witnesses by the prosecution, who testified that they had made a personal examination of the defendant with reference to his sanity, and were then asked whether, in their opinion, he was sane at the time of such examination. These questions were objected to by the defense as incompetent, but the objection was overruled, and there was an exception. It is now urged that these experts should not have been permitted to express an opinion without first stating the facts upon which such opinion was based. The testimony of experts is an exception to the general rule which requires that the witness must state facts and not express opinions. In such cases the opinion of the witness may be based upon facts so exclusively within the domain of scientific or professional knowledge that their significance or force cannot be perceived by the jury, and it is because the facts are of such a character that they cannot be weighed or understood by the jury that the witness is permitted to give an opinion as to what they do or do not indicate. In such cases it is the opinion of the witness that is supposed to possess peculiar value for the information of the jury.

Of course, all the facts or symptoms upon which the opinion is based may be drawn out also either upon the direct or cross-examinations. It is undoubtedly the better practice to require the witness to state the circumstances of his examination, and the facts, symptoms, or indications upon which his conclusion is based, before giving the opinion to the jury. But we think that it is not legal error to permit a medical expert, who has made a personal examination of a patient for the purpose of determining his mental condition, to give his opinion as to that condition at the time of the examination, without, in the first instance, disclosing the particular facts upon which the opinion is based. The party calling the witness may undoubtedly prove the facts upon which the opinion is based, and as we have already observed, that is doubtless the safer practice. It may also be true that the court, in the exercise of a sound discretion, may require the witness to state the facts before expressing the opinion, and in all cases the opposite party has the right to elicit the facts upon cross-examination. But the precise question here is whether the court committed an error in permitting the witness to give the opinion before the facts upon which it was founded were all disclosed, and we think that, when it is shown that a medical expert has made the proper professional examination of the patient in order to ascertain the existence of some physical or

mental disease, he is then qualified to express an opinion on the subject, though he may not yet have stated the scientific facts or external symptoms upon which it is based. People v. Kemmler, 119 N. Y. 580, 24 N. E. 9; People v. Taylor, 138 N. Y. 398, 34 N. E. 275; People v. Hoch, 150 N. Y. 291, 44 N. E. 976. * * *

Affirmed.[42]

KIMBROUGH v. CHICAGO CITY RY. CO.

(Supreme Court of Illinois, 1916. 272 Ill. 71, 111 N. E. 499.)

DUNCAN, J.[43] An action on the case for personal injuries alleged to have been sustained September 5, 1907, was brought by Marie A. Fellows-Kimbrough against the Chicago City Railway Company, plaintiff in error, in the superior court of Cook county. On the first trial, in February, 1909, defendant in error claimed that a malignant cancer was developing in her breast as a result of her injuries, and the jury awarded $7,000 as damages. The trial judge required a remittitur of $3,000 and entered judgment for $4,000. That judgment was reversed by the Appellate Court for the First District because of the improper conduct of one of the attorneys for defendant in error. On the second trial, in March, 1913, her physicians testified, in substance, that the lump in her breast, which they had in the first trial testified was in their opinion a cancer, was a fatty tumor about the size of a hen's egg, the removal of which, as shown by the evidence, was a simple matter that would not be followed with serious consequences. The only other ailment claimed by defendant in error on the second trial to be still enduring as a result of her injuries was a traumatic neurasthenia, which plaintiff in error insisted was the result of a series of troubles that she experienced as the result of three marriages and two divorces and two long spells of sickness and confinement in a hospital, during which time she underwent two severe surgical operations. On the second trial the jury returned a verdict for $3,750 damages, upon which the court entered judgment. The Appellate Court affirmed that judgment, and a writ of certiorari was granted by this court for the purpose of reviewing the judgment of the Appellate Court. * * *

It is first argued by plaintiff in error that the trial court erred in permitting purely speculative evidence as to the future consequences of the tumor in the breast of defendant in error to be considered by the jury. The particular evidence in question appears in the * * * redirect examination of defendant in error's witness, Dr. Mowery, which appears in the record as follows: * * *

[42] And so in People v. Faber, 199 N. Y. 256, 92 N. E. 674, 20 Ann. Cas. 879 (1910).

But see Oliver v. North End St. Ry. Co., 170 Mass. 222, 49 N. E. 117 (1898).

[43] Part of opinion omitted.

Q. "Doctor, you say, as I understand you, that the seed of cancer, or the conditions that cause a cancer, may lie dormant for a number of years before they develop into cancer. How long would that period of dormancy be?" A. "The dormancy may extend over years. A little lump may be in the breast, and lie there for years dormant, and become cancer after a number of years."

The last question and answer were also objected to by plaintiff in error as speculative evidence, and that it was not redirect examination, but the objections were overruled, and proper exceptions preserved. It is clear that the evidence thus elicited and objected to by plaintiff in error is purely speculative evidence—that is, the conjecture of the witness as to consequences that are mere possibilities—and was therefore incompetent.

The witness admitted in his examination that defendant in error did not have a cancer at that time and had not had one, and that he was mistaken when he testified on the former trial that the lump in question was a cancer. The examination of Dr. Mowery by plaintiff in error, as above shown, was for the purpose of getting him to admit that he was so mistaken. His answer to the question of plaintiff in error, and to which it objected, was not responsive to the question, as insisted by defendant in error, and should have been excluded by the court. Plaintiff in error was inquiring as to what would have been the result if defendant in error had really had a cancer four years before, as the witness had testified, and the answer was, in substance, that the tumor might lie dormant for a number of years and then develop into a cancer. For the reason that the answer was not responsive the court also committed error in allowing the defendant in error to repeat the objectionable evidence on redirect examination, and the jury were thus permitted to consider the same in fixing the amount of her damages. Mere surmise or conjecture cannot be regarded as proof of an existing fact or of a future condition that will result. Expert witnesses can only testify or give their opinion as to future consequences that are shown to be reasonably certain to follow. Lauth v. Chicago Union Traction Co., 244 Ill. 244, 91 N. E. 431; Lyons v. Chicago City Railway Co., 258 Ill. 75, 101 N. E. 211.

The court also erred in overruling plaintiff in error's objections to the evidence of Dr. Adams in his examination in chief by defendant in error's counsel, as shown by the following questions and answers, to wit: Q. "Doctor, referring to the supposititious or hypothetical patient and taking into account the elements of the hypothesis, have you an opinion as a medical man, and based upon reasonable certainty, as to what was the cause of the neurasthenia and the tumor in the hypothetical patient?" A. "Yes, sir." Q. "What is your opinion as to the connection between this disease and the tumor or growth in the breast?" A. "That the tumor resulted from the bruise—the injury to the breast. The neurasthenia resulted from the shock of the accident, and was kept alive by the breast condition."

One of the objections of the plaintiff in error to the foregoing questions was that they were improper, as invading the province of the jury and calling for an opinion on an ultimate fact. Where there is a conflict in the evidence, as in this case, as to whether or not the party suing was injured in the manner charged, it is not competent for witnesses, even though testifying as experts, to give their opinions on the very fact the jury is to determine. Whether or not the collision or accident in this case caused traumatic neurasthenia in the defendant in error, or caused the tumor in her breast, are ultimate facts upon which the jury must make their findings. It is no more proper, legally, for physicians to settle those questions for the jury by their direct answers than it would be for a motorman of another street car company to settle the question of negligence by testifying in broad terms that the plaintiff in error was guilty of negligence because its motorman failed to cut off the power by use of the canopy switch in time to prevent the collision.

The rule in such cases is not different where hypothetical questions are put to the expert witnesses. A physician may be asked whether the facts stated in a hypothetical question are sufficient, from a medical or surgical point of view, to cause and bring about a certain condition or malady, or he may be asked whether or not a given condition or malady of a person may or could result from and be caused by the facts stated in the hypothetical question; but he should not be asked whether or not such facts did cause and bring about such condition or malady. Illinois Central Railroad Co. v. Smith, 208 Ill. 608, 70 N. E. 628; Keefe v. Armour & Co., 258 Ill. 28, 101 N. E. 252, Ann. Cas. 1914B, 188; People v. Schultz, 260 Ill. 35, 102 N. E. 1045; Castanie v. United Railways Co., 249 Mo. 195, 155 S. W. 38, L. R. A. 1915A, 1056; Sever v. M. & St. Louis Railroad Co., 156 Iowa, 664, 137 N. W. 937, 44 L. R. A. (N. S.) 1200. In cases where there is no dispute as to the manner and cause of the injury, and no dispute that there was an injury sustained by reason of the acts of which complaint is made, this court has held that a physician may then directly testify that a later malady was or was not caused by the accident or original injury, upon the same principle that he may testify that death resulted from a certain wound. Schlauder v. Chicago & Southern Traction Co., 253 Ill. 154, 97 N. E. 233; City of Chicago v. Didier, 227 Ill. 571, 81 N. E. 698.

Dr. Olof Steffenson was permitted, over the same objections of plaintiff in error, in answer to a similar hypothetical question by defendant in error's counsel, to testify that the cause of the neurasthenia, or of the condition found in the hypothetical patient, was due to the accident. [44]

[44] See, also, Glasgow v. Metropolitan St. Ry. Co., 191 Mo. 347, 89 S. W. 915. (1905).

The errors committed by the court in the admission of evidence, as aforesaid, must be regarded as very prejudicial to plaintiff in error. There is no disease more feared by the human family than cancer. The jury were allowed to consider in this case the testimony of Dr. Mowery that the defendant in error might some time in the future find that the tumor in her breast had developed into a fatal cancer. How much effect or weight that testimony may have had with the jury on the question of fixing the measure of her damages no one can say. They were directed by the instructions of the court to consider all the evidence bearing on the question of damages in fixing the amount of damages. The physicians in the case settled the question by their direct and positive testimony that the tumor and the neurasthenia or nervousness of the defendant in error were caused by the collision. The jury had nothing left to do but to proceed to award large damages under this evidence. * * *

Judgment reversed.

CONNOR v. O'DONNELL.

(Supreme Judicial Court of Massachusetts, 1918. 230 Mass. 39, 119 N. E. 446.)

CROSBY, J.[45] The plaintiff in the first action seeks to recover damages from the defendant, a physician, for alleged negligence in his treatment and care of her after she had given birth to a child. She will hereinafter be referred to as the plaintiff. The second action is brought by the husband of the plaintiff in the first action to recover consequential damages.

The plaintiff filed specifications of the unskillfulness and negligence of the defendant, alleged in her declaration in substance as follows: The first specification alleged that the defendant negligently directed that the plaintiff, while suffering from convulsions following childbirth, be restrained and held in bed by holding her by her wrists, whereby her shoulders became dislocated and fractured; the second specification alleged that after the plaintiff's shoulders had been fractured and dislocated, the defendant failed to discover her injuries and negligently prescribed treatment which caused her great pain and resulted in permanent disabilities. [The jury returned a verdict for the plaintiffs in each case.]

The remaining exceptions relate to questions put to Dr. Jefferson, a medical expert called by the plaintiff. He was asked on direct examination: "Now coming to the left shoulder, Doctor, from your examination of the plate and Mrs. Connor and the evidence in the case, have you formed any opinion as to the cause of the present condition?"

The exception to the admission of this question must be sustained. It is settled that an expert witness cannot be asked or allowed to ex-

[45] Statement and part of opinion omitted.

press an opinion founded in whole or in part on the evidence where, as in the case at bar, it was conflicting. An important question at the trial was whether the fracture and dislocation of the plaintiff's shoulders was due to the convulsions alone or resulted from the convulsions together with the physical restraint exercised upon her by the defendant or under his direction.

It was said by this court in Stoddard v. Winchester, 157 Mass. 567, at page 575, 32 N. E. 948, at page 949: "The proper way to interrogate an expert, to obtain his opinion on facts to be derived from testimony, is to put questions on hypothetical statements of facts, or to ask the witness to give opinions founded on possible views of the evidence, stating in connection with the opinions the hypothetical facts to which they relate, so as to make them intelligible. An expert witness cannot be asked to give an opinion founded on his understanding of the evidence, against the objection of the other party, except in cases where the evidence is capable of but one interpretation. In other words, questions must be so framed that the witness will not be called upon to give an answer involving his opinion on disputed questions of fact which are not proper subjects for the testimony of an expert, nor to intimate to the jury his opinion as to the credibility of any of the witnesses." Hunt v. Lowell Gas Light Co., 8 Allen, 169, 85 Am. Dec. 697; Chalmers v. Whitmore Mfg. Co., 164 Mass. 532, 42 N. E. 98; McCarthy v. Boston Duck Co., 165 Mass. 165, 42 N. E. 568; Rafferty v. Nawn, 182 Mass. 503, 507, 65 N. E. 830; Burnside v. Everett, 186 Mass. 4, 71 N. E. 82; Com. v. Johnson, 188 Mass. 382, 386, 74 N. E. 939; Wigmore on Evidence, § 681.
* * *

As the witness Jefferson was allowed to express an opinion founded in part on "the evidence in the case" which was conflicting, the exception thereto must be sustained; the others are overruled.

Exceptions sustained.

SECTION 3.—OPINION BASED ON EXAMINATION AND COMPARISON OF WRITINGS

GOODTITLE dem. REVETT v. BRAHAM.

(Court of King's Bench, 1792. 4 Term R. 497.)

This ejectment was tried at bar by a special jury from Suffolk, and, by consent, some talesmen from Middlesex. The lessor of the plaintiff claimed as the heir at law, the defendant as the devisee of Mrs. Elizabeth Braham, the person last seised.[46] * * *

[46] Part of case omitted.

The plaintiff then stated his pedigree, which was admitted; and the defendant proved the will, which was impeached on various grounds, but chiefly on those of forgery, and undue influence. There were two parts of the will, to each of which were three signatures and a seal; and with one of them was sealed up a paper, purporting to be instructions for the will, in the hand-writing of the testatrix, and signed and sealed by her; at the bottom of which was a memorandum, that the testatrix at the time of executing the will requested the attesting witnesses to sign the paper for her, which she declared to be her writing; and they had signed it accordingly. This memorandum was in the hand of one Reilly, who was supposed by the plaintiff to be the contriver of the will, and who was considerably benefited by it. The plaintiff's case, as to the forgery, consisted of evidence that the testratrix was incapable of writing a paper of such length as these instructions, and hardly able to sign her name; of declarations in her life-time that she never would make any will; and of some contradictions by the attesting witnesses. The plaintiff then called two clerks of the Post-office, who swore that they were used to inspect franks and detect forgeries. They were then asked whether, from their general knowledge of writing, the instructions were a natural or an imitated hand; this question was objected to, but allowed by the Court; and the clerks swore that the hand was imitated. They were then asked if they could judge whether the instructions were written by the person who wrote the memorandum: This question was also objected to, as being a comparison of hands; but allowed by the Court.

LORD KENYON, C. J., mentioned a case where a decypherer had given evidence of the meaning of letters without explaining the grounds of his art, and where the prisoner was convicted and executed. And BULLER, J., said it was like the case of Wells Harbour, where persons of skill were allowed to give evidence of opinion. The clerks then swore that from their knowledge of the similarity of hands they were sure that the instructions and memorandum were written by the same person. They also swore that all the signatures to the will, and the signature to a power of attorney to surrender copy-holds to the use of the will executed afterwards, were imitated and not natural writing. On cross-examination they admitted that they had never detected an imitation of the hand of a very old person, who wrote with difficulty, and might be supposed frequently to stop. That their principal means of knowing was by seeing whether the letters were painted, that is, gone over a second time with the pen, which they admitted might happen to any person from a failure of ink. Other signatures of the testatrix proved by unsuspected persons, were then shewn to these witnesses; one of these signatures was sworn to be genuine by one of them, and by the other to be imitated.

LORD KENYON, in summing up to the jury, said he should leave the question of forgery on the evidence they had heard, without any observations.

Evidence was also given on the ground of influence. The jury found for the plaintiff.[47]

[47] In Rex v. Cator, 4 Espinasse, 117 (Nisi Prius, 1802), Baron Hotham received similar opinion that a writing was not natural, but rejected an opinion based on comparison, saying:

"* * * Then comes the inspector of franks, from the Post-office; he has these libels put into his hands. Now, I do not know how that gentleman could speak to the hand-writing, unless he could say he had seen the party write, or unless he had been in the habit of correspondence with him, excepting that he is called to speak as a man of science to an abstract question. In that light he has been called, and his evidence has been admitted. He is shown these papers; and he is asked to look at them, and, without inquiring who wrote them, or for what purpose. He is asked, 'From your knowledge of hand-writing in general, do you believe that writing to be a natural or fictitious hand?' His science, his knowledge, his habit, all entitle him to say, I am confident it is a feigned hand. To that there is no objection; and so far as that goes, I see no reason for rejecting that evidence.

"Then comes the next and important point. It is said to him, 'Now look at this paper, and tell me whether the same hand wrote both?' Why, one cannot help seeing, evidently, what must be the consequence:—I cannot conceive there is anything in the idea of a comparison of hands, if this is not to be considered as comparison of hands. The witness says, I never saw him write in my life. Why then, I collect all my knowledge of his being the author of this, by comparing the same hand with that which other witnesses have proved to be a natural hand: by looking at the two, he draws his conclusion. It seems to me, therefore, directly and completely a comparison of hand. This question seems to have been solemnly decided; but when I see the same noble and learned Judge repenting of what he had suffered in the former case, and expressly saying he could not receive such evidence; and observing, that though such evidence was received in Revett and Braham, he had, in his summing up to the jury, laid no stress upon it: this being the case, I cannot consider it so adjudged, but that I may exercise my own judgment in rejecting it."

The latter observations appear to be based on a misunderstanding of certain rulings by Lord Kenyon in Pitt v. Carey, Peake Adl. Cases, 130 (1797), 2 Peake, N. P. 130, where it was proposed to prove that the alleged signature of the defendant was a forgery, by an expert witness who had no knowledge of the genuine signature except from having seen several papers purporting to have been written by him. Lord Kenyon rejected this as not coming within the rule that the witness must have seen the person write, or at least have become acquainted with his writing from correspondence. Garrow then asked the witness whether, having been used to detect forgeries, he could say this was a genuine handwriting. Lord Kenyon said he would not receive this, and observed that though such evidence was received in Revett and Braham, he had, in his charge to the jury, laid no stress upon it.

GURNEY et al. v. LANGLANDS.

(Court of King's Bench, 1822. 5 Barn. & Ald. 330.)

Feigned issue directed by the Court of King's Bench, to try whether the supposed signature of Thomas Gurney the plaintiff, to a certain warrant of attorney, dated 16th April, 1821, was forged. At the trial before Wood, B., at the last assizes for Surrey, the plaintiff, in support of the affirmative of the issue, tendered the evidence of Joseph Hume, inspector of franks at the post-office, who stated, that he was unacquainted with the plaintiff's hand-writing, and was then asked the following question: "From your knowledge of hand-writing, do you believe the hand-writing in question to be a genuine signature, or an imitation?" This question was objected to, and the objection allowed by the learned Judge, who stated in his report the following reasons: "When a witness has seen another write, or has, by receiving notes or letters from him, become acquainted with his hand-writing, he has a ground of forming a belief as to it. But where, as in this case, he acknowledges that he had not any previous acquaintance whatever with the hand-writing of the plaintiff, he could not, as I conceived, have any foundation for his opinion or belief, whether the signature in question was genuine or only an imitation; for he had never seen or had any knowledge of that of which it was supposed to be an imitation. There is no general known standard by which hand-writing can upon inspection only be determined to be counterfeited, without some previous knowledge of the genuine hand-writing, the hand-writings of men being as various as their faces. Opinions of skilful engineers and mariners, &c., may be given in evidence in matters depending upon skill, viz.: as to what effect an embankment in a particular situation may have upon a harbour, or whether a ship has been navigated skillfully. Because, in such cases, the witness has a knowledge of the alleged cause, and his skill enables him to judge and form a belief of the effect. I had never known such loose general evidence admitted, or even offered, and it struck me, that the admission of it would produce much mischief, and greatly endanger written securities." The evidence on the part of the defendant, of the subscribing witnesses to the warrant of attorney and others, was so strong, that the jury declared themselves satisfied, and found a verdict for the defendant. Knowlys, in last Michaelmas term, obtained a rule nisi for a new trial, on the ground that this evidence was admissible, and had been rejected.

ABBOTT, C. J. I have long been of opinion, that evidence of this description, whether in strictness of law receivable or not, ought, if received, to have no great weight given to it. This was an issue directed by the Court, in order to enable them to come to a satisfactory conclusion upon a rule pending before them. The other evidence in this case was of so cogent a description as to have produced a verdict satisfactory to the Judge who tried the cause; and I can pronounce my

judgment much more to my own satisfaction upon a verdict so found, than if this evidence had been admitted, and had produced a contrary verdict. For I think it much too loose to be the foundation of a judicial decision, either by judges or juries. The rule, therefore, for a new trial must be discharged.

BAYLEY, J., concurred.

HOLROYD, J. I have great doubt whether this is legal evidence; but I am perfectly clear that it is, if received, entitled to no weight; and this being an issue directed to satisfy the Court, we shall best exercise our discretion by refusing a new trial.

BEST, J. There can be no doubt that this is not, in all probability, the natural hand-writing of the party; for it is clear, that if at the time he wrote it he had the intention to dispute the deed, he would not sign it in his usual mode. The evidence, therefore, if received, would be entitled to no weight. It is impossible for any person to speak to hand-writing being an imitation, unless he has seen the original: and it does not appear to me necessarily to follow, that an inspector of franks has peculiar means of ascertaining imitated hand-writing. I think, at all events, this evidence was properly rejected, sufficient ground not having been previously laid for receiving it. But still, even if it was receivable, I am satisfied that, on the ground stated by my Lord Chief Justice, this rule ought to be discharged.

Rule discharged.

DOE ex dem. PERRY v. NEWTON et ux.

(Court of King's Bench, 1836. 5 Adol. & E. 514.)

On the trial of this ejectment before Coleridge, J., at the last Summer Assizes for Cumberland, the defendants produced the alleged will of one John Brockbank, on which they rested their title. The genuineness of the signature, purporting to be that of the testator, was disputed, and contradictory evidence given respecting it, for the plaintiff and defendants. The plaintiff's counsel, in cross-examining one of the defendants' witnesses, put into his hand some letters, which the witness said he believed, from the character, to be of Brockbank's writing. It was afterwards proposed, on behalf of the plaintiff, to submit these letters to the jury, in order that they might compare them with the disputed signature, and thereby judge both of its genuineness and of the credit due to the witnesses on this subject. The letters were not in evidence for any other purpose. The learned Judge would not allow them to be put in; and the defendants had a verdict.

Alexander now moved for a new trial, on the ground (among others) of the rejection of evidence.

LORD DENMAN, C. J.[48] This is a point on which we ought not to raise any doubt. I rather think the decision in Griffith v. Williams, 1

[48] Opinions of Patteson and Williams, JJ., omitted.

Cro. & J. 47,[49] has been considered to go a long way; but the real ground upon which that rests appears to me to be that the comparison is unavoidable. There being two documents in question in the cause, one of which is known to be in the handwriting of a party, the other alleged, but denied to be so, no human power can prevent the jury from comparing them with a view to the question of genuineness; and therefore it is best for the Court to enter with the jury into that inquiry, and to do the best it can, under circumstances which cannot be helped. I cannot easily reconcile Lord Kenyon's ruling in Allesbrook v. Roach, 1 Esp. 351, with what has been done in any other case. The facts indeed were peculiar; but I think that at present no judge would come to the same decision. The best rule is, that comparison of writings by the jury shall not be allowed in any case where it can be avoided. When we consider that the same course which is permitted in a case like this may also be resorted to in a criminal case for the purpose of a conviction, we cannot draw the limit too carefully.

COLERIDGE, J. I am of the same opinion. It is true that the objection now taken applies in some degree to the proof of ancient writings by comparison, which is constantly allowed. But that is an excepted case, from necessity, the documents not being capable of proof in the usual way; and the danger of improper selection is less than in the case of modern writings. In addition to the reasons which have been given in this case, it must be considered how many irrelevant issues a jury would have to try if the proposed comparison were allowed. Documents bearing upon the cause must be proved with reference to the main points in issue, independently of the question of handwriting; but

[49] The material parts of this case, as reported in 1 Cr. & J. 47 (1830), are as follows:

"Assumpsit for a breach of promise to marry. At the trial before Goulburn, J., at the last Lent Assizes for the county of Cardigan, the jury found a verdict for the plaintiff. A rule nisi for a new trial had been granted on the ground that the verdict was contrary to evidence.

"At the trial, the plaintiff put in several letters, which were admitted to be in the defendant's handwriting; and called witnesses to prove that another letter, upon which the question mainly depended, was also in the handwriting of the defendant. The defendant called witnesses to prove that this letter was not in his handwriting.

"In the course of the argument it was suggested by John Evans, for the defendant, that the Jury had been influenced by a comparison of handwriting, which the learned Judge had desired them to make between the admitted and disputed letters.

"Per Curiam. Where two documents are in evidence, it is competent for the Court or the Jury to compare them. The rule as to the comparison of handwriting applies to witnesses, who can only compare a writing to which they are examined, with the character of the handwriting impressed upon their own minds; but that rule does not apply to the Court or Jury, who may compare the two documents when they are properly in evidence.

"The rule was subsequently discharged, the judgment of Bolland, B., proceeding on an elaborate comparison which he had made between the letters in question; and he pointed out a number of remarkable coincidences between the documents, in the formation of several letters and the mode of writing several words."

for the purpose of such a comparison, many documents quite irrelevant to the cause must be admitted, with the disadvantage that the opposite party could not be prepared for such evidence. It might even become necessary that the contents of such documents should be gone into.

Rule refused.

THE FITZWALTER PEERAGE CASE.

(House of Lords, 1843. 10 Clark & F. 193.)

This was the claim of Sir Brook William Bridges, Bart., to the Barony of Fitzwalter, which was created by writ of summons in the year 1295, and fell into abeyance in 1756, on the death of Benjamin Mildmay, the 17th and last Lord Fitzwalter, without surviving issue.

Mr. Loftus Wigram and Sir Harris Nicolas, the Claimant's counsel, proposed to put in evidence some family pedigrees, which were produced from the proper custody; no objection was made to them in that respect. They purported to have been made by Edmund Fowler, who was proved to have died in 1751. He had stood in the direct line of the Claimant's ancestors, being the father of his grandmother, one of the coheiresses to the Barony, being also third son and, in the events which happened, heir of Frances Mildmay (or Fowler), who was first cousin and coheir of the said Benjamin, last Lord Fitzwalter. So that, if those pedigrees could be proved to have been of the writing of this Edmund Fowler, they would be admissible in evidence for the Claimant, as declarations made by a deceased relative of circumstances respecting the state of his family and immediate relatives (see Vowles v. Young, 13 Ves. p. 143 et seq.). They had been offered in evidence before the Attorney-General, on the reference of the Claimant's petition to him, but were rejected for want of proof of the handwriting.

The way in which it was proposed now to prove the handwriting was this: first, by producing from the Prerogative Office Mr. Fowler's will,—already received in evidence for other purposes,—and four other documents, which were proved to be of his handwriting: namely, a confidential letter written by him to the steward of his manor at St. Clear's Hall, Essex; another letter by him, appointing a gamekeeper within that manor; a memorandum in an account book; and a deed of settlement of property comprised within the said manor. These were produced from the closet containing the Claimant's family muniments, including the title-deeds of the said manor and property, which now belong to him in right of his grandmother. It was proved that the deed of settlement had been repeatedly, and very recently, acted upon, and that all the documents had the genuine signature of "E. Fowler." It was next proposed to prove the identity of the signer of those documents with the writer of the pedigrees, by comparison of the handwriting of the latter, with the signatures to the proved documents; and for that purpose—

Mr. Lewis Silvester Clarac was examined: He said, in answer to the questions put to him by the counsel and Lords, that he held for 18 years the office of inspector of franks in the General Post-office; and after the abolition of the franking privilege, he had become inspector of official correspondence; that he had much experience in distinguishing the characters of handwriting, and was consulted on this matter upon important occasions. Being then asked if he had examined the signatures of E. Fowler to three of the documents, the deed, the will, and the appointment of gamekeeper, all of which were produced to him, he said he had examined the signature to the will in the Prerogative Office twice, and looked four or five times at the signatures to the letter and other documents of Edmund Fowler, and to the handwriting of the entries in the account book and of queries on the pedigree of the Mildmay family, at the office of the Claimant's solicitor; and he considered that by the inspections he had made, he was so familiar with the handwriting of the person by whom these documents were written or signed, that without any immediate comparison with them, he should be able to say whether any other document produced was or was not in the handwriting of the same person. He believed all these documents to have been signed by the same person; and he did not form his opinion merely from the signatures, but more from the general similarity of the letters, which, he said, were written in a remarkable character.

The Attorney-General, having before objected to the examination of this witness, again submitted that his evidence was not receivable, not being the knowledge of handwriting acquired by a person in the ordinary course of business, giving him a practical acquaintance with the writing of a particular person. The rule of admitting professional skill in handwriting had been carried too far, and ought not to be extended. The Courts of Law were accordingly becoming more strict. This witness was not familiar with the handwriting, which he undertook to prove, from a course of business, like a party's solicitor or steward, or like a parishioner admitted as a witness in some cases; but he had studied the handwriting for the purpose of speaking to the identity of the writer. A person who reads a medical or chemical book with the utmost attention, for the purpose of giving evidence on a question of medicine or chemistry, is not an admissible witness for such purpose.[50]

The LORD CHANCELLOR and LORD BROUGHAM, after looking into some of the cases referred to, said the pedigree could not be received on the sort of proof of the handwriting now offered.

LORD BROUGHAM added, that about five years ago, the Lord Chief Justice of the Court of Queen's Bench did him the honour to consult him on this sort of evidence; and their joint impression was, that if the cases of Doe v. Tarver, and Sparrow v. Farrant,—one before Lord

[50] Statement condensed and part of opinion omitted.

Chief Justice Abbott, and the other before Mr. Justice Holroyd,—were correctly reported, they had gone farther than the rule was ever carried. In the present case his noble and learned friend (the Lord Chancellor) and himself were clearly of opinion that they ought not to allow a person to say from inspection of the signatures to two or three documents—two only, the deed and will, being genuine instruments, admitted to be in the handwriting of Edmund Fowler—from the inspection of those two documents, that he could prove the handwriting of the party. No doubt such evidence had been often received, because it was not objected to. A witness was properly allowed to speak to a person's handwriting from inspection of a number of documents with which he had grown familiar from frequent use of them; and it was on that ground that a person's solicitor and steward were admitted to prove his handwriting.

Mr. Wigram referred to a case of a trial at bar, Revett v. Braham (4 Term. Rep. 497), in which an inspector of franks at the Post-office was admitted to say, as a matter of skill and judgment, whether the name signed to a will was genuine or in a feigned hand.

LORD BROUGHAM. Yes, truly; for that is matter of professional skill (vide ante, p. 154). But that is no reason for admitting a witness to speak to the real handwriting of a person from only having seen a few of his signatures to other instruments produced to him, and that for the purpose of proving its identity. * * *[51]

[51] The document was finally admitted in this case on the testimony of the family solicitor, who had become familiar with the handwriting in question from an examination of a large number of title deeds, etc.

A somewhat similar question arose in Doe v. Suckermore, 5 Adol. & El. 703 (1836), the facts of which are thus stated in the headnote:

"Defendant in ejectment produced a will, and, on one day of the trial (which lasted several days), called an attesting witness, who swore that the attestation was his. On his cross-examination, two signatures to depositions respecting the same will in an ecclesiastical court, and several other signatures, were shown to him (none of these being in evidence for any other purpose of the cause), and he stated that he believed them to be his. On the following day, the plaintiff tendered a witness to prove the attestation not to be genuine. The witness was an inspector at the bank of England, and had no knowledge of the handwriting of the supposed attesting witness, except from having, previously to the trial and again between the two days, examined the signatures admitted by the attesting witness, which admission he had heard made in Court.

"Per Lord Denman, C. J., and Williams, J. Such evidence was receivable.

"Per Patteson and Coleridge, JJ. It was not."

The evidence was rejected at the trial, and the Court being equally divided in opinion, a new trial was refused.

In 1854 the vexed question was settled in England by section 27, c. 125, 17 & 18 Victoria:

"Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute."

RIDEOUT v. NEWTON et al.

(Superior Court of New Hampshire, 1845. 17 N. H. 71.)

Assumpsit on a note, dated on the eighth day of August, 1843, for $50, purporting to be made by the defendants to the plaintiff.

There was no service upon Levi H. Newton, and Elbridge G. Newton pleaded the general issue, denying that he ever signed the note. Among other witnesses produced by the plaintiff to prove the signature to be genuine, was one who testified that he never saw the said Elbridge write but once, and then only to receipt a bill which he presented against the witness. To the competency of this witness to give an opinion as to the genuineness of the signature on the note, defendant objected, but the court admitted him.[52]

GILCHRIST, J. * * * There is no rule of law that requires that a witness, called to prove the hand-writing of a party, should have seen the party write a large number of times. Hand-writing, like the countenance, form, gait, and gesture of a party, is recognized by some more readily than by other witnesses, and is in some persons marked by more decisive and obvious peculiarities than in others. All that is requisite, is to ascertain whether the witness has seen hand-writing which, by an infallible test, he knows to be that of the party; and then he must upon his oath declare if the writing exhibited appears to him to be that of the same party. The weight to be attached to such testimony must depend upon the ordinary tests of knowledge, the capacity of the witness, and his disposition to tell the truth, and the means that have been afforded him, whether from the intrinsic nature of the subject itself, or the familiarity of the witness with it to acquire the information he assumes to have. The witness to the genuineness of the defendant's signature to the note was therefore properly admitted. * * *

New trial (on other grounds).[53]

[52] Statement condensed and part of opinion omitted.

[53] And so in Woodford v. McClenahan, 9 Ill. (4 Gilman) 85 (1847).

The witness may acquire a knowledge of the hand-writing in question from business correspondence without having seen the person write. Reyburn v. Belotti, 10 Mo. 597 (1847); Redding v. Redding's Estate, 69 Vt. 500, 38 Atl. 230 (1897). But not from seeing a document not known or acknowledged to have been written by such person. Randolph v. Gordon, 5 Price, 312 (1818).

For a collection of the cases, see Ratliff v. Ratliff, 131 N. C. 425, 42 S. E. 887, 63 L. R. A. 963 (1902), annotated.

ELLINGWOOD v. BRAGG.

(Supreme Judicial Court of New Hampshire, 1872. 52 N. H. 488.)

Assumpsit, by John W. Ellingwood against Wm. W. Bragg. The plaintiff offered Wm. Heywood as an expert, to give an opinion upon the question whether a long account upon the defendant's books against the plaintiff was written at different times, as it purported to be on the book, or whether it was all written with the same pen and ink and at the same time. The witness testified that he had been in practice as an attorney-at-law some forty years, and had had about the same experience as lawyers in general in the examination and comparison of handwritings; that he had been engaged in one or two cases which led him particularly to examine and compare handwritings, but he did not claim to be able to give an opinion upon which any great reliance could be placed. The court allowed him to give his opinion as an expert, and the defendant excepted. The question of discretion was fully reserved.

The questions of law thus raised were reserved.

FOSTER, J.[54] The defendant excepted to the ruling of the court, admitting the testimony of Mr. Heywood as an expert. The rules which govern the determination of the question thus presented, were declared by this court in the recent case of Dole v. Johnson, 50 N. H. 452; and we see no reason to modify the views then expressed.

According to that case (and upon elementary principles), in order to qualify one to testify as an expert, it should appear, in the first place, that the subject concerning which he is called to testify is one upon which the opinion of an expert can be received. The subject must be one peculiar and exceptional, concerning which some explanation, such a peculiar knowledge alone can afford, is required, in order to render it intelligible to the comprehension and understanding of ordinary men. In other words, the subject-matter of the evidence "must so far partake of the nature of a science as to require a course of previous habit or study in order to the attainment of a knowledge of it." Smith's note to Carter v. Boehm, 1 Smith's L. Cases, 286 a.

The rule which admits the testimony of experts, in any case, is exceptional; and all evidence, which is not founded upon absolute knowledge of the facts pertaining to the cause under investigation, should be received with caution. See Brehm v. Great Western Railway Co., 34 Barb. (N. Y.) 273.

We are not disposed to enlarge, but rather to restrain within as narrow limits as a due regard for the ascertainment of truth in judicial investigations will allow, all such encroachments, so to speak, upon the province of the jury as shall permit witnesses to express opinions merely.

[54] Part of opinion omitted.

We are not prepared to say that the subject-matter of Mr. Heywood's testimony was one upon which the opinion of an expert was inadmissible. But it comes very near the line of demarcation.

It is not like a question concerning the genuineness of a signature or other writing, about which persons, like cashiers of banks, for example, skilled by a course of study, training, and practice, may undoubtedly be called to assist the investigations of unskilled jurors. It is more, perhaps, like the case of a comparison of writings, which was formerly held in England to be inadmissible, for reasons not applicable to New England and its officers and institutions, namely because the jury were supposed to be too illiterate to judge of this sort of evidence.

The question here is not whether the writings were genuine or feigned, but whether the items of account were written at different times, or whether they were all written at the same time with the same pen and ink.

It is admitted, as we understand it, that the items were all written by the same person,—by which admission the principal and most difficult investigation is withdrawn, from the case; and the other question would seem to rest more upon conclusions to be drawn from the general appearance of the color of the ink, and the coarse or fine character of the letters, and their uniformity or diversity in this respect, than from any other sources of knowledge. Such comparison and examination, it seems to us, might not imprudently be entrusted to such men as usually compose our panels of jurors.

But whether the subject upon which Mr. Heywood was called to testify was one upon which the opinion of an expert may be received or not, we are clearly of the opinion that the witness did not possess the legal qualifications requisite to enable him to testify in the capacity of an expert.

In this matter, our opinion coincides with his own, as it was modestly, but conscientiously, expressed upon the witness-stand.

His attention had only once or twice, in the course of a long professional experience as a lawyer, been particularly called to the examination and comparison of handwritings.

He was not, with reference to the subject under investigation, a man of science, and he was not qualified by any previous habit and course of attention, observation, and particular and special study in that direction.

The possession of some, at least, of these qualifications was, in the opinion of this court two years ago, deemed essential to the admissibility of such testimony, in the exercise of a prudent judicial discretion. Dole v. Johnson, 50 N. H. 452, 459.

We may reasonably doubt whether the verdict of the jury was obtained or influenced by the evidence thus improperly received, since, as already remarked, the subject-matter of the evidence was one which the jury might, perhaps, determine upon their own inspection. And

it is matter of deep regret that the question of discretion should be reserved in cases like this, the competency of such evidence being most conveniently and satisfactorily determined at the trial, upon personal examination of the witness. Dole v. Johnson. This court cannot deal with the matter so confidently as the presiding judge; and the revision of the question, by a tribunal not so competent to consider and pass upon it as the tribunal by which it is reserved, seems an almost unwarrantable expenditure of labor, time, and pecuniary cost.

But, since the question is reserved and must be determined, we see no way to avoid the expense and delay of a new trial of the cause. * * *[55]

MILES v. LOOMIS et al.

(Court of Appeals of New York, 1878. 75 N. Y. 288, 31 Am. Rep. 470.)

This action was brought upon a promissory note claimed to have been made and delivered by defendants' testator to the plaintiff.

The plaintiff alleged in his complaint that the note was in fact made by the testator that it might be used as an off-set to a note which he at the same time executed to the testator and at his earnest solicitation, for an amount which he did not justly owe, but which the testator desired in order to satisfy his wife and her father, and which the testator did not intend should be paid by the plaintiff, but that said note had after the death of the testator been transferred for a valuable consideration, before maturity, so that the plaintiff was liable thereon to the bona fide holder. The defense was forgery of the note in suit.

The note given by the plaintiff to the deceased was given in evidence on the trial without objection, the body of it including the name of the deceased as payee was proved to be in his handwriting. The will of the testator was also put in evidence by the defendants, and

[55] See general test as to qualification suggested in Miles v. Loomis, 75 N. Y. 288, 31 Am. Rep. 470 (1878).

Compare Vinton v. Peck, 14 Mich. 287 (1866), where the court seemed to think that no particular qualifications were necessary, in cases involving handwriting.

In other fields something more than general information on a given subject is required. Thus the editor of an agricultural journal who had read extensively about certain animal diseases was held lacking in the necessary qualifications to give an opinion on such matters. Dole v. Johnson, 50 N. H. 452 (1870).

Physicians are assumed to be generally competent as to medical matters, and it is not necessary that they should have had personal experience with the kind of disease or injury in question; their knowledge may be largely based on the study of medical writers. State v. Terrell, 12 Rich. (S. C.) 321 (1859); State v. Baldwin, 36 Kan. 1, 12 Pac. 318 (1886); Finnegan v. Fall River Gas Works Co., 159 Mass. 311, 34 N. E. 523 (1893); State v. Wood, 53 N. H. 484 (1873).

was received without objection. Defendants then called certain witnesses who after testifying to their qualifications to speak as experts in handwriting, were asked to look at the name of the deceased appearing in the body of the note executed by plaintiff and at the signature to the will, and were then asked to give their opinion, assuming them to be genuine signatures, as to whether the signature to the note in suit was genuine. This was objected to upon the ground that such a comparison of hands could not be made by experts. The objection was overruled and exception taken. The witnesses answered substantially, that in their opinion the signature was not genuine; that it was not written by the same person as the one who wrote the others. They were also permitted to testify under objection and exception that in their opinion the signature in question was simulated.

HAND, J.[56] I think the two documents put in by the defendants without objection on the part of the plaintiff must be regarded as properly in evidence for all the purposes of the case. * * *

Treating therefore these two signatures of the testator as properly in evidence, the question is whether experts in handwriting could be permitted, upon comparison in court of these signatures with that of the note in suit, without any other knowledge of the testator's writing, to express an opinion as to the genuineness of the latter and as to whether it appeared a natural or simulated hand.

The statement of the learned counsel for the appellant that precisely this kind of evidence has never yet been held proper by the court of last resort in this state is, we believe, accurate, although it comes in principle within the decision in Dubois v. Baker, 30 N. Y. 355, 361. Indeed, I think it must be conceded that the earlier cases adjudged in our courts lean pretty decidedly against the admissibility of such evidence. In this respect we were formerly more strict than any of the other States. People v. Spooner, 1 Denio, 343, 43 Am. Dec. 672; Jackson ex dem. v. Phillips, 9 Cow. 112; Phœnix F. Ins. Co. v. Philip, 13 Wend. 81. Our courts followed of course the common law which was supposed to differ from the practice of the civil and ecclesiastical courts. The nisi prius decisions in the English courts, although not in entire harmony (Allesbrook v. Roach, 1 Esp. 351) and much criticised by the text writers, were generally hostile to the admission of comparison by experts until by the act of parliament [57] in 1854 such evidence was declared legitimate (Stranger v. Searle, 1 Esp. 14: Clermont v. Tullidge, 4 Car. & P. 1; Rex v. Cator, 4 Esp. 117). Even, however, before the passage of that act a jury was allowed, itself, to institute the comparison, but only with documents in evidence before them and relevant to the issue. Doe dem. Perry v. Newton, 5

[56] Part of opinion omitted.

[57] For a review of similar legislation in New York, see People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193 (1901). A number of the states have such statutes at this time.

Ad. & Ell. 514; Solita v. Yarron, 1 Moo. & Rob. 133; Griffiths v. Williams, 1 Cro. & Jer. 47; Bromage v. Rice, 7 C. & P. 547.[58]
* * *

Although this decision [59] lays down, as has been already intimated, a somewhat more liberal rule as to evidence of handwriting than had previously prevailed in this State, yet it has been generally acquiesced in, is in conformity with the law in other States and seems to have become an established practice in the trial courts. See Goodyear v. Vosburgh, 63 Barb. 154; Johnson v. Hicks, 1 Lans. 160; Roe v. Roe, 40 N. Y. Super. Ct. 1.

We are very strongly of the opinion that it is sounder in principle than the more narrow one and in no respect an infringement upon any wholesome and just limitation of expert testimony.

Evidence of handwriting, it is universally conceded, may be opinion merely. It is as universally conceded that a witness who has either ever seen the party write or who, not having seen him write, has received letters from him which have been "acted upon" by him as genuine, is competent to give an opinion as to his handwriting. And this competency is not affected by the lack of frequency of observation, the length of time which has elapsed since the writing was seen, or the slightness of the correspondence, although the weight of the opinion will of course depend much upon these circumstances.

From what in these cases is the opinion derived, if not from a mental comparison of hands? The signature is presented to the witness and his only means of forming an opinion upon it is by recalling with more or less distinctness to his mind images of the signatures he has either seen made or attached to letters received, and comparing them with the one presented for his opinion. This is certainly a "comparison of hands" and in my judgment no favorable distinction as to accuracy or safety can be made between such a mental process and that of the expert who has become quick by practice in detecting identity of hands, and also compares in his mind and with his eye the one in question with other signatures as certainly genuine as those which the ordinary witness has seen written or received in letters. The comparative weight of the two kinds of evidence is not the question under consideration. The opinion of the ordinary witness, founded only upon a mental comparison of the disputed writing with a single signature seen by him twenty years before, would be worth little, but it would undoubtedly be competent. Jackson ex dem. v. Van Dusen, 5 Johns. 144, 4 Am. Dec. 330; Eagleton v. Kingston, 8 Ves. 473. So the opinion of an expert founded upon a comparison with but one or two genuine signatures should not perhaps be regarded as of much value, but it still has every claim, in principle, to competency possess-

[58] In the omitted passage the court reviewed Doe v. Suckermore, 5 Ad. & El. 703 (1836), and Dubois v. Baker, 30 N. Y. 366 (1864).

[59] Dubois v. Baker, 30 N. Y. 366 (1864).

ed by the other. Nor does the distinction sought to be raised by Lord Denman in Doe v. Suckermore [5 Ad. & E. 703], supra, between an opinion of an expert who has previously examined other genuine signatures put in evidence and then is called to speak as to genuineness from his knowledge of the signature thus gained, without actual comparison before the court, and one given upon an examination or comparison in court of the signatures and without any previous knowledge, seem on scrutiny to be well grounded or practicable. It would be impossible to draw a line between these processes. It is undoubtedly true that the opinion as to handwriting should depend not so much upon mathematical measurements and minute criticisms of lines nor their exact correspondence in detail, when placed in juxtaposition with other specimens, as upon its general character and features as in the recognition of the human face. But in the case of one expert, his mental image or idea of the genuine handwriting may become as clear and vivid and accurate by an examination of the other signatures on the instant as in the case of another of less practice or quickness of perception after hours or days of study. The amount of knowledge gained by this study and the length of time and frequency of opportunity to gain it affect the weight of the evidence as in the case of the ordinary witness, but cannot properly decide its competency.

The principal objections which have been raised to the comparison of hands are two: First, the introduction of numerous and distracting collateral issues as to the genuineness of the signatures to be compared. As to each one of these, it is said there might be the same controversy as with regard to the original signature, and the further introduction of the comparison of hands and so the number of issues to be decided be without end. But this objection seems tolerably met by the restriction of the signatures to be compared to those necessarily or properly proved in the case as relevant evidence for other purposes and upon the genuineness of which, if there is any controversy about them, the jury must pass in any event. This limitation, it must be conceded, is not very philosophical or logically satisfactory, but is justified by the necessity of the case, and at all events answers the objection of collateral issues. Second. The second objection to the comparison of hands is that no man writes always the same signature and the specimens will be unfairly selected as being unlike or like the signature in dispute according to the interest of the party producing them. They will not be fair average specimens of the general character of the handwriting. Dallas, C. J., Burr v. Harper, Holt N. P. C. 44. That, consequently, the expert, to whom they are submitted, will have no opportunity of obtaining an accurate notion of the ordinary natural hand; and as illustrative of this objection, the decision of Lord Kenyon is cited, who refused to allow a witness to give an opinion, whose only knowledge was from the signatures he had seen the party himself write for the avowed purpose of showing his true man-

ner of writing. Stranger v. Searle, 1 Esp. 14. The force of this objection also is, I think, done away by the restriction of the rule to signatures relevant in the cause for other purposes and as to which therefore there could hardly be any selection of the signatures for the purposes of comparison.

On the whole therefore I am inclined to concur in the soundness of the doctrine upon this point contended for in the most approved text writers upon evidence. "It cannot be denied," says Mr. Starkie (Starkie on Evi. vol. 2, p. 375), "that abstractly a witness is more likely to form a correct judgment as to the identity of handwriting by comparing it critically and minutely with a fair and genuine specimen of the party's handwriting than he would be able to make by comparing what he sees with the faint impression made by having seen the party write but once and then perhaps under circumstances which did not awaken his attention." "When other writings," says Prof. Greenleaf (Greenl. on Evi. § 578), "admitted to be genuine are already in the case, here comparison may be made by the jury with or without the aid of experts." See, also, Phillips on Evi. vol. 1 (6th Ed.) 472; Evans' note to Pothier on Contracts, 2 Evans' Pothier, p. 185.

My conclusion is that there was no error in the admission of the evidence of experts before the referee.

The counsel for appellant insists here that the witness is called by the defendants as experts were not qualified as such, but no such objection was taken upon the trial. These witnesses were, however, we think shown to be sufficiently competent to give the opinions upon handwriting. They had been engaged in occupations in which it was their duty to scrutinize handwritings and detect forgeries and had acquired more or less skill by practice.

There being no error committed upon the trial, the judgment must be affirmed, with costs.

All concur, except ANDREWS, J., absent.

Judgment affirmed.[60]

[60] Accord: Griffin v. Working Women's Home Ass'n, 151 Ala. 597, 44 South. 605 (1907); Himrod v. Gilman, 147 Ill. 293, 35 N. E. 373 (1893); Vinton v. Peck, 14 Mich. 287 (1866); State v. David, 131 Mo. 380, 33 S. W. 28 (1895).

In State v. Thompson, 132 Mo. 301, 34 S. W. 31 (1896), in holding that irrelevant documents should not have been admitted for the purpose of comparison, the rule was stated as follows: "Under repeated adjudications of this court it has been ruled that unless writings are in evidence for some legitimate purpose in the case and are admitted to be in the genuine handwriting of the party or he is estopped from denying their genuineness they cannot be admitted for the purpose of comparison with disputed writings or for the purpose of proving the handwriting of a party." A similar limitation is suggested in some of the Illinois cases.

In Massachusetts and a number of the New England states a comparison is allowed with any writing proved to be genuine, though not otherwise relevant. Moody v. Rowell, 17 Pick. (Mass.) 490, 28 Am. Dec. 317 (1835).

See In re Hopkins' Will, 172 N. Y. 360, 65 N. E. 173, 65 L. R. A. 95, 92 Am. St. Rep. 746 (1902), excluding expert opinion as to the genuineness of a cross mark used as a signature.

THROCKMORTON v. HOLT.

(Supreme Court of the United States, 1901. 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663.)

Mr. Justice PECKHAM.[61] * * * Again, in the course of the trial the contestants called a Mrs. Briggs as a witness, and proved by her that she was a journalist by profession and had made literature her business in life, and that she had received instruction from Judge Holt in the line of composition in the English language; that she had gone to him and asked his advice about a series of articles written by her, because she had been informed that he was a master of the English language; that he was her master and teacher in such matters. She was also somewhat familiar with his handwriting, and stated that in her opinion the signature "J. Holt" to the paper in question was not the signature of Judge Holt. She was then asked: "Have you formed that opinion in any respect upon any matter except the mere handwriting?" This was objected to and admitted under an exception. The witness answered that she had, that it was from the composition: "More the composition, as well as the writing."

Other witnesses were called who were permitted to prove that they formed their opinions in regard to the paper from its composition and style, and their knowledge of Judge Holt's legal and literary attainments, as well as from their familiarity with his handwriting. One witness was asked this question: "Let me call your attention to the use of the word 'inherit' in that paper, in the middle paragraph. From your knowledge of General Holt's characteristics and his way of expressing himself, what do you think as to that being his expression?" This question was duly objected to and the grounds fully stated, but the court overruled the objection and permitted the witness to answer, which he did by saying that he did not think the testator would use that expression. * * *

We are thus brought to a consideration of the merits of the question decided by the court below. Is the opinion of a witness as to the genuineness of the handwriting found in the paper, based in part upon the knowledge of the witness, of the character and style of composition and the legal and literary attainments of the individual whose handwriting it purports to be, competent to go to the jury upon that question? If he is able to give an opinion without such evidence, and from his familiarity alone with the handwriting, can the attempt be permitted to corroborate or strengthen such an opinion by this kind of evidence? We think not. An expert in regard to handwriting is one who has become familiar with the handwriting of the individual in regard to whom the question is raised. Handwriting is a physical matter, and does not in itself represent any characteristics of the writer as to composition or general style, or as to his literary or legal

[61] For the statement of the case, see ante, p. 701. Part of opinion omitted.

attainments. It is to be seen and the characters recognized by the eye. But the process of his mind and the language or style in which in the opinion of a witness the person habitually clothes his thoughts, are not matter of expert evidence, proper to be presented to a jury, for the purpose of determining whether the paper presented is or is not in the handwriting of the particular individual, in regard to whom the inquiry is made. The fact may of course be proved that the person was a man of intelligence, education, high legal attainments, refinement, and not addicted to coarseness in speech or writing, and the inference may be sought to be drawn from the facts that the paper in question is or is not his composition and is or is not his handwriting; but where it is material the inference is for the jury, and taking the opinion of the witness in that regard is to take his opinion upon the very subject to be decided by the jury, and is not at all a proper case for opinion evidence.

We think the court, therefore, erred in permitting witnesses to give an opinion as to the genuineness of handwriting founded partly upon knowledge and familiarity with the legal attainments, the style and composition of the individual whose handwriting was in controversy, and as corroborative of their opinion from knowledge of handwriting alone. * * *

Judgment reversed.

PEOPLE v. STORRS.

(Court of Appeals of New York, 1912. 207 N. Y. 147, 100 N. E. 730, 45 L. R. A. [N. S.] 860, Ann. Cas. 1914C, 196.)

BARTLETT, J.[62] * * * It was important, if not essential, to the case for the prosecution to prove that the body of the document was produced by the use of the defendant's typewriting machine. For this purpose the district attorney was permitted, over the defendant's objection and exception, to introduce in evidence another paper prepared by a witness who was at the time the defendant's law partner upon the defendant's typewriter. The contents of this paper were in no wise relevant to the issue on trial, and the paper was received, as the learned county judge stated, not so much as a standard for the comparison of handwriting as upon the principle that, where an impression is made upon paper, wood, leather, or any other plastic material by an instrument or mechanical contrivance having or possessing a defect or peculiarity, the identity of the instrument may be established by proving the identity of the defects or peculiarities which it impresses on different papers.

Section 961d of the Code of Civil Procedure, amended so as to take effect in its present form on February 17, 1909, provides as follows:

[62] Part of opinion omitted.

"Comparison of a disputed writing with any writing proved to the satisfaction of the court to be the genuine handwriting of any person, claimed on the trial to have made or executed the disputed instrument, or writing, shall be permitted and submitted to the court and jury in like manner." Formerly the comparison of disputed handwriting with unquestionable specimens was permitted only when the latter had been admitted in evidence for other purposes, as relevant to the issue, or without objection. Miles v. Loomis, 75 N. Y. 288, 31 Am. Rep. 470. The history of subsequent legislation on the subject and the interpretation of such legislation by the courts will be found fully narrated and explained in the opinion of Judge Werner in People v. Molineux, 168 N. Y. 264, 318, 61 N. E. 286, 62 L. R. A. 193. I think it may well be doubted whether typewriting can be deemed handwriting within the meaning of the existing statute. Nevertheless, I think the law sanctions the reception of the evidence in question, substantially on the theory adopted by the trial judge.

If the impression of a seal were in controversy, it would surely be competent to show by other impressions from the same sealing instrument that the impression was invariably characterized by a particular mark or defect. Impressions made by a shoe, for the sole and very purpose of comparison, would undoubtedly be competent evidence in a prosecution for burglary, where it was sought to identify the accused by means of his footprints. This evidence is quite analogous. Typewritten specimens were similarly received for the purpose of showing that certain disputed receipts could not have been produced by the typewriter on which they were alleged to have been prepared, in a case tried before Vice Chancellor Pitney of New Jersey in 1893. Levy v. Rust, 49 Atl. 1017, 1025. There the court was called upon to determine the character of certain receipts which were alleged to be forgeries. To assist him the vice chancellor took the testimony of "a gentleman who is employed by the vendors of typewriting machines to go about the country and examine typewriting machines and see whether they are out of order, and in that way his eye becomes very acute and quick to discover things that will escape the vision of a casual observer." This witness pointed out three defects in the machine on which the questionable receipts must have been written. The period mark was invariably too low. The letter "s" was "off its feet," and the "u" was placed too far to the left. Specimens of typewriting done by the machine on which the receipts were said to have been written were produced for comparison, and in these specimens none of these defects appeared. Hence the vice chancellor concluded that they were written on a different and defective machine and were forgeries. * * *

These several cases base the rulings which have been mentioned upon the assumption or proof that a typewriting machine may possess an individuality which differentiates it from other typewriters and which is recognizable through the character of the work which it pro-

duces. Inasmuch as its work affords the readiest means of identification, no valid reason is perceived why admitted or established samples of that work should not be received in evidence for purposes of comparison with other typewritten matter alleged to have been produced upon the same machine. * * *

Reversed (on other grounds).[62]

[62] For a collection of the cases on this point, see notes to principal case in 45 L. R. A. (N. S.) 860 (1912).

For a collection of the cases dealing with expert opinion as to typewriting, see Baird v. Shaffer, 101 Kan. 585, 168 Pac. 836, L. R. A. 1918D, 638 (1917), annotated.

See, also, People v. Jennings, 252 Ill. 534, 96 N. E. 1077, 43 L. R. A. (N. S.) 1206 (1911), admitting expert comparison of finger prints; and so, in State v. Cerciello, 86 N. J. Law, 309, 90 Atl. 1112, 52 L. R. A. (N. S.) 1010 (1914); People v. Roach, 215 N. Y. 592, 109 N. E. 618, Ann. Cas. 1917A, 410 (1915).

CHAPTER V

CIRCUMSTANTIAL EVIDENCE [1]

SECTION 1.—CHARACTER.[2]

REX v. STANNARD et al.

(Central Criminal Court, 1837. 7 Carr. & P. 673.)

The prisoners were indicted for robbery.

The prisoner's counsel having called witnesses to character, C. Phillips, for the prosecution, stated, that in the course of the day it had been intimated to the bar in another place, that in future, when the prisoner's counsel called witnesses to character, the counsel for the prosecution would have the right, if he chose to exercise it, of replying in the case, although no witnesses to fact were called; and as this had never been the practice in cases of misdemeanor, he wished to hear their lordships' opinions on the subject.

PATTESON, J. I am very sorry that this question has been raised. I was in great hopes that the same practice would have been tacitly adopted by counsel, in cases of felony since the late act, as has hitherto prevailed in cases of misdemeanor. That practice, as far as my experience goes, has uniformly been, that when witnesses have been called, on the part of the accused, to character only, and for no other purpose, the counsel for the prosecution has not addressed the jury in

[1] Denio, C. J., in People v. Kennedy, 32 N. Y. 141 (1865): "The logic upon which circumstantial evidence is based is this: We know, from our experience, that certain things are usual concomitants of each other. In seeking to establish the existence of one, where the direct proof is deficient or uncertain, we prove the certain existence of the co-relative fact, and thus establish with more or less certainty, according to the nature of the case, the reality of the principal fact."

[2] Whether in certain tort actions the character of the plaintiff may affect the amount of damages, or whether the bad character of the plaintiff is one of the facts going to make up probable cause in actions for malicious prosecution, are not questions belonging to the law of evidence, and hence are not treated here. If good or bad character does affect the amount of damages recoverable, or is otherwise legally important, it may be proved as a matter of course, and the only problem in evidence is the means of proof, whether by specific acts, personal opinion, or general reputation.

The evidential use of character to discredit or support a witness has already been considered in connection with the impeachment and corroboration of witnesses. For that purpose the logical relevancy of character seems never to have been doubted.—*Ed.*

reply; but I am not aware of any case in which the right to do so has been decided one way or the other. I can easily understand and lament the painful situation in which counsel for the prisoner may be placed, in exercising a discretion, whether, for the sake of proving the previous character of his client, and having no evidence directly bearing upon the facts of the case, he should run the risk of an ingenious reply from the opposite counsel. However, if I am driven to give an opinion, I must say that I think that the counsel for the prosecution has a right to reply, where any witnesses are called for the defence, whether to facts or to character. I cannot in principle make any distinction between evidence of facts, and evidence of character: the latter is equally laid before the jury as the former, as being relevant to the question of guilty or not guilty: the object of laying it before the jury is to induce them to believe, from the improbability that a person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution, and it is strictly evidence in the case. I am therefore of opinion that the counsel for the prosecution must, upon principle, be at liberty to address the jury in reply, where such evidence is given.[3]

HOPPS v. PEOPLE.

(Supreme Court of Illinois, 1863. 31 Ill. 385, 83 Am. Dec. 231.)

William Hopps was indicted in the court below for the murder of his wife. Being put upon his trial, the fact of the killing was clearly established, and was not controverted by the accused; but it was insisted in his behalf, that he was insane at the time of the commission of the act charged, and in reference to that question voluminous proofs were made both by the defense and the prosecution.

The trial below resulted in the conviction of the prisoner of the crime as charged in the indictment, and a new trial being refused, he brought the case to this court upon a writ of error. * * *

Mr. Justice BREESE.[4] * * * He complains, first, that the Circuit Court would not permit him to give evidence of his uniform good character as a man and a citizen.

It was, at one time, a disputed question, whether such evidence could be given in a case where, as in this, the homicide is not denied. Some of the books say, such evidence, if offered, ought to be restricted to the trait of character in issue, or, in other words, should bear some analogy to the nature of the charge. 3 Gr. Ev. § 25.

To the same effect is 2 Russ. on Crimes, 784, but yet, he says, the good character of an accused party is an ingredient which should al-

[3] Opinion of Williams, J., omitted.

[4] Statement condensed. Part of opinion of Breese, J., and the opinions of Caton, C. J., and Walker, J., are omitted.

ways be submitted to the consideration of the jury, along with the other facts of the case. Id. 785.

In a case where the defense is insanity, we cannot have a doubt, that evidence of uniform good character as a man and a citizen, is proper for the jury to consider; whether a person whose character has been uniformly good, has, in a sane moment, committed the crime charged. It is undoubtedly true, a sane man, whose previous character has been unexceptionable, may commit an atrocious homicide, no doubt may exist of the fact, yet, under his plea of insanity, should he not be entitled to all the benefit which may be derived from the fact of uniform good character, as tending, slightly, it may be, to the conclusion that he could not have been sane at the time the deed was done. Generally, a person of good character does not, of a sudden, fall from a high position to the commission of outrageous crimes; should he do so, would it be an unnatural or forced inference, that he may have been affected with insanity at the time? But be this as it may, it seems to be now settled, that such evidence in capital cases, is admissible. In the case of the Commonwealth v. Hardy, 2 Mass. 317, which was a capital case, Parsons, C. J., said, a prisoner ought to be permitted to give in evidence his general character in all cases. Sewell and Parker, justices, said, they were not prepared to admit that testimony of general character should be admitted in behalf of the defendant, in all criminal prosecutions; but, they were clearly of opinion, that it might be admitted in capital cases in favor of life. The same rule was stated in the case of the Commonwealth v. Webster, 5 Cush. 325, 52 Am. Dec. 711. The Court there say, it is the privilege of the accused, to put his character in issue or not.

In 2 Bennett & Heard's Leading Cases, 159, and notes, the cases are collected and commented on, in which this rule is recognized.

In the case of People v. Vane, 12 Wend. (N. Y.) 78, the court held, that evidence of the good character of the defendant on the trial of an indictment, is always admissible, though it cannot avail when the evidence against him is positive and unimpeached; but when the evidence is circumstantial, or comes from a suspected or impeached witness, proof of good character is important.

We think, at least in view of the defense relied on, the evidence of the prisoner's uniform correct bearing, as a man and a citizen, should have been made known to the jury. A good character is a most precious possession, and it ought to be permitted, in favor of life at least, to go to the jury. * * *

Judgment reversed.

EDGINGTON v. UNITED STATES.

(Supreme Court of the United States, 1896. 164 U. S. 361, 17 Sup. Ct. 72, 41 L. Ed. 467.)

At the March term, 1895, in the district court of the United States for the Southern district of Iowa, Avington A. Edgington was tried and found guilty of the crime of making a false deposition, on April 13, 1894, in aid of a fraudulent pension claim on behalf of his mother, Jennie M. Edgington, claiming to be the widow of Francis M. Edgington.

On April 30, 1895, judgment was pronounced against the defendant that he pay a fine of $1,500 and the costs, and that he stand committed to jail until said fine and costs should be paid. A writ of error was prayed for and allowed.

Mr. Justice SHIRAS.[5] * * * We are constrained to sustain the assignments which complain of the exclusion of testimony offered to show defendant's general reputation for truth and veracity. It is not necessary to cite authorities to show that, in criminal prosecutions, the accused will be allowed to call witnesses to show that his character was such as would make it unlikely that he would be guilty of the particular crime with which he is charged. And as here the defendant was charged with a species of the crimen falsi, the rejected evidence was material and competent. This, indeed, is conceded in the brief for the government; but it is argued that, as the learned judge, in overruling the offer of the evidence, observed that the testimony might "become proper later on," he was merely passing on the order of proof, his discretion in respect to which is not reversible.

It is possible, as suggested, that the judge thought that such evidence should not be offered until it appeared that the defendant had himself testified. But this would show a misconception of the reason why the evidence was competent. It was not intended to give weight to the defendant's personal testimony in the case, but to establish a general character inconsistent with guilt of the crime with which he stood charged; and the evidence was admissible, whether or not the defendant himself testified. When testimony, competent and material, has been offered and erroneously rejected, the error is not cured by a conjecture that, if offered at a subsequent period in the trial, the evidence might have been admitted. It should also be observed, that, when a subsequent offer to the same effect was made, the judge rejected it without qualification.

There was likewise error in that portion of the charge in which the judge instructed the jury as to the effect that they should give to the testimony showing the defendant's good character.

[5] Statement condensed and part of opinion omitted.

It is proper to give the judge's own language:

"Some testimony has been given you touching the good character of the defendant. When a man is charged with crime, the courts of the United States permit this question of good character to be introduced to go to the jury. The theory, as I view it, is a wise one. If a man, in the community where he lives, by his incoming and outgoing among his neighbors, has built up in the years of his life, be they comparatively few or many, a character among them for good morals, which includes the uprightness and excellency of our general citizenship, it is right that the jury should know that fact. It is of value to them, in conflicting cases, in determining points in the case; and yet, gentlemen, I have to say to you that evidence of good character is no defense against crime actually proven. If the defendant in this case is proven guilty of crime charged, any good character borne by him in his community is no defense. It must not change your verdict; for the experience of mankind, of all of us, teaches us that men reputed to be of good moral character in a community—Unfortunately, sometimes, we find they are sadly different from that which they are reputed to be, and that they are committers of crime. Yet the good character goes to the jury with special force wherever the commission of the crime is doubtful. If your mind hesitates on any point as to the guilt of this defendant, then you have the right and should consider the testimony given as to his good character, and it becomes, as I have suggested, or may be, of great importance in the minds of the jury in the matters of doubt." * * *

It is impossible, we think, to read the charge, without perceiving that the leading thought in the mind of the learned judge was that evidence of good character could only be considered if the rest of the evidence created a doubt of defendant's guilt. He stated that such evidence "is of value in conflicting cases," and that, if the mind of the jury "hesitates on any point as to the guilt of the defendant, then you have the right and should consider the testimony given as to his good character."

Whatever may have been said in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although, without it, the other evidence would be convincing.

Jupitz v. People, 34 Ill. 516, was a case where the defendant was indicted for having received goods knowing them to have been stolen, and his counsel requested the trial judge to instruct the jury that the evidence of the good character of the defendant for honesty should

have great weight in determining as to his guilt or innocence. This was qualified by the court by the addition of these words: "If the jury believe there is any doubt of his guilt." This was held to be error, and the supreme court of Illinois used the following language:

"The instruction, as asked, may be objectionable, on account of the epithet 'great'; but as that was not the ground of the qualification, but on the ground, as is inferable, that the court did not consider evidence of good character of any weight except in a doubtful case. The more modern decisions go to the extent that, in all criminal cases, whether the case is doubful or not, evidence of good character is admissible on the part of the prisoner. * * * We can hardly imagine a case where evidence of a good character was a more important element of defense than this, and in the language of the instruction was entitled to great weight. Proof of uniform good character should raise a doubt of guilty knowledge, and the prisoner would be entitled to the benefit of that doubt. Proof of this kind may sometimes be the only mode by which an innocent man can repel the presumption arising from the possession of stolen goods. It is not proof of innocence, although it may be sufficient to raise a doubt of guilt. The court seemed to think it was entitled to no weight, unless, taking the language used in its most favorable aspect, there was doubt of his guilt. A strong prima facie case was made out by the prosecution, but it was not conclusive. If the court had told the jury that his good character should be taken into consideration by them, and was entitled to much weight, a reasonable doubt of the prisoner's guilt might have been raised, which would have resulted in his acquittal."

Similar conclusions were reached in Com. v. Leonard, 140 Mass. 473, 4 N. E. 96, 54 Am. Rep. 485; Heine v. Com., 91 Pa. 145; Remsen v. People, 43 N. Y. 6; People v. Garbutt, 17 Mich. 28, 97 Am. Dec. 162; 1 Whart. Cr. Law, § 636.

We find no errors disclosed by the other assignments.

The judgment of the court below is reversed, and the cause remanded, with directions to set aside the verdict and award a new trial.

Judgment reversed.[6]

Mr. Justice BREWER concurs in the judgment. Mr. Justice BROWN dissents.

[6] That the error of the trial judge in the principal case probably resulted from a misunderstanding of the charges in some of the earlier cases, when judges were in the habit of advising juries more freely on matters of fact, see State v. Henry, 50 N. C. 65 (1857).

For a further refinement to the effect that "good character may create a doubt against positive evidence, but only when in the judgment of the jury the character is so good as to raise a doubt as to the truthfulness or correctness of the positive evidence," see People v. Goodman, 283 Ill. 414, 119 N. E. 429 (1918), citing People v. Hughson, 154 N. Y. 153, 47 N. E. 1092 (1897).

HARPER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit, 1909. 170 Fed. 885, 95 C. C. A. 555.)

RINER, District Judge.[7] At the October term of the United States Court for the Northern District of Indian Territory, sitting at Vinita, the plaintiff in error, hereafter called the defendant, was indicted for making a false entry in a report to the Comptroller of the Currency, showing the resources and liabilities of the First National Bank of Miami, Ind. T. * * *

The fourth error assigned is that the trial court erred in not permitting W. P. Gatewood, a witness for the defendant, to testify to the moral character of the defendant. The witness was permitted to testify that he had known defendant for about six years; that he knew his reputation for honesty during the time he resided at Vinita, and that it was good, but that he did not know his reputation for honesty during the time he had resided at Miami. The question which the court declined to permit him to answer was: "Are you acquainted with his general reputation in the neighborhood, during the time he resided here, for morality and sobriety?" Objection was made to this question, and the objection sustained. Gatewood and three other witnesses were allowed to testify to the general reputation of the defendant, in the neighborhood in which he lived, for truthfulness, veracity and honesty, and, within the rule stated by Greenleaf, vol. 3, § 25, "Evidence, when admissible, ought to be restricted to the trait of character which is in issue; or, as it is elsewhere expressed, ought to bear some analogy and reference to the nature of the charge; it being obviously irrelevant and absurd, on a charge of stealing, to inquire into the prisoner's loyalty; or, on a trial for treason, to inquire into his character for honesty in his private dealings"—we think the court committed no error in ruling out the answer to this question. * * *

Judgment affirmed.[8]

[7] Part of opinion of Riner, District Judge, the concurring opinion of Adams Circuit Judge, and dissenting opinion of Sanborn, Circuit Judge, are omitted.

[8] And so in Wistand v. People, 218 Ill. 323, 75 N. E. 891 (1905), where, on a prosecution for statutory rape, the defendant sought to prove his good character for peace.

PEOPLE v. HINKSMAN.

(Court of Appeals of New York, 1908. 192 N. Y. 421, 85 N. E. 676.)

WERNER, J.* The defendant appeals from a judgment convicting him of the crime of murder in the first degree. The charge set forth in the indictment is that on the 30th day of November, 1905, the defendant did feloniously, with premeditation and deliberation, shoot Samuel Hinksman with a shotgun, inflicting wounds from which the victim died on the following day. * * *

It appears that the defendant had been called as a witness in his own behalf. He had stated, in some detail, the history of his life, and had specifically denied the more serious of the circumstances calculated to connect him with the shooting of his father. Just at the conclusion of his direct examination his counsel had evidently asked him if he had ever been in any trouble; for, as the narrative of the record has it, the defendant testified: "I had a little trouble once. I was convicted of grand larceny, second degree. That was for stealing something. That was the only trouble I ever had in my life, and it was three years ago. Sentence was suspended on me. I have been a good boy ever since." Upon the bit of testimony just quoted, and after the defendant had rested his case, the prosecution claimed the right to give evidence as to the defendant's general reputation. The defense objected; but the court sustained the contention of the prosecution, and admitted the evidence. Several of the influential men of that vicinity testified that the defendant's general reputation was bad, and this evidence was dwelt upon, as has been stated, with much force in the address of the district attorney to the jury.

The spur of a strong imagination is hardly necessary to convince the average person of intelligence that evidence of general bad character, produced against a defendant charged with the commission of a crime, can never be helpful to the accused, and, in a case where the opposing facts are very evenly balanced, or the direct case against him is weak, such evidence may be the factor which determines the result against him. In the very nature of things must this be true when the evidence is purely circumstantial. It may be taken for granted, therefore, that the evidence tending to establish the defendant's bad reputation was harmful to him, and the only question to be considered is whether it was competent. Briefly stated, the contention of the learned prosecutor is that the defendant made this evidence competent by voluntarily assuming the character of a witness in his own behalf. The defendant insists, however, that his character could not be put in issue until he did it himself; that by becoming a witness he did not proffer for scrutiny his general character, but merely his reputation for truthfulness; and that the very scant reference in his

* Part of opinion of Werner, J., and the dissenting opinion of Gray, J., omitted.

testimony to his conduct subsequent to his conviction of larceny and prior to the homicide did not open the door to an investigation of his general character. Stephen, in his treatise on the Law of Evidence, says that the word "character," when used in the sense in which it is here employed, means reputation, as distinguished from disposition, and that, of course, is the general understanding of the profession. The rule laid down by that learned author upon the subject under discussion is that "in criminal proceedings the fact that the person accused has a good character is deemed to be relevant, but the fact that he has a bad character is deemed to be irrelevant,[10] unless it is itself a fact in issue, or unless evidence has been given that he has a good character, in which case evidence that he has a bad character is admissible." Stephen's Digest of Ev. (2d Ed.) p. 158.

This short, yet comprehensive, statement embodies the rule as we believe it to have existed in this state both before and since the law has made it competent for an accused person to be a witness in his own behalf. Other learned writers on the law of evidence are credited, however, with having added to that rule a suggestion which has given rise to the contention at bar. The rule as stated in Elliott on Evidence (volume 4, § 2721) is that the prosecution cannot give evidence of a defendant's bad character "unless he has introduced evidence of good character, except where he is a witness, in which case such evidence is admissible to impeach him, as in the case of other witnesses." * * *

Logically a defendant who voluntarily testifies in his own behalf occupies a dual position. He is at once a party and a witness, and is entitled to the rights and privileges of each. As a party he need not testify at all. If he deems it prudent to remain silent, no presumption is to be indulged against him. If he prefers to testify, his general character is safe from attack until he puts it in issue by himself introducing evidence relating to it. But when he assumes the character of a witness he exposes himself to the legitimate attacks which may be made upon any witness. Other witnesses may be called to impeach his credibility by showing that his general reputation for

[10] Willes, J., in Reg. v. Rowton, 10 Cox, 25 (1865): "* * * It is evidence strictly relevant to the issue, but such evidence is not admissible upon the part of the prosecution for the reasons stated by my brother Martin, because if the prosecution were allowed to go into such evidence we should have the whole life of the prisoner ripped up, and as has been witnessed in the proceedings of jurisdictions where such evidence is admissible upon a charge preferred, you might begin by showing that when a boy at school he had robbed an orchard and so read the rest of his conduct and the whole of his life; and the result would be that a man on his trial would be overwhelmed by prejudice instead of being convicted on affirmative evidence, which the law of this country requires. The prosecution is prevented from giving such evidence for reasons rather of policy and humanity than because proof that the prisoner was a bad character is not relevant to the issue,—it is relevant to the issue, but it is expedient (?) for the sake of letting in all the evidence which might possibly throw light upon the subject; you might arrive at justice in one case and you might do injustice in ninety-nine."

veracity is bad, or he may upon cross-examination be interrogated as to any specific act or thing which may affect his character and tend to show that he is not worthy of belief. This latter phase of the well-known rule is seized upon by the learned district attorney to sustain the reception of the evidence tending to establish the defendant's general bad character. He argues that, if a defendant who testifies in his own behalf can be subjected to a cross-examination which demolishes his presumptively good character and shows it to be utterly bad, it is in effect nothing more nor less than attacking his general character. That may be precisely the effect of a cross-examination which demonstrates that a defendant's character is bad. The difference is more in the method than in the result. If a man's bad character is proven by his own admissions of specified acts, a jury will usually have no difficulty in determining the extent to which his credibility is impaired. But when the conclusions of a jury depend entirely upon the opinions of witnesses who are testifying to a defendant's general reputation based upon the speech of others, and not to any concrete fact of personal knowledge, the method is, to say the least, far less reliable, although the result in a particular case may be just the same. Proof of general reputation by hearsay is one of the exceptions to the general rule that facts and not conclusions constitute legal evidence. It is one of those unsatisfactory exceptions which is recognized as a makeshift, and is tolerated only because we do not seem to be able to improve upon it. Much might be written upon the reasons for this exception, and much more about the considerations which have led the courts in some other jurisdictions to hold that a defendant who testifies in a criminal action or proceeding against him may be impeached by evidence tending to establish his general bad character. It could not be done, however, without considerable prolixity, and it is doubtful whether it would be profitable. We shall content ourselves, therefore, with a few observations upon the authorities [11] in this state which are relied upon, respectively, by the district attorney and the counsel for the defendant in their contentions upon this question. * * *

We think that evidence of general bad character, which is nothing but evidence of general reputation, should not be considered competent to decide the issue whether a defendant who testifies in his own behalf is worthy of belief, any more than evidence of a reputation for untruthfulness should be directly decisive of his guilt or innocence. A man may have the reputation of being a liar, and yet scorn to steal sheep; and by the same rule one who cannot resist the temptation to commit larceny may never lie about it. It is true, of course, that if

[11] In the omitted passage, the court reviewed People v. Webster, 139 N. Y. 73, 34 N. E. 730 (1893); Brandon v. People, 42 N. Y. 265 (1870); People v. Giblin, 115 N. Y. 196, 21 N. E. 1062, 4 L. R. A. 757 (1889); People v. McCormick, 135 N. Y. 663, 32 N. E. 26 (1892); People v. Casey, 72 N. Y. 393 (1878); Adams v. People, 9 Hun, 89 (1876); Burdick v. People, 58 Barb. 51 (1870).

a man is proven a liar his statement that he did not commit a particular crime will be much less likely to command belief than it would if he were reputed to be a truthful man. It may be equally true that proof of a man's reputation for general depravity may involve his credibility; but it also involves much more. In addition to undermining his credit for veracity, it stamps him as a generally bad man, who would be much more likely to commit a particular crime than he whose reputation is good. That is precisely the evil which it was designed to thwart with the rule that a defendant's general reputation cannot be shown against him until he puts it in issue himself. For these reasons we must decline to follow the Cases of Burdick and Adams, above referred to, in so far as they favor the doctrine that evidence of a defendant's general bad reputation is competent simply because he is a witness in his own behalf. * * *

Having concluded that it was error for the trial court to admit the evidence of the defendant's general bad character under the circumstances above stated, we have no hesitation in deciding that the district attorney's references to the same were clearly unauthorized and very prejudicial. * * *

Judgment reversed.

COMMONWEALTH v. MADDOCKS.

(Supreme Judicial Court of Massachusetts, 1910. 207 Mass. 152, 93 N. E. 253.)

Complaint, received and sworn to in the District Court of Eastern Essex on November 26, 1909, charging the defendant with keeping and maintaining a tenement in Gloucester used by him for the illegal sale and the illegal keeping of intoxicating liquors between May 1 and November 26, 1909.

At the trial in the Superior Court before Raymond, J., it appeared that the defendant was a retail druggist at Gloucester, licensed as a pharmacist and holding a certificate of fitness, issued under the statute on the subject, authorizing him to sell intoxicating liquors on physicians' prescriptions. The premises consisted of a store and a cellar underneath, the store being an ordinary drug store and equipped as such. * * *

During the trial of the case the defendant introduced the evidence of several witnesses who testified that the reputation of the defendant in the community as to his general character was good. John Karcher, one of the witnesses who so testified, was asked upon cross-examination by the district attorney as to the reputation of the defendant in the community in regard to the sale of intoxicating liquors. To this question the defendant objected. The judge overruled the objection and the defendant excepted. The witness then answered, "I don't know."

The commonwealth then called to the stand the county treasurer, David I. Robinson of Gloucester, and asked him the following question: "Do you know what is the reputation of the defendant in the community as to his being a law-abiding person in relation to the liquor law?" To this question the defendant objected. The judge overruled the objection and the defendant excepted. The witness then answered, "I do." The district attorney then asked, "What is it?" To this question the witness answered, "It is bad." To this question and answer the defendant also objected. The judge overruled the objection and the defendant excepted. * * *

SHELDON, J.[12] * * * We cannot say that after the defendant had put his general reputation in issue, the commonwealth might not show in reply that his reputation as to being a law-abiding person in relation to the liquor law was bad, although we intimate no opinion as to the particular question which was excepted to. The introduction of such evidence would of course call for great care on the part of the judge to see that the jury should not use it as evidence of guilt, but should treat it merely as meeting and nullifying (so far as it might have any effect) the evidence of the defendant's good reputation. But it was not incompetent. It was so held in State v. Knapp, 45 N. H. 148, 157; Balkum v. State, 115 Ala. 117, 22 South. 532, 67 Am. St. Rep. 19, and State v. Thornhill, 174 Mo. 364, 74 S. W. 832. See the discussion in 1 Wigmore on Ev. § 59 et seq. The testimony excluded in Commonwealth v. Nagle, 157 Mass. 555, 32 N. E. 861, was as to the defendant's habits and course of action, not as to his reputation itself. * * *

Exceptions sustained (on other points).[13]

GREER v. UNITED STATES.

(Supreme Court of the United States, 1918. 245 U. S. 559, 38 Sup. Ct. 209, 62 L. Ed. 469.)

Mr. Justice HOLMES delivered the opinion of the Court.

The petitioner was tried for introducing whiskey from without the State into that part of Oklahoma that formerly was within the Indian Territory. He was convicted and sentenced to fine and imprisonment. Material error at the trial is alleged because the Court refused to instruct the jury that the defendant was presumed to be a person of good character, and that the supposed presumption should be considered as evidence in favor of the accused, with some further amplifications not necessary to be repeated. The court did instruct the jury that the defendant was presumed to be innocent of the charge

[12] Statement condensed and part of opinion omitted.

[13] On the general question of the right of the prosecution to rebut evidence of good character, see Reg. v. Rowton, 10 Cox, Cr. Cas. 25 (1865).

until his guilt was established beyond a reasonable doubt, and that the presumption followed him throughout the trial until so overcome. The Circuit Court of Appeals sustained the Court below. 240 Fed. 320, 153 C. C. A. 246. This judgment was in accordance with a carefully reasoned earlier decision in the same circuit, Price v. United States, 218 Fed. 149, 132 C. C. A. 1, L. R. A. 1915D, 1070, with an acute statement in United States v. Smith (D. C.) 217 Fed. 839, and with numerous state cases and text books. But as other Circuit Courts of Appeal had taken a different view, Mullen v. United States, 106 Fed. 892, 46 C. C. A. 22; Garst v. United States, 180 Fed. 339, 344, 345, 103 C. C. A. 469, also taken by other cases and text books, it becomes necessary for this Court to settle the doubt.

Obviously the character of the defendant was a matter of fact, which, if investigated, might turn out either way. It is not established as matter of law that all persons indicted are men of good character. If it were a fact regarded as necessarily material to the main issues it would be itself issuable, and the Government would be entitled to put in evidence whether the prisoner did so or not. As the Government cannot put in evidence except to answer evidence introduced by the defence the natural inference is that the prisoner is allowed to try to prove a good character for what it may be worth, but that the choice whether to raise that issue rests with him. The rule that if he prefers not to go into the matter the Government cannot argue from it would be meaningless if there were a presumption in his favor that could not be attacked. For the failure to put on witnesses, instead of suggesting unfavorable comment, would only show the astuteness of the prisoner's counsel. The meaning must be that character is not an issue in the case unless the prisoner chooses to make it one; otherwise he would be foolish to open the door to contradiction by going into evidence when without it good character would be incontrovertibly presumed. Addison v. People, 193 Ill. 405, 419, 62 N. E. 235.

Our reasoning is confirmed by the fact that the right to introduce evidence of good character seems formerly to have been regarded as a favor to prisoners, McNally, Evidence, 320, which sufficiently implies that good character was not presumed. In reason it should not be. A presumption upon a matter of fact, when it is not merely a disguise for some other principle, means that common experience shows the fact to be so generally true that courts may notice the truth. Whatever the scope of the presumption that a man is innocent of the specific crime charged, it cannot be said that by common experience the character of most people indicted by a grand jury is good.

It is argued that the Court was bound by the rules of evidence as they stood in 1789. That those rules would not be conclusive is sufficiently shown by Rosen v. United States (January 7, 1918) 245 U. S. 467, 38 Sup. Ct. 148, 62 L. Ed. 406. But it is safe to believe that the supposed presumption is of later date, of American origin, and comes

from overlooking the distinction between this and the presumption of innocence and from other causes not necessary to detail.

Judgment affirmed.

Mr. Justice McKENNA dissents.

STATE v. POTTER.

(Supreme Court of Kansas, 1874. 13 Kan. 414.)

BREWER, J.[14] The appellant was convicted in the district court of Atchison county of the crime of murder in the second degree, and sentenced to the penitentiary for ten years. From this he has appealed to this court, and alleges numerous errors in the proceedings of that court. And, first, he complains that that court erred in overruling a motion to quash the information. We do not think the objections made to the information are well founded, and hence see no error in the rulings on the motion to quash. Again, he insists that the court erred in allowing the state to introduce evidence of the character of the deceased as a quiet and peaceable man. It appears that the deceased was killed in an affray; that this was the second quarrel upon the same afternoon between the deceased and defendant, others participating. The first quarrel took place shortly after the parties left Atchison to go to their respective homes, each in his own wagon, and with two companions. No serious injury was done to either of the parties at this time. At its close the deceased drove ahead with his wagon, and the parties lost sight of each other. After driving some miles, the deceased stopped beside a field where one of his sons was at work, and while there the other wagon, with the defendant, came along. The quarrel was resumed, and in it the deceased was struck on the head and elsewhere with a piece of a rail or club, and so injured that he died shortly thereafter.

On the trial, and before closing their case, the prosecution was permitted, over objection, to ask witnesses, who had testified that they knew the deceased, this question: "State if you knew his general reputation for being a peaceable, quiet, and law-abiding citizen;" and the witnesses testified that he was a peaceable, quiet, and law-abiding man. No attack was made by defendant at any time during the trial on the character of the deceased, and no attempt to show that he was a quarrelsome or turbulent man. The question, then, is fairly presented whether the prosecution, on a trial for murder, may, in the first instance, and as a part of their case, show the character and reputation of the deceased. We do not understand counsel for the state as claiming that such testimony is admissible in all cases, but only in cases where there is a doubt as to whether the killing was done in self-defense, and where such testimony may serve to explain the conduct of

[14] Statement and part of opinion omitted.

the deceased, and is therefore fairly a part of the res gestæ. In such cases it is said that the authorities hold that the defendant may show the bad character and reputation of the deceased as a turbulent, quarrelsome man. See, among other authorities, Franklin v. State, 29 Ala. 14; State v. Keene, 50 Mo. 357; Wise v. State, 2 Kan. *429, 85 Am. Dec. 595; People v. Murray, 10 Cal. 310. And if the defendant may show that the deceased was a known quarrelsome, dangerous man, why may not the state show that he was a known peaceable, quiet citizen? The argument is not good. The books are full of parallel cases. The accused may, in some cases, show his own good character. The state can never, in the first instance, show his bad character. A party can never offer evidence to support a witness' credibility until it is attacked. The reasons for these rules are obvious. Such testimony tends to distract the minds of the jury from the principal question, and should only be admitted when absolutely essential to the discovery of the truth. Again, the law presumes that a witness is honest, that a defendant has a good character, and that a party killed was a quiet and peaceable citizen, except so far as the contrary appears from the testimony in the case; and this presumption renders it unnecessary to offer any evidence in support thereof. No authorities have been cited sustaining the admission of such testimony, and the following are in point against it: Ben v. State, 37 Ala. 103; Chase v. State, 46 Miss. 707; Pound v. State, 43 Ga. 128. For the same reasons the court erred in permitting the state to offer evidence of the character and reputation of Polk Keeley, a son of the deceased, who took part in the last affray. * * *

Judgment reversed.[15]

HARRISON v. HARRISON.

(Supreme Court of Vermont, 1871. 43 Vt. 417.)

REDFIELD, J.[16] The case shows that the defendant's father was the owner of the freehold on which was situate the aqueduct. The father "had forbidden the plaintiff's entering on the land where it was," and "had directed the defendant to watch the aqueduct and see that no one interfered with it." The defendant was a minor son, in the service of his father, on the premises. The defendant went to the boundary of the land where the aqueduct was, and found the plaintiff about to enter upon the land, on his way to the aqueduct, and about 22½ feet from it. Defendant forbid the plaintiff's going upon the land, but he persisted and sprang over the fence, and approached the defendant in a threatening manner, and the defendant thereupon

[15] And so in State v. Reed, 250 Mo. 379, 157 S. W. 316 (1913), where a number of the cases are collected.

[16] Statement and part of opinion omitted.

struck him several blows, which he claimed were "in necessary defense of himself, the land, and the aqueduct." * * *

The defendant offered to prove that "plaintiff was reputed to be, and was in fact, a quarrelsome man, with a violent and uncontrollable temper, and this was known to the defendant at the time;" which was excluded by the court. The defendant must be judged and justified or condemned, in the light of the circumstances that surrounded him; not by the secret motive or intent of the plaintiff, but by the apparent purpose; not by the actual, but apparent danger. If a man presents a pistol to another and threatens his life, the assailed party is not required to wait till he is dead, to test the certainty that the man intended to kill him, but he would be justified in disabling his assailant at once, though it should finally prove that the pistol was unloaded and murder not intended. So if the assailant is known to the assailed to be a practiced pugilist and a man of violence, the kind and degree of resistance must be measured, or at least modified, by the apparent danger with which the party is threatened. And we think that, when the "plaintiff sprang over the fence and went toward the defendant in a threatening manner," the degree of force, whether it be reasonable or unreasonable, which defendant might employ, would depend measurably upon the known character, in that respect, of the plaintiff; whether he be a "man of war from his youth," or of peace; whether he had the temper, the will and ability, to inflict sudden and great bodily injury, and the danger was imminent, or whether he be known to the defendant as a man of mild temper and a stranger to violence. We think the evidence should have been received, and that the apparent danger which threatened the defendant would be somewhat affected by it, and the degree of force which defendant might lawfully use should be measured or modified by it.

The judgment of the county court is reversed, and the cause remanded.[17]

[17] And so in McQuiggan v. Ladd, 79 Vt. 90, 64 Atl. 503, 14 L. R. A. (N. S.) 689 (1906) annotated.

Compare Davenport v. Silvey, 265 Mo. 543, 178 S. W. 168, L. R. A. 1916A, 1240 (1915), apparently sanctioning the use of plaintiff's bad character for violence on the issue of self-defense, both to show the reasonableness of defendant's apprehension, and the probable aggression by plaintiff.

For the use of general reputation to prove notice or knowledge of a fact, such as the incompetency of an employé, see Monahan v. City of Worcester, 150 Mass. 439, 23 N. E. 228, 15 Am. St. Rep. 226 (1890); Park v. New York Cent. & H. R. R. Co., 155 N. Y. 215, 49 N. E. 674, 63 Am. St. Rep. 663 (1892); Baltimore & O. R. Co. v. Henthorne, 73 Fed. 634, 19 C. C. A. 623 (1896).

WOODS v. PEOPLE.

(Court of Appeals of New York, 1874. 55 N. Y. 515, 14 Am. Rep. 309.)

Error to the General Term of the Supreme Court in the First Judicial Department, affirming judgment of the Court of General Sessions of the Peace in and for the city and county of New York, entered upon a verdict convicting plaintiff in error of the crime of rape. * * *

GROVER, J.[18] Upon the trial the prisoner offered to prove by seven witnesses that the complainant was in the habit of receiving men there for the purpose of promiscuous intercourse, and for liquor especially. This evidence was objected to by the prosecution and rejected by the court, to which an exception was taken by the counsel for the prisoner. The evidence previously given shows that the place intended by the offer where she was in the habit of receiving men for the purpose specified was where she dwelt, known as "The Ranch," and that the liquor especially was intended to include the practice of the men so going there of taking liquor with them, of which the complainant partook to great excess during such visits.

Upon the assumption that the plaintiff in error had intercourse with the complainant, as to which the testimony was conflicting, the further issue was whether he ravished her by force, or whether she assented to such intercourse. Upon this issue all the authorities concur in holding that evidence showing that the character of the prosecutrix for chastity was bad is competent, and this for the reason that it is more probable that an unchaste woman assented to such intercourse than one of strict virtue. The evidence is received upon this ground, and not for the purpose of impeaching the general credibility of the witness. Evidence showing that the prosecutrix has on a previous occasion had connection with the accused is competent, and this for the reason that having done this shows a probability that she did not resist but consented to that charged in the indictment. In Rex v. Barker, 14 Eng. Com. Law, 467, it was held that the prosecutrix might be asked, with a view to contradict her, whether she was not on a specified day after the alleged offense walking in High street, Oxford, looking out for men, and the further question whether upon another specified day after the alleged offense she was not walking in High street with a woman reputed to be a common prostitute. This evidence was competent, not for the purpose of impeaching the general credibility of the witness, but proper for the consideration of the jury upon the question whether she assented to the intercourse with the prisoner.

Under these authorities it is entirely clear that the evidence offered by the accused was competent. The number of witnesses by whom

[18] Statement condensed.

he proposed to prove the fact was immaterial. It was competent for him to prove, by any one knowing the fact, that the prosecutrix was in the habit of receiving men at her dwelling for promiscuous intercourse with them, and the weight of such testimony was in no respect impaired by the further fact that the men so received took liquor with them on these occasions, of which they and she partook to great excess. The testimony offered, if true, would have shown the complainant to be a common prostitute; proof more satisfactory than that of a bad general reputation for chastity. The trial court, as well as the General Term, regarded the offer as nothing more than that of proof of some particular acts of lewdness. But it was much more. It was an offer to show by direct evidence not only this, but that the complainant was a common prostitute and in the habit of plying her vocation at the place where she dwelt. Whether evidence of particular acts of criminality by the prosecutrix is competent is a question upon which the authorities differ, but one not necessary to determine in this case. In People v. Abbot, 19 Wend. 192, such proof was held to be admissible. In People v. Jackson, 3 Parker's Cr. R. 397, it was held incompetent. The authorities are all cited and ably examined in the opinions in these cases by Cowen, J., in the former, and by S. B. Strong, J., in the latter. See also Roscoe Crim. Ev. 810. When a determination of this question by this court shall be necessary to a disposition of the case before it, it will be considered and decided.

The judgment appealed from must be reversed and a new trial ordered.

All concur.

Judgment reversed.[19]

PEOPLE v. RODAWALD.

(Court of Appeals of New York, 1904. 177 N. Y. 408, 70 N. E. 1.)

VANN, J.[20] The homicide which is the subject of this appeal was committed in April, 1903. The defendant was indicted in May, convicted in June, and appealed to this court in July of the same year. * * *

According to the evidence for the defendant, although he may have armed himself without adequate cause, he had given up the controversy over the wood, and had started for home, when he was attacked by the deceased with a dangerous weapon, and the revolver was fired in lawful defense of his person, or went off accidentally. A fearful

[19] Some of the courts appear to admit such evidence to discredit the prosecuting witness, as well as to prove consent. O'Blenis v. State, 47 N. J. Law, 279 (1885).

[20] Part of opinion of Vann, J., and the dissenting opinion of O'Brien, J., omitted.

mistake may have been made by the jury, yet justice cannot be administered without running that risk in almost every murder case that is tried. * * *

The defendant offered in evidence certified copies of the following records: A judgment rendered by a court of special sessions held in Montgomery county on the 14th of January, 1889, convicting the deceased of petit larceny upon his plea of guilty, and sentencing him to the State Industrial School at the city of Rochester. A judgment of the county court of Cattaraugus county convicting the deceased, also upon a plea of guilty, of assault in the first degree, and sentencing him to imprisonment in State Prison for four years. * * * No offer was made to show that the defendant had heard that the deceased had been convicted of any of these offenses. All this evidence was excluded upon the objection that it was not the proper method of proving the character of the deceased. * * *

The general character of the deceased was immaterial, for the worst man has the right to live, the same as the best, and no one may attack another because his general reputation is bad. The law protects every one from unlawful violence, regardless of his character. Upon a trial for murder, however, the accused, after giving evidence tending to show that he acted in self-defense, may prove that the general reputation of the deceased was that of a quarrelsome, vindictive, or violent man, and that such reputation had come to his knowledge prior to the homicide. People v. Gaimari, 176 N. Y. 84, 95, 68 N. E. 112; People v. Lamb, *41 N. Y. 360, 366; Abbott v. People, 86 N. Y. 460; Eggler v. People, 56 N. Y. 642; Wharton's Criminal Law [2d Ed.] § 606; Wharton's Criminal Evidence [9th Ed.] § 69; Underhill's Criminal Evidence, § 324. Such evidence is not received to show that the deceased was the aggressor, for, if competent for that purpose, similar evidence could be given as to the reputation of the defendant, as bearing on the probability that he was the aggressor. It is competent "only in cases where the killing took place under circumstances that afforded the slayer reasonable grounds to believe himself in peril, and then solely for the purpose of illustrating to the jury the motive which actuated him." People v. Lamb, *41 N. Y. 376. Fear founded on fact tends to rebut the presumption of malice.

The character of the deceased with reference to violence, when known to the accused, enables him to judge of the danger, and aids the jury in deciding whether he acted in good faith, and upon the honest belief that his life was in peril. It shows the state of his mind as to the necessity of defending himself. It bears upon the question whether, in the language of the Penal Code, "there is reasonable ground to apprehend a design on the part of the person slain * * * to do some great personal injury to the slayer * * * and there is imminent danger of such design being accomplished." Section 205. When self-defense is an issue, threats of the deceased, even if unknown to the defendant, are admissible, as they tend to show the state

of mind of the deceased, and that he was the aggressor. Stokes v. People, 53 N. Y. 164, 174, 13 Am. Rep. 492; People v. Taylor, 177 N. Y. 237, 69 N. E. 534. Evidence of general reputation for violence, however, is received, not to show the state of mind of the deceased, but of the accused—not to show who was in fact the aggressor, but whether the defendant had reasonable ground to believe that he was in danger of great personal injury. Hence it is obvious that, whatever the reputation of the deceased for violence may be, it can have no bearing on what the defendant apprehended, unless he knew it. If he knew that the deceased was reputed to be violent, it might raise in his mind a fear of danger, but not otherwise. We think the evidence of previous convictions was incompetent, because the defendant knew nothing about them, or about the nature of the offenses, so far as appears.

The evidence, moreover, was incompetent for another reason. The offer was not to prove the general reputation of the deceased for violence, but to show specific acts of which he had been guilty, not toward the defendant, or to his knowledge, but toward third persons, or their property. The rule is well settled that this is improper, not only because character is never established by proof of individual acts, but because each specific act shown would create a new issue. People v. Gaimari, 176 N. Y. 84, 95, 68 N. E. 112; People v. Druse, 103 N. Y. 655, 8 N. E. 733; Thomas v. People, 67 N. Y. 218, 225; Eggler v. People, 56 N. Y. 642; People v. Lamb, *41 N. Y. 360, 366. * * *

Judgment affirmed.[21]

PEOPLE v. LAMAR.

(Supreme Court of California, 1906. 148 Cal. 564, 83 Pac. 993.)

LORIGAN, J.[22] The justices of the District Court of Appeal for the Second District, before whom this appeal was originally pending, being unable to agree on a judgment therein, the matter has been transferred to this court for disposition. The defendant was prosecuted for murder, convicted of manslaughter, and sentenced to imprisonment in the state prison for a term of 10 years. Upon the trial the killing by defendant was admitted, and he sought to justify it on the ground that it was done in necessary self-defense. * * *

Neither can we accord with the further contention of respondent that upon no principle of law was the evidence admissible. On the contrary, under the circumstances of the case as presented to the jury, we think that the offer to show that the general reputation of deceased was that of a quarrelsome, violent, dangerous man when intoxicated

[21] See, also, State v. Barrett, 240 Mo. 161, 144 S. W. 485 (1912), approving an instruction limiting the bad character of the deceased to questions of reasonable apprehension on the part of the defendant.

[22] Part of opinion omitted.

was both proper and pertinent. We say, under the circumstances of the case, because it is undoubtedly true that, as an abstract proposition, the good or bad character of the deceased cannot be taken into consideration as an element influencing the jury in determining the guilt of a defendant. All men, independent of their character or reputation, are under the equal protection of the law, and it in no degree excuses or palliates the taking of human life that the person slain was of bad character or reputation; the offense is as great whether the life maliciously taken be that of a man of bad or of good character. But, while the general rule is that evidence of the bad reputation of deceased for peace and quiet cannot be given in evidence, still this rule has its exceptions applicable to cases where the facts and circumstances surrounding them are peculiar. Such an exception applies in cases of homicide where the plea of self-defense is interposed, and the evidence before the jury leaves it in doubt whether the deceased was the aggressor, or where the circumstances attending the homicide render it doubtful or equivocal whether the defendant was justified in believing himself in imminent danger at the hands of deceased. The conflicting evidence in the case at bar brought the case within the exception stated, as presenting a situation where the sufficiency of the plea of self-defense, made by the defendant, in the essential elements necessary to constitute it, was enveloped in doubt.

It was early laid down as the rule in this state, that under such circumstances, evidence of the reputation of the deceased for violence is admissible. In People v. Murray, 10 Cal. 310, this court says: "The other point is, the exclusion of evidence of the character of the deceased for turbulence, recklessness, and violence. The rule is well settled that the reputation of the deceased cannot be given in evidence, unless, at the least, the circumstances of the case raise a doubt in regard to the question whether the prisoner acted in self-defense. It is no excuse for a murder that the person murdered was a bad man; but it has been held that the reputation of the deceased may sometimes be given in proof to show that the defendant was justified in believing himself in danger, when the circumstances of the contest are equivocal." The case of People v. Anderson, 39 Cal. 704, also confirms this doctrine. These cases lay down the broad rule that in all cases of homicide, where the other evidence introduced raises a doubt whether defendant acted in self-defense, evidence of the reputation of the deceased is admissible, and this rule applies as to every essential issue in the case upon which that plea is founded. It is always a vital issue before the jury, when such a plea is interposed, as to who was the aggressor in the contest. In the case at bar this issue, under the evidence, was involved in doubt, and any fact which would, under such circumstances, serve to illustrate who was the assailant in the encounter, where the death of one of the parties ensued, would be admissible. In such equivocal condition of the evidence the reputation of the deceased as a violent, turbulent, dangerous man would be a le-

gitimate subject of inquiry, illustrating the animus with which he encountered the defendant. It would be a circumstance immediately connected with the quarrel tending to illustrate the true intent or motive which characterized the conduct of deceased therein, to be taken into consideration by the jury, in connection with the other facts and circumstances in the case, in determining who was the aggressor in the fatal contest.

It is the rule in this state that threats of hostile intention made by a deceased, whether communicated or uncommunicated, are admissible evidence for the said purpose when the evidence is equivocal. People v. Scoggins, 37 Cal. 686; People v. Travis, 56 Cal. 251; People v. Tamkin, 62 Cal. 468; People v. Thomson, 92 Cal. 506, 28 Pac. 589. The philosophy which supports this rule as to the admissibility of evidence of such threats, where it is otherwise in doubt from the evidence who was the assailant, is that it is more probable that one who has made threats of hostile intention towards another would, when opportunity permits, attempt to carry such threats into execution and become the assailant, than would one who has made no such threats, or declared no such intention. So, too, with reference to the admissibility of evidence of the reputation of deceased as being a violent, turbulent, dangerous man, such proof, when the evidence as to who was the assailant is in doubt, for a similar philosophic reason should be permitted; it being more probable that one bearing such a reputation would precipitate a deadly contest than would one having no such reputation. Hence we think the rule should be that whenever the circumstances of a case permit of the admission of evidence of threats made by the deceased against the defendant, either communicated or uncommunicated, evidence of the reputation of the deceased as being a violent, quarrelsome, dangerous man, either known or unknown to the defendant, is equally admissible, the consideration of the jury to be limited by proper instructions of the court, where the reputation is unknown to defendant, to the same extent that the law limits the consideration by them of uncommunicated threats—to the question solely as to who was the assailant in the fatal encounter. The rule as to such limitation when applied to uncommunicated threats is declared in People v. Scoggins, 37 Cal. 686. * * *

Judgment reversed.

STOW v. CONVERSE.

(Supreme Court of Errors of Connecticut, 1820. 3 Conn. 325, 8 Am. Dec. 189.)

This was an action on the case for the publication of a libel imputing misconduct to the plaintiff in his office of tax collector. The defendant attempted to justify the imputation as true.

The plaintiff, in order to rebut the proof introduced on the part of the defendant to justify those parts of the publication relating to the plaintiff's conduct as collector and bank director, offered proof that the plaintiff had ever sustained the character of an honest man; to which the defendant objected; but the judge decided, that it was admissible, and permitted it to go to the jury.

The jury having returned a verdict for the plaintiff, the defendant moved for a new trial, on the ground that the several questions with regard to the admission of evidence were erroneously decided, and that the charge was incorrect. This motion the judge reserved.[28]

HOSMER, C. J. * * * There remains to be considered two objections, the order of which I shall invert. To rebut the proof introduced on the part of the defendant, adduced to establish the truth of his charges against the plaintiff's conduct as collector of the revenue, and bank director, evidence was admitted on the part of the plaintiff, to show that he had ever sustained the character of an honest man. The matter in issue here was conduct, not character. The charge on the plaintiff was that of having exacted money in violation of his official duty; and to this point alone should the testimony have been received. There is no pretext for the assertion, that such evidence was ever before admitted. The decisions in Westminster-Hall, in the neighboring states, and in our own state, all harmonize on this subject. "In ordinary cases, where the defendant's character is not called in question, otherwise than by charging him with fraud, or misconduct, it is not admissible to produce any proof to support or impeach his character." Swift's Ev. 140. And as the plaintiff derives no support from adjudged cases, as little is derivable from principle. It is not only in contravention of the fundamental rule, that evidence shall be confined to the issue, to admit such testimony; but it would be infinitely dangerous to the administration of justice. Instead of meeting a charge of misconduct, by testimony evincive of not having misconducted, general character would become the principle evidence in most cases; and he who could throng the court with witnesses to establish his reputation in general, would shelter himself from the wrongs he had perpetrated. In criminal cases, by way of exception, the prisoner is permitted to adduce his general character, in opposition to a specific charge. But the rule has not been, and ought not to be, extended further.

[28] Statement of facts condensed and part of opinion omitted.

Had the plaintiff offered general character in evidence, on the points on which the charges were made against him, the long practice of our courts would have sanctioned the admission of such testimony to enhance damages; but it would not have been received for any other purpose. * * *

New trial granted.[24]

HARRIS v. NEAL.

(Supreme Court of Michigan, 1908. 153 Mich. 57, 116 N. W. 535.)

CARPENTER, J.[25] Plaintiff alleges that she was assaulted and raped by defendant. She brought this suit to recover compensation. Her testimony supported her claim. Defendant denied having had any intercourse with plaintiff, and he introduced testimony tending to prove an alibi. The issue was submitted to a jury, who rendered a verdict in plaintiff's favor. Defendant seeks a reversal. Defendant was permitted to introduce testimony tending to prove that plaintiff had a bad reputation for chastity. The trial court held that this testimony could be used only for the purpose of mitigating damages. Defendant contends that this was error; that the testimony was "material as bearing upon the probability of plaintiff's testimony." In the interest of clearness, we think it proper for us to distinguish the question raised by defendant's contention from certain other questions which often arise. The question is different from the one which arises when a female witness upon cross-examination, for the purpose of affecting her credibility, is asked questions imputing lack of chastity. While the law in such cases is not thoroughly settled, this much may be safely stated: That the trial court has authority to exclude such testimony (Knickerbocker v. Worthing, 138 Mich. 224, 101 N. W. 540), and that the answers of the witness are conclusive.

The question before us is also to be distinguished from the question which arises when it is sought to impair the credibility of a witness by proof of reputation. In such a case the proof of reputation is confined to reputation for veracity. Leonard v. Pope, 27 Mich. 145; People v. Abbott, 97 Mich. 488, 56 N. W. 862, 37 Am. St. Rep. 360. The principles governing the admissibility of testimony in the two classes of cases above mentioned have no application to the question before us, and, if they had, they would not sustain defendant's contention. The rule invoked by defendant's counsel is a different rule. He

[24] And so in McKane v. Howard, 202 N. Y. 181, 95 N. E. 642, Ann. Cas. 1912D, 960 (1911), where in an action for breach of promise of marriage the plaintiff sought to prove her good character to rebut the defense of immoral conduct.

Compare Provis v. Reed, 5 Bingham, 435 (1829), where the court admitted evidence of the good character of a deceased attesting witness to rebut an imputation of fraud on his part.

[25] Part of opinion omitted.

invokes the rule applied by this court in People v. Ryno, 148 Mich. 137, 111 N. W. 740. That was a criminal case wherein respondent was convicted of rape. There we held that "the bad reputation of a prosecuting witness above the age of consent for chastity prior to the date of the offense charged" was admissible as tending to prove that the intercourse may have been had by consent, and we reversed the judgment because this rule was violated by the trial court. The rule laid down in People v. Ryno would be applicable if the case at bar were a criminal case. It, however, is not a criminal case. It is a civil case, and this court has held that that rule is inapplicable to civil cases. Adams v. Elseffer, 132 Mich. 100, 92 N. W. 772; Knickerbocker v. Worthing, supra. Adams v. Elseffer was a suit brought by the employer Adams against his employé Elseffer to recover moneys alleged to have been misappropriated. As bearing upon the probability of innocence, defendant was permitted to introduce proof of good character. This court held such testimony inadmissible, saying: "The correct rule according to the great weight of authority is that in civil actions the character of a party to the action may become the subject of proof in case, and only in case, it is involved in the issue. And we think the character is involved in the issue only in the cases in which either the right of recovery or the extent of recovery is affected by the character of either the plaintiff or the defendant." In Knickerbocker v. Worthing we applied the same principles, and there we held that defendant, who in a civil case was charged with committing adultery, could not introduce evidence of his good character for chastity.

It may be said that those cases are to be distinguished from this because there the question related to the proof of character; here to the proof of reputation. This distinction is not tenable. The ordinary way of proving character, indeed, according to the weight of authority (Wigmore on Evidence, § 1983; People v. McLean, 71 Mich. 309, 38 N. W. 917, 15 Am. St. Rep. 263) the only way of proving character, is to prove reputation. And the language of our opinion in Adams v. Elseffer very clearly indicates that proof of reputation as well as proof of character is inadmissible. Indeed, I think it may be said that the only sound argument which could be advanced for admitting testimony of reputation in such cases is that reputation furnishes evidence of character, and therefore the decision that proof of character is inadmissible is also a decision that proof of reputation is inadmissible. We conclude that proof of reputation was not admissible as bearing upon the probability of plaintiff's testimony, and it follows that, though admitted for another purpose, it could not be legitimately used for that purpose. The complaint under consideration discloses no error. * * *

Judgment affirmed.[26]

[26] And so in a civil action for assault the defendant's good character for peace is not admissible. Vawter v. Hultz, 112 Mo. 633, 20 S. W. 689 (1892); Coruth v. Jones, 77 Vt. 441, 60 Atl. 814 (1905).

But see Hein v. Holdridge, 78 Minn. 468, 81 N. W. 522 (1900), making an

CHASE v. MAINE CENT. R. CO.

(Supreme Judicial Court of Maine, 1885. 77 Me. 62, 52 Am. Rep. 744.)

PETERS, C. J.[27] The intestate's sleigh collided with a train at a railroad crossing. He thereby received an injury and very soon afterwards died. He never was conscious enough after the injury to tell how the accident happened. No one was with him at the time. No one saw him at the moment of the collision. As evidence that he could not have been guilty of any negligence which contributed to the accident, witnesses who had been his neighbors for some time were permitted to testify to their opinion of his general character for carefulness. We think this was overstepping the limit allowed to collateral evidence in this State. We dare not abide by it. Our belief is that such a rule would be fraught with much more evil than good.

It was said in Eaton v. Telegraph Co., 68 Me. 63, 67, that "the best authorities clearly sustain the doctrine that the fact of a person having once or many times in his life done a particular act in a particular way, does not prove that he has done the same thing in the same way upon another and different occasion." See cases there cited. If in civil cases a person's character proves carefulness in one instance, why not in all instances? Where and how can a true line of distinction be drawn? If by such proof a plaintiff can be shown to have been careful in one case, why not by the same mode of proof show that a person acted carefully or carelessly in any case—in all cases? In many litigations, under such a test, there would arise a wager of character which would as unfairly settle the dispute as did formerly the wager of battle. If the intestate's general character for care be in issue, why not that of the engineer and of every man concerned in the management of the train? If a man who is customarily careful were always so, there would be reason for admitting the evidence. But the issue is, whether the intestate was careful in this particular instance,—a fact to be, either directly or circumstantially, affirmatively proved. The objection to such a method of proof is augmented by the fact that the testimony consisted of merely the opinions of neighbors,—one generality proving another. But upon what tests or what definition of care are their opinions grounded? The question was not whether the intestate managed his farm, or his shop, or

exception in favor of the defendant's character for chastity in an action against him for the seduction of the plaintiff's daughter.

See, also, Rasmusson v. North Coast Fire Ins. Co., 83 Wash. 569, 145 Pac. 610, L. R. A. 1915C, 1179 (1915), making an exception where the action involves a charge of fraud against a person since deceased. Contra: Great Western Life Ins. Co. v. Sparks, 38 Okl. 395, 132 Pac. 1092, 49 L. R. A. (N. S.) 724 (1913) annotated. See, also, Wilson Lumber & Milling Co. v. Atkinson, 162 N. C. 298, 78 S. E. 212, 49 L. R. A. (N. S.) 733 (1913).

[27] Statement and part of opinion omitted.

his horses, carefully, but whether he used due care in attempting to cross a railroad track at the very moment when a regular train was due at the crossing. The law imperatively demands that a traveler look and listen before crossing if there is any opportunity to do so. What did these farmer witnesses know about the intestate's habitual care in that respect. It is not a ground for the admission of this evidence that the plaintiff can produce no other. It is neither of primary or secondary importance,—it is not evidence at all. 1 Greenl. Ev. § 84.

The question is not a new one in this court. The sole question considered in the case of Scott v. Hale, 16 Me. 326, was, whether similar evidence was admissible. The defendant there was sued for damages for the loss of a building by fire, the allegation being that the fire was occasioned by the negligence of the defendant. In that case the same arguments were presented as here. The evidence received in that case came nearer the point at issue than the evidence here. At the trial the court permitted witnesses to testify that the defendant was very careful with fire, and that they never discovered any carelessness in him about taking care of his fires during the time they were at his house just before the event complained of. It was held that the evidence was inadmissible, and the verdict was set aside. The same rule has been maintained in subsequent cases. Lawrence v. Mt. Vernon, 35 Me. 100; Dunham v. Rackliff, 71 Me. 345. The case of Morris v. East Haven, 41 Conn. 252, cited by the defendant, is an especially pertinent and sustaining decision. See Baldwin v. Railroad, 4 Gray (Mass.) 333. * * *

Exceptions sustained.

ILLINOIS CENT. R. CO. v. PRICKETT.

(Supreme Court of Illinois, 1904. 210 Ill. 140, 71 N. E. 435.)

BOGGS, J.[28] A judgment in the sum of $4,000 in favor of the appellee administratrix, entered in the circuit court of Marion county against the appellant company, was affirmed by the Appellate Court for the Fourth District on appeal, and this judgment is before us for review by the further appeal of the appellant company.

Thomas J. Prickett, appellee's intestate, was a locomotive engineer in the employ of the appellant company. On the morning of the 17th day of May, 1900, he left Centralia, going south, on locomotive engine No. 915, which was drawing a passenger train. When approaching the station at Du Bois, about 20 miles south of Centralia, with slackening speed preparatory to stopping at such station, the boiler of the locomotive engine suddenly exploded with great violence, causing the death of the engineer, Prickett, and of the fireman of the locomo-

[28] Part of opinion omitted.

tive, and injuring a section hand who was standing by the side of the track.

In proper order, the alleged errors of the court in its rulings as to the admission and exclusion of evidence present themselves for consideration.

The court allowed testimony to be produced to show the deceased had the reputation of a careful and competent engineer and of a sober man. Whether the explosion was occasioned by any lack of ordinary care on the part of the deceased was at issue. It was incumbent on the plaintiff to maintain the negative of that contention. That the decedent exercised ordinary care was susceptible of circumstantial proof; that is, it might be inferred from facts and circumstances appearing in the proof. Chicago, Burlington & Quincy Railroad Co. v. Gunderson, 174 Ill. 495, 51 N. E. 708; Chicago & Eastern Illinois Railroad Co. v. Beaver, 199 Ill. 34, 65 N. E. 144. No one other than the fireman was in the cab of the engine, or so situated as to be able to see the acts and conduct of the deceased engineer. The fireman was also killed by the explosion. The exploding engine was seen by other witnesses, but they could not see what the deceased did at the time when and immediately before the explosion occurred. Such being the fact, we think the court properly regarded the evidence as to the general reputation of the deceased as a careful and competent engineer and a sober man to be admissible as testimony tending to establish that he exercised ordinary care on the occasion under investigation. Illinois Central Railroad Co. v. Nowicki, 148 Ill. 29, 35 N. E. 358; Chicago, Burlington & Quincy Railroad Co. v. Gunderson, supra. * * *

Judgment affirmed.[29]

SECTION 2.—CONDUCT

REX v. BALL.

(Court of Crown Cases Reserved, 1807. Russ. & R. 132.)

The prisoner was tried before Mr. Justice Heath, at the Lewes summer assizes, in the year 1807, on an indictment charging him in the first count with forging a Bank of England promissory note for the payment of £5., with an intent to defraud the Governor and Company of the Bank of England. And on another count for uttering the same, &c.[30]

[29] See Southern Kan. Ry. Co. v. Robbins, 43 Kan. 145, 23 Pac. 113 (1890), limiting the use of such evidence to cases where no eyewitnesses were available.

[30] Part of opinion omitted.

The prisoner uttered the note in question on the 11th of June, 1807. The note was forged with a camel-hair pencil.

The counsel for the prosecution offered to prove that the prisoner had uttered another forged note, in the same manner, by the same hand, and with the same materials, on the 20th day of March preceding; and that two ten pound notes and thirteen one pound notes of the same fabrication had been found on the files of the Company, on the back of which there was the prisoner's hand-writing, which was evidence of their having been in his possession; but it did not appear when the Company received them.

The learned judge told the counsel for the prosecution who insisted that such evidence had been admitted in a similar case, that he would receive it subject to the opinion of the judges, if they chose to risk it; but if the judges should be of opinion that the evidence was inadmissible, it would probably operate as an acquittal. After some consultation, the counsel for the prosecution tendered the evidence, which was received and the prisoner found guilty.

In Michaelmas term, 14th of November, 1807, all the judges (except Rooke, J.) met, and the majority were of opinion, that the evidence was admissible, subject however to observations as to the weight of it, which would be more or less considerable, according to the number of the other notes; the distance of time at which they were put off, and the situation of life of the prisoner, so as to make it more or less probable that so many notes should pass through his hands in the course of business.

Chambre, J., thought the evidence wholly inadmissible as being evidence of facts wholly distinct from the transaction which formed the subject of the indictment, and which the prisoner could not be prepared to answer or explain.[81] * * *

REX v. VOKE.

(Court of Crown Cases Reserved, 1823. Russ. & R. 531.)

The indictment in this case charged the defendant with assault on Thomas Pearce with intent to kill. Other counts charged assault with intent to maim.[82]

* * * Thomas Pearce proved, that on the 3d July last, he was gamekeeper to Lord Glastonbury, for the manor of Compton Dunden, in the county of Somerset. On that day he went to the said manor; he was on horseback, but left his horse in some furze because he saw a man with a gun; he went to the man who was the prisoner, and asked him what he was about, and told him he was do-

[81] For a collection of the modern cases of forgery, see People v. Marrin, 205 N. Y. 275, 98 N. E. 474, 43 L. R. A. (N. S.) 754 (1912), annotated.

[82] The statement has been condensed.

ing a wrong thing, and giving him a great deal of trouble; and asked him why he did so. Pearce had known the prisoner for several years. He then asked him if he had taken out a certificate, and being answered that he had not, he asked him why he went about so; upon which the prisoner said, "You can pardon me, can't you?" Pearce told him he could not; upon which the prisoner said he would go anywhere with him. Pearce then proposed that the prisoner should go down to Mr. Ryal, Lord Gastonbury's steward, and said that if Mr. Ryal would pardon him, he should have no objection; and the prisoner assented to go with him. Pearce observed that the ramrod of the prisoner's gun was broken short off in the middle. They walked along together, until they came near to the horse which was about sixty yards off, when Pearce went on before him towards the horse, and when he was at a short distance from the prisoner, the prisoner fired at his back, but said nothing. Pearce attempted to turn round and saw the prisoner running, and attempted to run after him, but his back seemed to be broken, and he could not get on at all. Pearce then turned back to the horse, and after getting upon it, was making his way home to a place called Butley, about two miles off, and had got about half a mile on his road, at a place where there was a hedge on each side, when he saw prisoner again in the lowest part of one of the hedges, and the moment he looked round at him, the prisoner again fired his gun, the discharge from which beat out one of Pearce's eyes and several of his teeth, but did not cause him to fall from his horse. Between the first and second firing was about a quarter of an hour; and when the prisoner fired the last time, he was not at a greater distance from Pearce than three or four yards.

In the course of the trial it was suggested that the prosecution ought not to give evidence of two distinct felonies. But the learned judge thought it unavoidable in this case; as it seemed to him, to be one continued transaction in the prosecution of the general malicious intent of the prisoner. Upon another ground also the learned judge thought such evidence proper. The counsel for the prisoner, by his cross examination of Pearce, had endeavored to show that the gun might have gone off the first time by accident: and although the learned judge was satisfied that this was not the case, he thought the second firing was evidence to show that the first, which had preceded it only one quarter of an hour, was wilful, and to remove the doubt, if any existed, in the minds of the jury. * * *

The jury found the prisoner guilty.

The learned judge passed sentence upon him, but respited the execution in order that he might request the opinion of the learned judges, as to the propriety of the conviction.

In Michaelmas term, 1823, the judges considered this case, and were of opinion that the evidence was properly received, and the prisoner rightly convicted.

STATE v. ADAMS.

(Supreme Court of Kansas, 1878. 20 Kan. 311.)

BREWER, J.[88] Defendant was convicted in the district court of Franklin county of the crime of burglary, and from such conviction has appealed to this court. Many errors are alleged, some of which present questions of importance and difficulty, while others have already been settled, or require but a passing notice. * * *

Error is alleged in the admission of testimony, in this, that evidence was admitted which simply tended to show defendant guilty of another offense, and in no manner tended to connect him with the crime charged. The rule of law applicable to questions of this kind is well settled. It is clear, that the commission of one offense cannot be proven on the trial of a party for another, merely for the purpose of inducing the jury to believe that he is guilty of the latter, because he committed the former. You cannot prejudice a defendant before a jury by proof of general bad character, or particular acts of crime other than the one for which he is being tried. And on the other hand, it is equally clear, that whatever testimony tends directly to show the defendant guilty of the crime charged, is competent, although it also tends to show him guilty of another and distinct offense. State v. Folwell, 14 Kan. 105. A party cannot, by multiplying his crimes, diminish the volume of competent testimony against him. A man may commit half a dozen distinct crimes, and the same facts, or some of them, may tend directly to prove his guilt of all; and on the trial for any one of such crimes it is no objection to the competency of such facts, as testimony, that they also tend to prove his guilt of the others. By this rule, whatever is done in preparation for a crime, or in concealing the fruits, is competent, although in such preparation or concealment is committed another and distinct offense. And wherever there is testimony showing a conspiracy to commit a crime, evidence of acts done intermediate the conspiracy and the crime, in preparation of means for such crime, is competent, and that notwithstanding through some outside intervention the means so prepared are not actually used, but the crime is otherwise accomplished.

Within the scope of these rules comes the testimony objected to in the case at bar. The facts are these: The charge was burglary, in breaking into a store. The information was against four parties. One was called as a witness by the state, and, admitting himself to be an accomplice, testified that all four were engaged in the burglary; that they all met, two nights prior thereto and arranged for committing the crime, and fixed the time at which it should be committed; that defendant then said that a bar of iron and a pair of pinchers was all that was needed, and he would get them; that at the time appoint-

[88] Statement and part of opinion omitted.

ed all met, and defendant had with him the bar of iron and the pinchers. Other witnesses testified that on the day before the burglary they saw this defendant, and one of the other parties charged with the crime, sitting together in a store engaged in conversation for a long time. And then a witness was permitted to testify that he saw this defendant coming out of the same store, after such conversation, with a carpenter's brace, which he hid behind some coffin boxes, and which, after his departure, was taken and returned to the owner. This last is the testimony objected to. As detailed by the witnesses it establishes an independent crime, that of larceny. As such, say counsel, it is incompetent. Nor is it competent as evidence of preparation, for the brace was not an instrument intended to be used, or in fact used in the burglary. To this we reply, that the state, having offered evidence of a conspiracy and agreement between the parties to commit the crime, might properly show any conduct or acts of either thereafter tending to sustain the evidence of the agreement, and indicating preparation to accomplish the crime, or remove the fruits.

It is not essential that the state establish beyond peradventure that the acts or conduct were based upon the conspiracy, or in reference to the crime; it is enough that they harmonize with and tend to confirm the charge of the conspiracy, and are reasonably indicative of preparation for the crime. If no act or conduct of the defendant could be shown, unless the motive therefor, or the connection between it and the crime, were made undisputably clear, the range of inquiry would be limited and narrow. It is enough that the act has an apparent or probable connection with the crime; and then the motive of the defendant, and the weight of it as testimony, are to be considered by the jury. The fact that defendant and another of the four implicated in the conspiracy were engaged for a long time in private conversation the noon prior to the burglary, may of itself, when the nature and substance of their conversation is unknown, prove nothing; yet it is a circumstance harmonizing with the alleged conspiracy, and proper for the consideration of the jury in determining whether there was, as charged, such a conspiracy. So, while the testimony of the accomplice is, that a bar of iron and pinchers were to be and were the instruments of the crime, may not the state show that defendant was engaged between the conspiracy and the crime in procuring other instruments therefor? That a brace and bit might be very serviceable in forcing an entrance through a door, cannot be doubted; that the brace stolen by defendant was not used in the burglary, was prevented by the act of one who witnessed its larceny; that it was intended to be so used, is not affirmatively shown. But inasmuch as it was an instrument one intending burglary might naturally seek to obtain, as it was taken intermediate the conspiracy and the crime, and immediately after a long interview between two of the conspirators, the taking and concealment of it was a circumstance which might fairly be presented to the jury for their consideration.

Suppose, that instead of stealing a brace, the defendant had on that day gone many miles away and brought his own brace thence to a place whence it could easily be obtained on the coming night for the contemplated burglary, and that then, without the knowledge of defendant, it was taken away by some third party: could not this circumstance be shown, and that, notwithstanding the testimony of the accomplice as to what was agreed to be and what was in fact used? Would not the act be one tending to show preparation—a preparation made fruitless by the unexpected act of another? Could it not be shown that one charged with homicide, immediately prior thereto, was providing himself with several weapons, though only one was in fact used? and if so, does the manner in which he so provides himself affect the competency of the testimony? If one weapon he stole, one he borrowed, and one (his own) he simply put in order, would proof as to the first be incompetent, while evidence as to the others was admissible? and must it be affirmatively shown that each weapon was procured with reference to the homicide, before evidence concerning its procurement is competent? or are the facts concerning all to be put in evidence, leaving their weight to be determined by the jury? This we think must be laid down as the true rule: that where there is evidence of a conspiracy to commit a crime, and of its subsequent commission, the state may in support and corroboration thereof show any act or conduct of the alleged conspirators intermediate the conspiracy and the crime, which apparently recognizes the existence of the conspiracy, or reasonably indicates preparation to commit the crime, or preserve its fruits; and this, notwithstanding such special act of preparation was not the one discussed and agreed upon by the conspirators, and is rendered actually fruitless and unavailing by the unexpected interference of third parties, and also involves the commission of another and distinct crime. State v. Cowell, 12 Nev. 337; Hester v. Commonwealth, Sup. Ct. of Penn., 6 Cent. Law J. 395.
* * *

Judgment affirmed.

MAKIN et ux. v. ATTORNEY GENERAL FOR NEW SOUTH WALES.

(Privy Council, 1893. L. R. [1894] A. C. 57.)

The LORD CHANCELLOR.[84] The appellants in this case were tried and found guilty at the Sydney Gaol Delivery held at Darlinghurst of the murder of the infant child of one Amber Murray. The learned judge before whom the case was tried deferred passing sentence

[84] Statement and part of opinion omitted.

until after the argument of the special case which he stated for the opinion of the Supreme Court of New South Wales.

The points reserved by the learned judge were: First, that his honour was wrong in admitting evidence of the finding of other bodies than the body of the child alleged to be Horace Amber Murray. * * *

Special leave was granted to appeal to this Board from the judgment of the Supreme Court of New South Wales, some of the questions raised being of grave and general importance.

At the close of the argument before their Lordships they intimated that they would advise Her Majesty that the appeal should be dismissed, and that they would state their reasons for this advice on a future occasion.

There can be no doubt, in their Lordships' opinion, that there was ample evidence to go to the jury that the infant was murdered. Indeed, that point was scarcely contested in the argument of the learned counsel for the appellants. The question which their Lordships had to determine was the admissibility of the evidence relating to the finding of other bodies, and to the fact that other children had been entrusted to the appellants.

In their Lordships' opinion the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other.

The principles which their Lordships have indicated appear to be on the whole consistent with the current of authority bearing on the point, though it cannot be denied that the decisions have not always been completely in accord.

The leading authority relied on by the Crown was the case of Reg. v. Geering, 18 L. J. (N. S.) M. C. 215, where on the trial of a prisoner for the murder of her husband by administering arsenic evidence was tendered with the view of shewing that two sons of the prisoner who had formed part of the same family, and for whom as well as for her husband the prisoner had cooked their food, had

died of poison, the symptoms in all these cases being the same. The evidence was admitted by Pollock, C. B., who tried the case; he held that it was admissible, inasmuch as its tendency was to prove that the death of the husband was occasioned by arsenic, and was relevant to the question whether such taking was accidental or not. The Chief Baron refused to reserve the point for the consideration of the judges, intimating that Alderson, B., and Talfourd, J., concurred with him in his opinion.

This authority has been followed in several subsequent cases. And in the case of Reg. v. Dossett, 2 C. & K. 306, which was tried a few years previously, the same view was acted upon by Maule, J., on a trial for arson, where it appeared that a rick of wheat-straw was set on fire by the prisoner having fired a gun near to it. Evidence was admitted to shew that the rick had been on fire the previous day, and that the prisoner was then close to it with a gun in his hand. Maule, J., said: "Although the evidence offered may be proof of another felony, that circumstance does not render it inadmissible, if the evidence be otherwise receivable. In many cases it is an important question whether a thing was done accidentally or willfully." * * *

The learned counsel for the appellants placed much reliance on the case of Reg. v. Oddy, 2 Den. C. C. 265,[85] the only one which has been considered by the Court for Crown Cases Reserved. It was there held that on the trial of an indictment containing counts for stealing, and for receiving the property knowing it to be stolen, evidence of the possession by the prisoner of other property stolen some time before from other persons was not admissible upon the count for receiving with guilty knowledge, in respect of which alone it had been admitted by the recorder. Lord Campbell said that in his opinion there was no more ground for admitting the evidence under the third count (for receiving) than under the first or second (for stealing). Under the two latter, it would have been evidence of the prisoner being a bad man, and likely to commit the offence there charged. So under the third count the evidence would only shew the prisoner to be a bad man; it would not be direct evidence of the particular fact in issue. Aldersen, B., in his judgment said that the evidence merely went to shew that the prisoner was in possession of other property which had been stolen in the previous December, and not that he had received such property knowing it to be stolen; that the mere possession of stolen property was evidence prima facie, not of receiving, but of stealing, and to admit such evidence in the case before him would be to allow a prosecutor, in order to make out that a prisoner had received property with a guilty knowledge which had been stolen in March, to shew that the prisoner had in the December previously

[85] See People v. Lindley, 282 Ill. 377, 118 N. E. 719 (1918), as to when other offenses are admissible on a charge of receiving stolen property.

stolen some other property from another place, and belonging to other persons. In other words, they were asked to say that in order to shew that the prisoner had committed one felony, the prosecutor might prove that he committed a totally different felony some time before.

Their Lordships do not think that the judgments in Reg. v. Oddy, 2 Den. C. C. 265, at all conflict with the judgment in Reg. v. Geering, 18 L. J. (N. S.) M. C. 215, and the other cases referred to.

Their Lordships do not think it necessary to enter upon a detailed examination of the evidence in the present case. The prisoners had alleged that they had received only one child to nurse; that they had received 10s. a week whilst it was under their care, and that after a few weeks it was given back to the parents. When the infant with whose murder the appellants were charged was received from the mother she stated that she had a child for them to adopt. Mrs. Makin said that she would take the child, and Makin said that they would bring it up as their own and educate it, and that he would take it because Mrs. Makin had lost a child of her own two years old. Makin said that he did not want any clothing; they had plenty of their own. The mother said that she did not mind his getting £3. premium so long as he took care of the child. The representation was that the prisoners were willing to take the child on payment of the small sum of £3., inasmuch as they desired to adopt it as their own.

Under these circumstances their Lordships cannot see that it was irrelevant to the issue to be tried by the jury that several other infants had been received from their mothers on like representations, and upon payment of a sum inadequate for the support of the child for more than a very limited period, or that the bodies of infants had been found buried in a similar manner in the gardens of several houses occupied by the prisoners.

In addition to the question whether the evidence objected to in the present case was admissible the learned judge (as has been stated) reserved for the opinion of the Supreme Court the further questions, whether, if not admissible, the prisoners were rightly convicted; and even if inadmissible, whether there was evidence sufficient to sustain the conviction.

These questions, and the point of law raised by them, were fully argued before their Lordships, and although their Lordships having arrived at the conclusion that the evidence was admissible it became unnecessary for the determination of the appeal to decide them, their Lordships think it right to state the opinion which they formed upon the important question of law involved.[36] * * *

[36] See State v. Hyde, 234 Mo. 226, 136 S. W. 316, Ann. Cas. 1912D, 191 (1911), that evidence of another homicide might be received to show the defendant's motive.

THE KING v. FISHER.

(Court of Criminal Appeal, 1909. L. R. [1910] 1 K. B. 149.)

The judgment of the Court (Lord Alverstone, C. J., and Channell and Lord Coleridge, JJ.) was delivered by

CHANNELL, J.[37] In this case the appellant was charged on an indictment containing three counts, all of which practically related to the same transaction. The appellant obtained on June 4, 1909, a pony and cart from the owner, saying he wanted it for his invalid wife, and that he would take it on a week's trial; he agreed to pay £2. for the use of the pony and cart for a week if he did not keep it, and as some sort of security for the price he gave a bill of exchange for £25. That was the transaction, and it was proved that his wife was not an invalid and that the whole story was false, and that a reference which he had given to a bank was a useless reference because he had kept the account at the bank in a different name, and, moreover, the account had been closed some time before. The substance of the case for the prosecution was that this was a fraudulent transaction. In the circumstances I should have thought that the evidence was amply sufficient to enable the prosecution to ask the jury to convict the appellant, but the prosecution proceeded to call witnesses to speak to other cases in which the appellant was alleged to have obtained goods by false pretenses. In one of those cases the circumstances were very similar to those of the present case, but, as the jury were not satisfied that the appellant was the man concerned in that case, it has no bearing on the present question; otherwise I should have been inclined to think that the evidence as to that case was material and admissible. The other cases of which evidence was given were cases where the appellant had obtained provender by falsely representing in substance that he was carrying on a business and was therefore in a position to pay for goods supplied to him. The question is whether this evidence was admissible on the authority of the cases in which it has been held that evidence is admissible to prove that the prisoner has committed other offenses besides the one charged in the indictment.

The question is one which has frequently come before this court and before judges at the assizes, and it is one that is not always easy to decide. The principle is clear, however, and if the principle is attended to I think it will usually be found that the difficulty of applying it to a particular case will disappear. The principle is that the prosecution are not allowed to prove that a prisoner has committed the offence with which he is charged by giving evidence that he is a person of bad character and one who is in the habit of committing crimes, for that is equivalent to asking the jury to say that because the prisoner has committed other offenses he must therefore be guilty of the particular offence for which he is being tried. But if the evidence of other

[37] Statement omitted.

offences does go to prove that he did commit the offence charged, it is admissible because it is relevant to the issue, and it is admissible not because, but notwithstanding that, it proves that the prisoner has committed another offence. For example, on a charge of embezzlement, if the defence is that the failure to account for the money is due to a mistake on the part of the prisoner, evidence is admissible to prove other instances of the same kind, because that evidence tends to prove that in the particular case the prisoner had not made a mistake. Another instance is where a person obtains goods by paying for them with a cheque which is subsequently dishonoured, in which case evidence is admissible to prove other cases in which the prisoner has obtained goods by cheques which were dishonoured. In other words, whenever it can be shewn that the case involves a question as to there having been some mistake or as to the existence of a system of fraud, it is open to the prosecution to give evidence of other instances of the same kind of transaction, notwithstanding that the evidence goes to prove the commission of other offences, in order to negative the suggestion of mistake or in order to shew the existence of a systematic course of fraud.

Applying these principles to this case, the charge here is that the prisoner obtained the pony and cart from the prosecutor by making certain statements. The falsity of those statements is not proved by giving evidence that in other cases the prisoner made other false statement, though it does tend to shew that the prisoner was a swindler. But there is no rule of law that swindling is, as regards proof, different from any other offence, and if a man is charged with swindling in a particular manner, his guilt cannot be proved by shewing that he has also swindled in some other manner. We are of opinion that the evidence as to the other cases was inadmissible in this case, because it was not relevant to prove that he had committed the particular fraud for which he was being charged, in that it only amounted to a suggestion that he was of a generally fraudulent disposition. On the other hand, if all the cases had been frauds of a similar character, shewing a systematic course of swindling by the same method, then the evidence would have been admissible.

In the circumstances of this case we cannot come to any other conclusion but that the jury may have been influenced by the evidence of the other cases, and, therefore, although there was sufficient evidence to convict the prisoner without the evidence as to the other cases, in accordance with the rule laid down in this Court, the conviction cannot stand.

Appeal allowed.[88]

[88] Compare Reg. v. Francis, L. R. 2 C. C. 128 (1874), where on a charge of fraudulently obtaining property by means of a pledge of imitation jewelry it was held proper to admit proof of other attempts to pledge similar jewelry. For a collection of the cases on fraud and false pretenses, see People v. Bercovitz, 163 Cal. 636, 126 Pac. 479, 43 L. R. A. (N. S.) 667 (1912), annotated.

PEOPLE v. KATZ.

(Court of Appeals of New York, 1913. 209 N. Y. 311, 103 N. E. 305, Ann. Cas. 1915A, 501.)

WERNER, J.[39] The defendant appeals from a judgment of the Appellate Division in the First Department affirming a judgment entered upon a verdict at Trial Term, convicting him of the crime of grand larceny in the first degree. The case is one of unusual interest, both in respect. of the novel scheme or method by means of which the crime is said to have been perpetrated, and the number, variety, and importance of the questions which we are asked to decide. More than 300 exceptions were taken by defendant's counsel to the rulings of the trial court, but many of these may be assigned to groups relating to different classes of testimony to which separate objections were repeated as the respective witnesses were examined. These groups of exceptions will, of course be considered collectively; but even this resort to economy of space and time can only measurably foreshorten this discussion, because a careful and comprehensive statement of the facts[40] is no less essential than a thorough discussion of the questions of law involved. * * *

It is contended that the trial court erred in receiving evidence tending to prove that the defendant had previously been concerned in an attempt to commit another and similar crime, and this contention is based upon the testimony of one Schwed which was received under objection and exception. * * *

It is the law that ordinarily a man cannot be convicted of one crime by proof that he was guilty of another. Coleman v. People, 55 N. Y. 81; People v. Sharp, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851; People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193; People v. Governale, 193 N. Y. 581, 86 N. E. 554. There are various recognized exceptions to this rule, however, and one of them is that when guilty knowledge, quite commonly called intent, is an essential ingredient of the crime charged, evidence is admissible of similar crimes or acts committed or attempted at or about the same time by the person charged. The reasons for the rule and the exception are equally simple and obvious. The general rule is rooted in the principle that a man may not be convicted of one crime simply because he may be shown guilty of another when there is no connection between the two. Simple proof showing that A. shot B. at one time and place throws no light upon the charge that A. poisoned C. at another time and place. In either of these cases guilty knowledge

[39] Part of opinion omitted.

[40] In the omitted passages the opinion sets out in detail a complicated series of transactions by which the defendant and several others associated with him obtained possession of a large amount of mining stock belonging to the prosecuting witness, Heinze. These facts are too extensive to be printed in full.

or intent is inferable from the nature and surroundings of each act, and each must be judged on its own circumstances.

Quite another principle is to be invoked, however, when guilt cannot be predicated upon the mere commission of the act charged as a crime. In such a case the general rule gives way to the exception under which guilty knowledge of a defendant may be proved by evidence of his complicity in similar offenses under such circumstances as to support the inference that the act charged was not innocently or inadvertently committed. Familiar illustrations of this exception to the general rule are to be found in cases of uttering counterfeit money, in forgery, in obtaining money under false pretenses, and in receiving stolen property. Commonwealth v. Jackson, 132 Mass. 16; Commonwealth v. Bigelow, 8 Metc. (Mass.) 235; Commonwealth v. Stone, 4 Metc. (Mass.) 43; Helm's Case, 1 City H. Rec. 46; Smith's Case, 1 City H. Rec. 49; Commonwealth v. Johnson, 133 Pa. 293, 19 Atl. 402; Coleman v. People, 58 N. Y. 555; Copperman v. People, 56 N. Y. 591; People v. McClure, 148 N. Y. 95, 42 N. E. 523; Commonwealth v. Russell, 156 Mass. 196, 30 N. E. 763; People v. Everhardt, 104 N. Y. 591, 11 N. E. 62; People v. Dolan, 186 N. Y. 4, 78 N. E. 569, 116 Am. St. Rep. 521, 9 Ann. Cas. 453; People v. Neff, 191 N. Y. 210, 83 N. E. 970; People v. Marrin, 205 N. Y. 275, 98 N. E. 474, 43 L. R. A. (N. S.) 754.

The application to the case at bar of the principle upon which these cases were decided can be simply illustrated in the light of a few undisputed facts. If the evidence had tended to show that the defendant had been guilty of a simple common-law larceny, by a physical trespass and a felonious asportation of the property, it would be true that evidence of other similar larcenies would have been inadmissible. The reason is obvious. In such a case the guilty knowledge or intent is proved by the act itself, and it would add nothing to the proof of guilt to show that on other occasions the defendant had committed other similar larcenies. That is not the case at bar. Here the larceny was committed by means of a conspiracy which required a number of actors to carry out the involved and ingenious plot, and it is quite possible that an innocent man, who had inadvertently and unfortunately made a business connection with one or more of the conspirators, might have been drawn into the meshes of the scheme without any criminal knowledge or purpose on his part. That is precisely the position which the defendant claims to have occupied in this transaction. Although confessedly a participant in certain phases of the scheme, he asked the jury to believe that his connection with it was free from criminality, and his story was such that if the jury had found for him the verdict could not have been questioned for lack of evidence to support it. His narration of the affair, while strongly indicative of guilt, was not incompatible with innocence, and therefore the real issue was whether he was a guiltless scapegoat or a guilty conspirator. That is exactly the typical case in which evidence of

other similar offenses may be proven. The talk with Schwed about the $15,000 loan was practically identical, in point of time, with the transaction in the case at bar, and it related to a loan upon the Heinze mining stocks. The scheme suggested was in all its essentials the same as this, and the conversation about it led to a meeting of some of the very persons who now figure among the conspirators before the court. The fact that the first scheme was not carried to a successful conclusion does not affect the admissibility of the evidence. It was just as competent and cogent for the purpose of proving the defendant's state of mind as it would have been if the thing had actually been accomplished. We conclude therefore that the evidence of Schwed was competent. * * *

Judgment affirmed.

STATE v. HILL.

(Supreme Court of Missouri, 1918. 273 Mo. 329, 201 S. W. 58.)

WALKER, P. J.[41] The appellant and one Marshall Dumas were charged in an information filed by the prosecuting attorney of Ray county with murder in the first degree. A severance was granted, and at the February term, 1917, of the circuit court of said county, appellant was tried, and the jury failing to agree, the case was continued until the May term, 1917. Upon a trial at this term appellant was convicted as charged, and her punishment assessed at life imprisonment in the penitentiary. From this judgment she appeals. * * *

III. The admission of testimony tending to show an attempted poisoning[42] of the deceased by appellant several months before the homicide is urged as error. The burden of this objection is that no connection was shown between this attempt and the crime for which appellant was being tried. This complaint falls short of raising a tenable objection to the admission of the testimony. There was no pretense on the part of the state that the attempted crime was a part of the one committed. It was in no sense the purpose of the introduction of this testimony to establish the crime, but to show the intent with which it was committed. On this ground testimony of this character, with the modification we will hereafter refer to, is held to be admissible.

White, Commissioner, in State v. Patterson, 271 Mo. 99, 109, 196 S. W. 3, has recently with painstaking care, reviewed and compiled the numerous Missouri cases on this subject, beginning with a learned opinion by Philips, Commissioner (State v. Myers, 82 Mo. 558, 52 Am. Rep. 389), which for many years has been the leading case on the subject. The rule deduced from these cases is that where the act constituting the crime speaks for itself as showing the intent, or where the criminal

[41] Part of opinion omitted.

[42] The actual killing in this case was accomplished by cutting the deceased's throat.

intent is presumed from the act itself, such evidence is not admissible; but where different inferences may be drawn regarding the intent with which the criminal act was done, and the circumstances of the act may be susceptible of an interpretation indicating innocence, then such evidence is admissible. Here the appellant was absent at the time of the homicide. Its actual commission was admitted by the witness Alonzo Jones. He and the appellant's paramour, Dumas, alone testify to her having provoked the crime by offering an incentive for its commission. She assails the truth of this testimony. Clothed as she is with a presumption of innocence, different inferences may be drawn as to the intent with which the crime was committed. If evidence existed susceptible of an interpretation indicative of her innocence, she would have been entitled to its admission; on the other hand, if facts existed of the attempted commission by her of a former act against the deceased of a kindred nature to the one with which she was charged, taken in connection with the facts and circumstances of her life and that of the deceased, all of which were in evidence, then the testimony was properly admitted. It is true that this evidence is based primarily upon the testimony of the witness Dumas, but the evidence of the former crime was not confined to her alleged statement. Confined to Dumas, its credibility might be open to serious question, but not its admissibility. Dumas' testimony, however, is corroborated by that of the doctor who stated that he had treated the deceased for strychnine poisoning at about the time the appellant stated she had made the attempt. The character of this testimony, therefore, as tending to show an intent to commit the crime for which she was on trial, is sufficiently established to authorize its admission. * * *

Judgment affirmed.

STATE v. WALDRON.

(Supreme Court of Appeals of West Virginia, 1912. 71 W. Va. 1, 75 S. E. 558.)

MILLER, J.[48] On an indictment for the murder of Ben Tate defendant was acquitted of murder in the first degree, but found guilty of murder in the second degree, and the judgment below was that he be confined in the penitentiary for the period of ten years.

The homicide, admitted, occurred on the night of January ——, 1910, a Sunday night, in a brothel in Keystone, McDowell County. Defendant was a deputy United States Marshal, who at the request of White, town sergeant, had gone with him to this house to make an arrest for alleged illicit sales of intoxicating liquors. While waiting the return of White from the Mayor's office with warrants, defendant, who before White left to secure the warrants, had been in-

[48] Part of opinion of Miller, J., and dissenting opinion of Williams, J., omitted.

vited on the outside of the house by Tate and his companion Gillespie, patrons of the house, and had declined, was on their coming out of the room of the mistress of this house, enticed by them into an adjoining room, where, almost instantly, the door being shut by one of them, the difficulty occurred, resulting not only in the death of Tate, but of Gillespie also, from pistol shots fired by defendant.

Defendant was the only living witness as to what actually took place in the room where the homicide occurred. He admitted the killing, but on his trial relied on self defense.

The controversy here is reduced to a few questions relating to the rejection of certain evidence proposed by the prisoner, and to the giving and rejecting of certain instructions to the jury. * * *

In connection with this testimony and as further tending to show Tate and Gillespie were the aggressors, and establish his theory of self defense, the prisoner proposed, but was not permitted to prove, by two witnesses, Baxter and Hermanson, that but a few moments before the homicide, both Tate and Gillespie, in connection with two or three other men, were in a violent state of mind towards Hermanson; that but a few moments before White and Waldron entered the house Tate and Gillespie, as Baxter thought from their actions, acting under the influence of liquor, jumped on Hermanson, in aid of their lewd mistresses, and without other cause, beat him, while Hermanson was there waiting for two other women to come down stairs and pay him some money he claimed they owed him.

The attorney general and associate counsel justify the action of the court in excluding this evidence, not on the ground that it might not have influenced the verdict of the jury, but on the grounds, (a) that evidence of a single act of violence is not admissible to establish the turbulent and violent character of deceased; (b) that the conduct of Tate and Gillespie towards Hermanson was unknown to Waldron, and if for no other was inadmissible for this reason; and, (c) because the conduct of Tate and Gillespie constituted no part of the res gestæ, had no bearing upon or connection with the homicide, that there was no causal or even explanatory relation between that recent occurrence and the homicide.

In homicide cases, where the general character of the deceased for turbulence and violence is involved, the general rule, establised by the weight of authority, no doubt is, that evidence of isolated facts or specific acts forming no part of the res gestæ, and in no way connected with defendant, will not be received in evidence. 21 Cyc. 910, and cases cited in notes. But when self defense is relied on, and where as in this case, there is evidence tending to show the deceased was the aggressor, the dangerous character of deceased may be shown by the facts and circumstances attending the homicide, and so connected with it as to constitute a part of the res gestæ. 21 Cyc. 909; 1 Wigmore on Ev., section 363; State v. Morrison, 49 W. Va. 210, 218, 38 S. E. 481; Harrison v. Com., 79 Va. 374, 52 Am. Rep. 634.

Moreover, Mr. Wigmore, 1 Wigmore on Ev., section 198, citing numerous cases says: "When the turbulent character of the deceased, in a prosecution for homicide, is relevant (under the principle of § 63, ante), there is no substantial reason against evidencing the character by particular instances of violent or quarrelsome conduct. Such instances may be very significant; their number can be controlled by the trial Court's discretion; and the prohibitory considerations applicable to an accused's character, (ante, § 194) have here little or no force." And whether in such cases as the one at bar there is necessity of showing defendant's knowledge of deceased's character, this writer, in section 63, referred to, says: "The reason for the hesitation, once observable in many Courts, in recognizing this sort of evidence, and the source of much confusion upon the subject, was the frequent failure to distinguish this use of the deceased's character from another use, perfectly well-settled, but subject to a peculiar limitation not here necessary,—the use of communicated character to show the fact and the reasonableness of the defendant's apprehension of violence. * * *

We agree with this writer that reason, if not the weight of judicial decision, favors the admissibility in evidence of such facts, when the question is the knowledge or belief of the defendant in the dangerous character of deceased, and the necessity for acting in self defense. And on parity of reasoning where self defense is relied on and there is some evidence that deceased was the aggressor, and the question is what the deceased probably did do, his quo animo, as evidenced by his recent acts of turbulence even towards a third person, so connected in time, place and circumstance with the homicide, as to likely characterize the deceased's conduct towards the defendant ought, on the principles stated by this writer in said section 63, to be received in evidence, for the question then is what deceased probably did, not what defendant probably thought deceased was going to do. * * *

Judgment reversed.[44]

HOLLINGHAM v. HEAD.

(Court of Common Pleas, 1858. 4 C. B. [N. S.] 388.)

This was an action for the price of a quantity of artificial manure sold by the plaintiff to the defendant.

At the trial before Williams, J., at the last Assizes for Sussex, it appeared that the plaintiff, who represented himself to be the agent of a company styled the Sussex Manure Company, was in the habit of

[44] See State v. Bailey, 190 Mo. 257, 88 S. W. 733 (1905), where in order to rebut self-defense it was held proper for the prosecution to prove that defendant assaulted another nonunion man during the earlier part of the same evening.

travelling about to the different market towns to sell an article called Rival Guano; that he met with the defendant, who was the occupier of a farm in the county of Sussex, adjacent to a farm which had formerly been in the occupation of the plaintiff, and prevailed upon him to purchase a quantity of this guano; and that it turned out to be altogether worthless.

The defence set up was, that the article had been purchased by the plaintiff subject to a condition that it was not to be paid for unless it proved equal to Peruvian guano: and it was proposed, on cross-examination, to ask the plaintiff whether he had not made contracts with other persons for the sale of his Rival Guano upon the terms that the purchasers should not pay for it unless it turned out to be equal to Peruvian guano.

The learned judge permitted the question to be put, for the purpose of testing the plaintiff's credit.

The defendant's counsel then proposed to call witnesses to prove that the plaintiff had made contracts with other persons for the sale of his guano upon the terms suggested.

The learned judge ruled that this evidence was not admissible, as not being relevant to the issue, and res inter alios acta.

A verdict having been found for the plaintiff,

Montagu Chambers now moved for a new trial, on the ground of the improper rejection of evidence, and also that the verdict was against evidence.

WILLES, J.[45] I am of opinion that there ought to be no rule in this case. The question is, whether, in an action for goods sold and delivered, it is competent to the defendant to set up by way of defence that the plaintiff has entered into contracts with third persons in a particular form, with the view of thereby inducing the jury to come to the conclusion that the contract sued upon was not as represented by the plaintiff. I am clearly of opinion that it was not competent to the defendant to do so. The case put forward on the part of the plaintiff, was, that the defendant bought of him a quantity of a certain article called "Rival Guano," at a given price per ton. The defendant, on the other hand, insists that it was one of the terms of the contract that he was not to pay for the article unless it turned out to be equal to Peruvian guano. The plaintiff, having given evidence in support of his case, was asked on cross-examination by the defendant's counsel whether he had not entered into contracts for the sale of his guano to other persons upon the terms suggested, viz., to be paid for only on condition that it proved equal to Peruvian guano. That question was disallowed as not being competent evidence for the purpose of establishing that the contract was made subject to that condition. And I understand that my Brother Williams also rejected similar evidence in chief, which was offered on the part of the defendant. I am of opin-

[45] Opinions of Byles and Williams, JJ., omitted.

ion that the evidence was properly disallowed, as not being relevant to the issue. It is not easy in all cases to draw the line, and to define with accuracy where probability ceases and speculation begins: but we are bound to lay down the rule to the best of our ability. No doubt, the rule as to confining the evidence to that which is relevant and pertinent to the issue, is one of great importance, not only as regards the particular case, but also with reference to saving the time of the court, and preventing the minds of the jury from being drawn away from the real point they have to decide. This rule is nowhere more clearly laid down than in the very able treatise by Mr. Best upon the Principles of Evidence, 2d edit. 319. "Of all rules of evidence," he says, "the most universal and most obvious is this,—that the evidence adduced should be alike directed and confined to the matters which are in dispute, or form the subject of investigation. Its theoretical propriety can never be matter of doubt, whatever difficulties may arise in its application. The tribunal is created to determine matters in dispute between contending parties, or which otherwise require proof; and anything which is neither directly nor indirectly relevant to those matters ought at once to be put aside, as beyond the jurisdiction of the tribunal, as tending to distract its attention and to waste its time." And the same learned author, in another part of his book, says,—p. 14,—"There is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former, a mere preponderance of probability, due regard being had to the burden of proof, is sufficient basis of decision; but, in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required." Now, it appears to me that the evidence proposed to be given in this case, if admitted, would not have shown that it was more probable that the contract was subject to the condition insisted upon by the defendant.

The question may be put thus,—Does the fact of a person having once or many times in his life done a particular act in a particular way make it more probable that he has done the same thing in the same way upon another and different occasion? To admit such speculative evidence would I think be fraught with great danger. Where, indeed, the question is one of guilty knowledge,—as in case of a charge of uttering base coin or forged notes,—such evidence is received as tending to establish a necessary ingredient in the crime. But I am not aware of any other instance. If such evidence were held admissible, it would be difficult to say that the defendant might not in any case where the question was whether or not there had been a sale of goods on credit, call witnesses to prove that the plaintiff had dealt with other persons upon a certain credit; or, in an action for an assault, that the plaintiff might not give evidence of former assaults committed by the defendant upon other persons, or upon other persons of a particular class, for the purpose of showing that he was a quarrelsome individual, and therefore that it was highly probable that the particular charge of

assault was well founded. The extent to which this sort of thing might be carried is inconceivable. The only ground upon which it could at all be suggested that such an inquiry could be permitted on cross-examination, would be, that it was a means of testing the credit [46] of the witness or the accuracy of his memory. But I doubt even that: and that does not appear to have been the way in which it was put. As to the cases referred to,—Egerton's Case, R. & R. C. C. 375, is altogether distinguishable. There, the prisoner was charged with having extorted money from the prosecutor by means of a threat to charge him with a certain offence: and the prosecutor was allowed to give evidence of another ineffectual attempt by the prisoner to obtain money from him by similar threats,—in order to show the intention of the prisoner in making the demand. The evidence there was admissible because it was all part of one persecution of the prosecutor; it was relevant to the matter in issue, as showing the nature and character of the transaction in question. In Llewellyn v. Winkworth, 13 M. & W. 598, which was an action against the defendant as acceptor of a bill of exchange accepted in his name by another person, evidence having been given of a general authority in that person to accept bills in the defendant's name, an admission by the defendant of liability upon another bill so accepted was held to be good confirmatory evidence. There, too, the evidence was relevant to the issue. For these reasons, I am of opinion that there is no pretence for granting a rule on the ground of misdirection or the improper rejection of evidence. As to the other branch of the motion,—for a new trial on the ground that the verdict was against the evidence,—if the learned judge who tried the cause had expressed himself dissatisfied with the verdict, I should probably have thought a rule might be granted: but, as he has not so expressed himself, there will be no rule.

Rule refused.

MILLER v. HACKLEY.

(Supreme Court of New York, 1810. 5 Johns. 375, 4 Am. Dec. 372.)

VAN NESS, J.[47] By an agreement of counsel, the motion on the part of the defendant, for a new trial and in arrest of judgment, came on together. This suit is to charge the defendant, as indorser of a bill, drawn in New York, on Baltimore for 250 dollars, and of two bills drawn in New York, on Charleston, the one for 310 dollars, and the other for 315 dollars.

With respect to the first bill, I do not perceive any objection to the right of recovery. The bill, when presented for acceptance, was refused, and due notice given to the defendant. The evidence to this

[46] That it is not error to exclude such a question on cross-examination, see Spenceley v. De Willott, 7 East, 108 (1805).

[47] Statement and part of opinion omitted.

point consisted of the deposition of a notary, who stated that he presented the bill for acceptance, and protested it for non-acceptance. That it was his usual practice, as notary, on the evening of the day of the protest, and in all cases of protest, to give notice, in writing, to the indorsers residing at a distance, by putting such notice in the post-office, directed to the party, at his place of residence; and he had no doubt notice in this case was duly given, though, at that distance of time, he could not recollect positively; and that it was possible he might have given the notice to the holder to be forwarded.

This evidence was certainly sufficient, in the first instance, to support the averment of due notice, and there being nothing to affect it, it will support the verdict.[48] * * *

MEIGHEN v. BANK.

(Supreme Court of Pennsylvania, 1855. 25 Pa. 288.)

KNOX, J.[49] * * * The action was against the bank, upon a certificate of deposit, purporting to have been given by the cashier to the plaintiff on the 19th of March, 1853; and the defence was that no deposit had been made on that day, but that it was really made on the 19th of March, 1852, and had been paid out on the plaintiff's check, and that the date of the year was a mistake.

After the cashier had sworn positively that the plaintiff had made no deposit in the bank on the 19th of March, 1853; and that he had no doubt the certificate, upon which the suit was brought, was the one he gave to the plaintiff on the 19th of March, 1852, and, had given, as a reason, that he stated so from the books; and from his recollection, he was permitted, under objection, to add as follows, viz., "it is the invariable custom of the bank to balance and settle the books every evening. There was no transaction of the kind in March, 1853. If he (Meighen) had made a deposit on that day, I would have entered the deposit in the daily receipts; and this is one reason for my belief that he made no such deposit. If he had made such a deposit, it would have been such a coincidence as would not have escaped my mind; besides, he owed no note of this kind at the time, and that, if there had been any discrepancy in the books, I would have heard of it. It is our custom to endorse such drafts before sending them away." Upon the reception of his evidence, the second, third, fourth, and fifth errors are assigned. It is unnecessary to notice the assignments separately and in detail, as they are all involved in the question whether the above stated evidence was properly received or not. The allegation of the plaintiff in error is, that the witness was illegally per-

[48] See cases under Regular Entries, where this sort of evidence is constantly used.

[49] Statement and part of opinion omitted.

mitted to prove the custom of the bank in settling its books, and endorsing drafts, and to speak of the contents of the book, and to express his belief with his reasons for it, that no deposit had been made on the 19th of March, 1853. It is important to remember that the witness had already stated, without objection, that no deposit was made by Meighen on the 19th of March, 1853, and that the evidence which is alleged to have been improperly received, was given merely as corroborative, or, rather, as explanatory of his previous assertion. Where a witness has stated a fact, or given an opinion, he may be asked, either in chief or on cross-examination, how he knows the fact, or upon what grounds his opinion is founded; and there is no error in permitting him to answer as to his knowledge of facts, or to give his reasons for opinions expressed. If it should appear that either the one or the other were based upon grounds which were legally inadmissible, it would clearly be the duty of the Court to instruct the jury to disregard the testimony. But surely there was no error in permitting the witness to give "the reason for the faith that was in him;" and it seems to us that the reasons which he gave entirely justified his statement,[50] that no deposit had been made in March, 1853, but that the certificate was really given in March, 1852.

Had the evidence of the usage and custom of the bank, in settling books and endorsing drafts, been offered of itself to disprove the liability of the corporation, upon the certificate in question, it might have been liable to the objection that it was the act of the party in whose behalf it was offered, and therefore not competent; but, as we have already observed, it was given merely as one of the reasons which induced the conclusion of the cashier that the certificate of

[50] Gray, J., in Gardam v. Batterson, 198 N. Y. 175, 91 N. E. 371, 139 Am. St. Rep. 806, 19 Ann. Cas. 649 (1910): "* * * The defendant testified to the paper writings being copies of original letters written by Beadnell; that the originals were addressed to the plaintiff, sealed, stamped, and put in a box or tray, 'on my desk to be mailed in the post office, the same as I always do with every letter going from my office. * * * They were put in there for the purpose of being mailed by somebody in my employ. I am head of a big insurance company down there. The letters are taken from that tray periodically through the day * * * by the clerk whose duty it was to gather up the mail and post it. That was the way that all the mail that emanated from my office always went through the post. That was the regular course of business in my office every day.' * * * It was essential, in this case, to the admissibility of the copies, that the testimony of the defendant as to the sending of the letters should have been supplemented by the further evidence of the clerk, or other employé, whose duty it was to post letters, that in the regular course of business he had invariably collected the letters upon the defendant's desk and had posted them. However strong the convictions and the statements of the defendant as to the usual mailing of the letters placed on his desk, there was the gap in the proof, created by the failure to show that regular practice, or custom, of carrying them to the post, by some one charged with that duty, from which a presumption would naturally arise of these letters having been posted. I think that the trial court committed no error in excluding the copies of letters offered by the defendant."

deposit was erroneously dated, and for this purpose it was plainly admissible. In Schoneman v. Fegley, 14 Pa. 376, the witness said, "he did not know whether he gave a receipt for a note or not;" and it was held that the question, whether he usually gave receipts for notes, was properly ruled out. This is by no means an authority against the decision of the Court in the case now in hand. If the witness in Schoneman v. Fegley had stated that he did give a receipt for the note in question, and had been refused permission to give, as one of the reasons for believing that he had given a receipt, his invariable practice to give such receipts, the case would have been in point here; but it is not now.

We see no objection to the reception of the deposition of Mr. Pennock, the teller, as to the entries in the books of the bank made in his handwriting. The books would not have been evidence, unsupported by the oath of the party making the entries; but, in connexion with the oath of the teller, they were evidence in accordance with the decision of this Court, in the case of Bank v. Boraef, 1 Rawle, 152.

Judgment affirmed.

STATE v. MANCHESTER & L. R. R.

(Supreme Judicial Court of New Hampshire, 1873. 52 N. H. 528.)

Indictment for negligently running over and killing Benjamin Woodbury at a public crossing.

The accident occurred on the passage of the up train, on the morning of December 17, 1870; and it appeared that the same engineer and fireman, who had charge of the locomotive on that occasion, had driven the same morning up train for the year preceding. Subject to the defendants' exception, the State was permitted to prove that, during the preceding year, the same train sometimes passed the crossing where the accident happened without sounding the whistle or ringing the bell, and were permitted to argue upon said testimony, in connection with other evidence, for the purpose of showing that the engineer and fireman of the defendants did not, on the occasion of the accident, seasonably sound the whistle and ring the bell. * * *

SARGENT, C. J.[51] * * * The first question raised by the case is as to the admissibility of the testimony as to the same train, run by the same engineer and fireman, having sometimes passed the same crossing where the accident happened, during the preceding year, without sounding the whistle or ringing the bell, as tending to show that the same men would be more likely to have neglected the performance of these duties upon the occasion in question. The regulations required that upon each occasion when this crossing was passed

[51] Statement condensed and part of opinion omitted.

the bell should be rung and the whistle sounded. There was direct evidence on one side that neither of these signals was given upon the occasion of the accident, while there was just as direct evidence upon the other side that both these signals were properly given. Here was a direct conflict in the evidence. Which shall the jury believe? Had this duty been invariably performed according to requirement, or had these servants of the road grown careless and negligent in regard to it? Would their conduct on former occasions have any bearing upon the probabilities of the case? Would they be more likely to neglect their duty on this occasion if they had frequently neglected it before, and with impunity, than they would if they had always scrupulously observed it?

Negligence is said to consist in the omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do, in either case causing unintentionally, mischief to a third party. 1 Hilliard on Torts (2d Ed.) 131. It would seem to be axiomatic, that a man is more likely to do or not to do a thing, or to do it or not to do it in a particular way, as he is in the habit of doing or not doing it. But this must be understood of acts which are done, or omitted to be done, without any particular intent or purpose to injure any one. It cannot apply to acts that are done intentionally, wilfully, or maliciously, because such acts are done with a specific object in view, and they are performed, not by force of habit, but with a definite purpose. It would not be competent evidence that a man was guilty of murder, to show that he had committed several other murders before; and so of any other crime, or any wilful trespass, or any act done and intended for the specified object in question.

If, in this case, it had been charged that these agents of the corporation had knowingly, intentionally, wilfully, or maliciously done or omitted to do any act for the purpose of injuring the deceased or any body else, then the only questions would be, was the act done, or omitted, as charged? and did the knowledge, the intention, the will, or the malice, exist when the act was done or omitted? But when the question is, Did these servants of the road, without any intention whatever, and through mere negligence or carelessness, omit to give these signals on that occasion? we think the inquiry was properly made as to what they had done before in that regard, and whether they had or had not grown habitually negligent of the requirements of the road in that particular. In this view of the case, we think the evidence was admissible, not as evidence of character, not as evidence of fitness or unfitness, but simply as having some tendency to show that on this particular occasion these agents were more probably negligent and careless, because they had before frequently neglected the same duty with impunity, and had thus become habitually negligent in that regard. This exception is overruled. * * *

BRODERICK v. HIGGINSON.

(Supreme Judicial Court of Massachusetts, 1897. 169 Mass. 482, 48 N. E. 269, 61 Am. St. Rep. 296.)

Two actions of tort, to recover, under Pub. St. c. 102, § 93,[52] doubled damages for injuries occasioned by a dog. At the trial in the Superior Court, before Hopkins, J., the defendant was charged as keeper of the dog, and the plaintiffs contended that the injury occurred because the dog rushed into the highway, frightened their horse, and caused both the plaintiffs, who were husband and wife, and who were riding together, to be thrown from their carriage.

The plaintiffs offered evidence tending to show that the dog had made other attacks upon other teams passing, in a like manner, and stated that the offer was made with a view to showing that the dog had made the attack in question. This evidence was excluded; and the plaintiffs excepted.

The defendant offered evidence tending to show that after the accident the husband said that it happened through the fault of the horse, and that the dog did not make an attack upon the horse, or any demonstration towards him.

KNOWLTON, J.[53] A question common to both of these cases is whether it is competent to prove that a dog has a habit of attacking passing teams, in support of a disputed allegation that he attacked a passing team on a particular occasion. It is a familiar fact that animals are more likely to act in a certain way at a particular time if the action is in accordance with their established habit or usual conduct than if it is not. There is a probability that an animal will act as he is accustomed to act under like circumstances. For this reason, when disputes have arisen in regard to the conduct of an animal, evidence of his habits in that particular has often been received. Todd v. Rowley, 8 Allen, 57; Maggi v. Cutts, 123 Mass. 537; Lynch v. Moore, 154 Mass. 335, 28 N. E. 277. These cases fully cover the question now presented. They are authorities, not only to the proposition that evidence of habit may be received in such cases, but that habits may be proved by evidence of the frequent observation of particular instances. Of similar import, although somewhat different in the application of the principle, are the later cases of Bemis v. Temple, 162 Mass. 342, 38 N. E. 970, 26 L. R. A. 254, and Shea v. Fabrics Co., 162 Mass. 463, 38 N. E. 1123. We are of opinion that the evidence should have been admitted. * * *

Exceptions sustained.

[52] "Every owner or keeper of a dog shall forfeit to any person injured by it double the amount of the damages sustained by him, to be recovered in an action of tort."

[53] Statement condensed and part of opinion omitted.

CARR v. WEST END ST. RY. CO.

(Supreme Judicial Court of Massachusetts, 1895. 163 Mass. 360, 40 N. E. 185.)

Tort, for personal injuries occasioned to the plaintiff, and for damages caused to his horses and wagon, by collision with a street car of the defendant. At the trial in the Superior Court before Mason, C. J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, in substance as follows.

The defendant introduced evidence tending to show that the plaintiff was at the time of the collision under the influence of liquor, and that his condition contributed not only to the accident, but to the extent of the injury which he claimed to have received therefrom.

One Story, who was conductor of the car and who had been in the employ of the defendant for fourteen years, testified for the defendant that he saw the plaintiff approaching, and watched him; that he acted stupid; that as he raised him up from the street, and when he was assisting him inside, he could smell his breath; and that after the plaintiff sat down in a chair the witness made the remark that the man was intoxicated.

On cross-examination, the same witness testified that he had his eye on the plaintiff because he had seen him intoxicated several times before on the street while on his wagon, and that he had seen him intoxicated while on his wagon, since the accident.

In rebuttal, the plaintiff called one Hursch, who testified that he had known the plaintiff as a carter of brick for twenty years, and that he had employed him for nearly eighteen years.

"Q. Did you ever see Mr. Carr intoxicated? A. Never. He was a very sober, industrious man, very reliable. Never knew him to be under the influence of liquor."

To this question and answer the defendant objected, but the judge allowed them; and the defendant excepted.

"Q. Now, will you state more particularly as to his habits as to drink? A. I never knew that he drank a drop in my life. Never knew him to. He may have drunk, but I never knew him to."

This question and answer were also objected to by the defendant, but the judge allowed them; and the defendant excepted.

HOLMES, J. The testimony as to the plaintiff's habits was not admissible to contradict the evidence that he was intoxicated at the time of the accident. Neither was it admissible to meet the testimony brought out by the plaintiff, on cross-examination, that he had been seen intoxicated several times before the accident. The latter testimony was immaterial, and the plaintiff was not entitled to contradict it. McCarty v. Leary, 118 Mass. 509; Shurtleff v. Parker, 130 Mass. 293, 297, 39 Am. Rep. 454; Lamagdelaine v. Tremblay, 162 Mass.

339, 39 N. E. 38; Alexander v. Kaiser, 149 Mass. 321, 21 N. E. 376; Harrington v. Lincoln, 2 Gray, 133.

Exceptions sustained.[54]

JOSEPH TAYLOR COAL CO. v. DAWES.

(Supreme Court of Illinois, 1906. 220 Ill. 145, 77 N. E. 131.)

Action on the case for personal injuries alleged to have been caused by the defendant's engineer in lowering the cage, in which the plaintiff was descending into a coal mine, at a rate of speed prohibited by the statute. The testimony as to the rate of speed was conflicting.

HAND, J.[55] * * * The plaintiff called a number of witnesses who were employed in the mine, and, over the objection of the defendant, was permitted to prove by them that prior to the plaintiff's injury the engineer repeatedly lowered the cage, when men were upon it, into the mine at a rate of speed greatly in excess of 600 feet per minute. This testimony, it is urged, was inadmissible, as it is said it was not permissible for the plaintiff to establish that the cage was lowered at a prohibited rate of speed at the time he was injured, by proving it was lowered at other times at a rate of speed prohibited by the statute. If such was the object of the testimony, the objection to its admission should have been sustained, as the general rule is that the plaintiff cannot establish the misconduct of the defendant upon which he bases a right to recover by proving the defendant guilty of similar acts of misconduct at another time.

This general rule, however, has its exceptions, and we think the evidence here in question falls within a well-recognized exception to the general rule and was admissible. The defendant was powerless to delegate to its engineer the right to lower into its mine said cage, and thereby relieve itself from liability in case the cage was lowered at a rate of speed prohibited by the statute, and injury followed, as the duty to lower the cage at a rate of speed not in excess of 600 feet per minute was a duty resting upon the defendant, and which could not be delegated by it to its engineer so as to relieve itself from liability. Chicago & Alton Railroad Co. v. Eaton, 194 Ill. 441, 62 N. E. 784, 88 Am. St. Rep. 161. The engineer, in the lowering of the cage, stood in the place of and as the representative of the defendant, and his knowledge with reference to the rate of speed at which the cage was being lowered into the mine at the time the plaintiff was injured was the knowledge of the defendant. In order that the defendant might be held liable, under the first count, for a willful

[54] But see Pennsylvania R. Co. v. Books, 57 Pa. 339, 98 Am. Dec. 229 (1868), that the intemperate habits of an employer are admissible to prove intoxication at the time of an accident.

[55] The statement has been condensed and part of opinion omitted.

violation of the statute in lowering the cage into the mine at a prohibited rate of speed, it devolved upon the plaintiff to establish that the defendant by its engineer, consciously—that is, knowingly—lowered the cage upon which the plaintiff was descending into the mine at the time he was injured at a rate of speed in excess of the rate of 600 feet per minute. Carterville Coal Co. v. Abbott, 181 Ill. 495, 55 N. E. 131; Donk Bros. Coal & Coke Co. v. Peton, 192 Ill. 41, 61 N. E. 330.

While the fact that the cage was descending into the mine at a rate of speed prohibited by the statute at the time plaintiff was injured might afford a presumption that the engineer who controlled the engine that regulated the descent of the cage had knowledge of the rate of speed at which the cage was descending into the mine, if that were the only time in the history of the mine when the cage had been allowed by the engineer to descend into the mine at a rate of speed prohibited by the statute, the presumption that its unlawful rate of descent was known to the engineer, and that such excessive rate of speed was not accidental, would be greatly weakened. If, on the other hand, the engineer had repeatedly, prior to the injury of the plaintiff, violated the statute by lowering the cage into the mine at a rate of speed prohibited by the statute, the presumption that he knowingly, and therefore willfully, violated the statute by lowering the cage into the mine at a prohibited rate of speed at the time plaintiff was injured, would be greatly strengthened. The gist of plaintiff's action under the first count of the declaration was a willful violation of the statute, which involved proof of a conscious violation of the statute, and any fact which would establish knowledge on the part of the engineer that the cage was being lowered into the mine at an unlawful rate of speed was admissible in evidence, even though it involved proof of the conduct of the engineer in handling the cage at times other than at the time plaintiff was injured. * * *

Judgment affirmed.

COMMONWEALTH v. RIVET.

(Supreme Judicial Court of Massachusetts, 1910. 205 Mass. 464, 91 N. E. 877.)

Indictment, found and returned on June 5, 1908, charging the defendant with murdering one Joseph Gailloux at Lowell on February 29, 1908.

In the Superior Court the defendant was tried before Harris and Hitchcock, JJ. The jury returned a verdict of guilty of murder in the first degree, and the defendant alleged exceptions, raising the questions which are stated in the opinion as well as others which were waived or were not argued by the defendant.

On Sunday, March 1, 1908, Gailloux was found dead in a small

office connected with a tinshop of one Daigle in Lowell. At the trial it appeared, among other things, that the deceased had taken out a life insurance policy payable to his heirs or legal representatives; the policy being taken out through the instrumentality of defendant, who paid the expense of taking the policy and also the first and second premiums on it. About a month after it was issued it had been assigned to defendant. At the time of the death both the policy and the assignment were in defendant's possession. The evidence in regard to the murder was entirely circumstantial. Other facts appear in the opinion.

LORING, J.[56] * * * Two exceptions to the exclusion of evidence have been argued together. One of these was to the exclusion of evidence that on one occasion, late in the fall previous to the murder, the deceased had been found in Daigle's shop, late at night, dead drunk. The other exception was to the exclusion of evidence that the deceased was frequently in fights when he was intoxicated, that he was frequently seen with his face all battered up in some contest he had had, and that he had been seen within a year before his death "with a swollen face, black eyes [and] battered face generally."

On inquiry the defendant's counsel disclaimed having evidence that the defendant knew of the character of the deceased. He also disclaimed offering this evidence to show that this killing was done in self-defense. The case therefore does not come within Com. v. Tircinski, 189 Mass. 257, 75 N. E. 261, 2 L. R. A. (N. S.) 102, 4 Ann. Cas. 337.

The defendant's argument in support of this exception is that this was evidence from which the jury could infer that the deceased came to his death by having got into a fight when drunk. The fact that a person's habits or character are such that he would be apt to do an act is not competent evidence that he did the act. Nothing is better settled than that. Com. v. Worcester, 3 Pick. 462; Ellis v. Short, 21 Pick. 142; Tenney v. Tuttle, 1 Allen, 185; Heland v. Lowell, 3 Allen, 407, 81 Am. Dec. 670; McCarty v. Leary, 118 Mass. 509; Menard v. Boston & Maine R. R., 150 Mass. 386, 23 N. E. 214; Geary v. Stevenson, 169 Mass. 23, 47 N. E. 508; Edwards v. Worcester, 172 Mass. 104, 51 N. E. 447; Rex v. Fisher, [1910] 1 K. B. 149.

There is no difference between the usual case where evidence of this character is offered by the prosecution to prove that the defendant did the act he is charged with doing and the case at bar where evidence was offered by the defendant to prove that the deceased did the act in question and thereby to show that he did not do it. Doing an act cannot be proved in either case by evidence that from the habits of the person in question he would be apt to do it. * * *

Exceptions overruled.

[56] Part of opinion omitted.

NOYES v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts, 1912. 213 Mass. 9, 99 N. E. 457.)

Tort under St. 1906, c. 463, part 2, § 247, for damages resulting from the burning on August 12, 1908, of a barn of the plaintiff in West Boylston alleged to have been caused by fire communicated by a locomotive engine of the defendant. Writ dated November 20, 1909.

In the Superior Court the case was tried before Irwin, J. The plaintiff introduced evidence, which in its nature was circumstantial and which was controverted by evidence of the defendant, tending to show that the fire was caused by sparks from a locomotive engine of the defendant.

It appeared that a son of the plaintiff was at home on the day of the fire, and the defendant offered to show that the son was there at the time of the fire; that when he was a young boy he had had a strong inclination to set fires, and had set several; that in the autumn of 1908 several fires occurred within a radius of a mile from the plaintiff's barn and that the plaintiff's son was very near the place where such fires took place at the time when they were discovered; that he was arrested by a constable, and that he admitted to the constable that he set several of these fires; that the district court of Clinton ordered an examination of the plaintiff's son by two physicians, who committed him to a hospital on the ground that he had a mania for setting fires. The defendant did not contend that the alleged admission to the constable in any way referred to the fire mentioned in the declaration.

The evidence was excluded subject to an exception by the defendant.

The jury found for the plaintiff in the sum of $2,436.23, and the defendant alleged exceptions.

BRALEY, J. The plaintiff seeks under St. 1906, pt. 2, § 247, to recover damages for the destruction of a barn with its contents, alleged to have been caused by fire directly communicated by the locomotive engine of the defendant. But if the loss is unquestioned the parties were at issue as to the origin of the fire. The defendant could show, by relevant testimony, that it originated from other independent causes even if the circumstantial evidence introduced by the plaintiff seems to have been clear and abundant, that the ignition of the roof, from which apparently the fire spread through the building, must have been from sparks emitted by the engine. Perley v. Eastern Railroad Co., 98 Mass. 414, 96 Am. Dec. 645.

The defendant contends that, if its offer of proof had been admitted in evidence, the jury would have been warranted in finding the fire had been set by a son of the plaintiff, or at least sufficient doubt would have been raised as to its liability to have overcome the burden of

proof. But in the absence of any direct evidence connecting him with the occurrence, the defendant endeavored to show, from incidents in his early life, that he had acquired a disposition which had ripened into a habit to set incendiary fires whenever the opportunity offered. A habit of this character is abnormal, and it may be criminal. The defendant was required to satisfy the presiding judge that the course of conduct on which it sought to predicate the commission of an affirmative wrongful act of the character claimed had become so continuous and systematic that the setting of the fire in question would follow as a reasonable and probable consequence. Shailer v. Bumstead, 99 Mass. 112; Thayer v. Thayer, 101 Mass. 111, 113, 114, 100 Am. Dec. 110; Com. v. Abbott, 130 Mass. 472, 473; Hathaway v. Tinkham, 148 Mass. 85, 19 N. E. 18; Lane v. Moore, 151 Mass. 87, 90, 23 N. E. 828, 21 Am. St. Rep. 430; Edwards v. Worcester, 172 Mass. 104, 51 N. E. 447; Wigmore on Ev. §§ 92, 376. If as a young boy he exhibited a strong inclination to set fires, and while still a youth did in several instances set them, proof of these instances would not raise a reasonable presumption that he had destroyed his mother's property wantonly, even if at the time he is shown to have been living at home. It would not follow from common experience, that because on some occasions in the past he may have done a particular thing in a particular manner, that upon another and different occasion he would act in the same way. Robinson v. Fitchburg & Worcester Railroad, 7 Gray, 92, 95; Lewis v. Smith, 107 Mass. 334; Peverly v. Boston, 136 Mass. 366, 49 Am. Rep. 37. It is because of this variability and uncertainty in the manifestations of individual conduct, even where the circumstances may be more or less uniform, that while an employé's general reputation for incompetency in the performance of work for which he has been engaged is admissible, if the employer knew or by the exercise of reasonable diligence should have known of it, single instances of carelessness are inadmissible. Cooney v. Commonwealth Avenue Street Railway, 196 Mass. 11, 14, 81 N. E. 905, and cases cited. The defendant, moreover, if it had been permitted to litigate the likelihood of his conduct by going at large into proof of alleged instances of previous fires, would have presented collateral issues which would have seriously embarrassed and prejudiced the plaintiff, and tended to confuse and mislead the jury. Emerson v. Lowell Gaslight Co., 3 Allen, 410, 417; Darling v. Stanwood, 14 Allen, 504, 508; Hill Mfg. Co. v. Providence & New York Steamship Co., 125 Mass. 292, 303; Com. v. Jackson, 132 Mass. 16, 20; Com. v. Ryan, 134 Mass. 223, 224; Reeve v. Dennett, 145 Mass. 23, 28, 11 N. E. 938; Lane v. Moore, 151 Mass. 87, 90, 23 N. E. 828, 21 Am. St. Rep. 430; Com. v. Hudson, 185 Mass. 402, 70 N. E. 436. The subsequent incendiary fires for which the son may have been responsible, as well as his admission of having set some of them, were occurrences having no connection with the plaintiff's cause of action. Com. v. Campbell, 7 Allen, 541, 83 Am. Dec. 705.

And the further offer that "the district court * * * ordered an examination by two physicians who committed him to the hospital on the ground that he had a mania for setting fires" must be construed as an offer of the record of judicial proceedings to which she was not a party or privy. McDowell v. Connecticut Fire Ins. Co., 164 Mass. 394, 41 N. E. 669. We are therefore of opinion that the judge in his discretion properly excluded the offer of proof.

Exceptions overruled.

MOFFITT v. CONNECTICUT CO.

(Supreme Court of Errors of Connecticut, 1913. 86 Conn. 527, 86 Atl. 16.)

WHEELER, J.[57] The plaintiff claimed he signaled the motorman of defendant's northbound trolley car to stop the car; that the motorman was then looking in his direction, and thereupon the car stopped about opposite the north corner of Main and East Main streets in New Britain; and, as he was attempting to board the car, it was started suddenly without giving him a reasonable opportunity to board it, causing him to be thrown upon the rear platform and to be injured. The defendant claimed the plaintiff never signaled said car; that it never stopped at the north corner; and that the accident never happened.

Upon cross-examination of plaintiff's witnesses, the defendant attempted to show that the point where the plaintiff's witnesses testified the car stopped, viz., on said north corner, was not the regular stopping place for cars, but that the regular stopping place was on the south corner of said streets, at which point there were two white poles indicating the stopping point. The plaintiff objected to this evidence and assigns its admission as a principal ground of error.

As here pressed, the objection is that proof of the place of stopping at other times is not admissible as tending to disprove the plaintiff's witnesses that the car did in fact stop at the north corner at the time in question; that negligence of a motorman existing at one time cannot be disproved by proof of careful conduct at other times.

It is true that one's negligence on a particular occasion cannot be proved by showing his negligence on other occasions; nor can his freedom from negligence on one occasion be shown by proof of his due care on other occasions. Our reports furnish numerous illustrations of the application of this principle. Morris, Adm'r, v. East Haven, 41 Conn. 252, 254; State v. Goetz, 83 Conn. 437, 440, 76 Atl. 1000, 30 L. R. A. (N. S.) 458; Budd, Adm'r, v. Meriden El. R. Co., 69 Conn. 272, 286, 37 Atl. 683; Tiesler v. Norwich, 73 Conn. 199, 201, 47 Atl. 161; Gilmore v. Am. T. & S. Co., 79 Conn. 499, 504, 66 Atl.

[57] Part of opinion omitted.

4. These are instances where an act of negligence or the reverse was sought to be inferred from other acts of negligence or nonnegligence. The case at bar differs from these cases, and does not fall within the principle invoked.

This is an attempt to corroborate the testimony of the operators of the car that it did not stop at the time and place the plaintiff claimed it did by showing that this place, under the rules of the defendant, was not its regular stopping place, but that that was on the opposite side of the street. The specific question is whether the rules of the defendant railway as to where its cars must stop are admissible in support of the testimony of the operators of the car that the car did not stop at the point claimed, but at the point named by the rules.

In the ordinary affairs of life in a conflict over a matter of fact between two persons, men would regard the fact that one of the persons was in duty bound to act under a certain rule which was equally obligatory upon a number of men and important in the prosecution of a quasi public business, as some evidence in support of his contention that he in fact acted under the rule. It would be thought to make more probable his claim. An evidential fact which men generally would act upon in the affairs of their life will logically aid in determining a legal issue, and ought to be held legally relevant and of probative value. And this is the test of legal admissibility. Locke v. Kraut, 85 Conn. 489, 83 Atl. 626.

If this offer be held in reality to be an attempt to prove the practice of the defendant in stopping its cars in accordance with its rule, it would still be admissible. We should then have a systematic and invariable regularity of conduct upon the part of a large body of operatives; and such a course of conduct would tend to prove the custom of the defendant to stop its cars at the particular point designated by the rules. A systematic course of conduct on the part of a body of men operating a railway, acting for a common purpose resulting in a custom in not stopping at a given point, may likewise be shown, since a negative custom may be equally effective in supporting a fact as an affirmative one. Wigmore on Ev. §§ 92, 376, 379. This principle applies to acts negligently done or omitted, not to those willfully done. State v. Railroad, 52 N. H. 549.

The authorities are not uniform; but we think the strong tendency is toward the conclusion we have reached, admitting evidence of a like character, tending to establish a systematic course of conduct ripening into a fixed habit or a definite custom.

The liberalization of courts in more recent times in the application of the rules of evidence has been due in no small measure to the more uniform enforcement of that first of all rules of evidence that "any fact may be proved which logically tends to aid the trier in the determination of the issue," and to the better appreciation of the practical justice of making the logical proof of the courtroom conform

to the logical proof of the everyday world. A reference to a few of the more modern cases [58] will indicate the tendency. * * *

"When there is a question whether a particular act was done, the existence of any course of office or business, according to which it naturally would have been done, is a relevant fact." Hall v. Brown, 58 N. H. 93; Jackson v. Grand Ave. Ry. Co., 118 Mo. 199, 24 S. W. 192; McGee v. Mo. Pac. Ry., 92 Mo. 220, 4 S. W. 739, 1 Am. St. Rep. 706.

Cases in our own reports which seem to conflict with the rule here announced may, we believe, be distinguished, except in one instance (Laufer v. Traction Co.) they were not instances of fixed habit or custom. The testimony of Mr. Victory, excluded in Laufer v. Bridgeport Tr. Co., 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533, should, under our present application of this rule, have been admitted.

For the purpose of rebutting the testimony of the defendant that cars did not stop at the point claimed by him, the plaintiff offered to prove that a car of the defendant had stopped at this point a year after the accident. This was remote and unconnected with an offer to prove other instances of stopping at times nearer to the time of the accident, or of an offer to prove a practice. The conclusion of the offer was within the discretion of the court. * * *

No error.

STEWART v. SMITH.

(Supreme Court of Wisconsin, 1896. 92 Wis. 76, 65 N. W. 736.)

The action is for the seduction of the plaintiff's unmarried daughter, Lizzie. The claim of the plaintiff is that his daughter, who was 24 years of age, was his housekeeper, and had general charge and management of his household affairs, and performed most of the work of caring for the household; that she was of chaste character; that some time about the month of June, 1893, the defendant seduced the said Lizzie, and had sexual intercourse with her at many different times between the date of the seduction and the subsequent month of December, whereby she became pregnant by the defendant, and gave birth to a child on May 5, 1894, by reason of which seduction and pregnancy the plaintiff has been greatly damaged. The answer was a general denial, and an allegation that before the alleged seduction the said Lizzie was a woman of unchaste character and reputation. There was verdict and judgment for the plaintiff, from which the defendant appeals. Reversed.

[58] In the omitted passage the court reviewed Maisels v. Dry Dock, E. B. & B. St. R. Co., 16 App. Div. 391, 45 N. Y. Supp. 4 (1897); Alexandria & F. R. Co. v. Herndon, 87 Va. 193, 12 S. E. 289 (1890); Hall v. Brown, 58 N. H. 93 (1877).

NEWMAN, J.[59] (after stating the facts). The errors alleged are, for the most part, in the admission and rejection of evidence, and to the charge of the court. It will be necessary to consider some of the more important. They relate, in the main, to the rejection of evidence tending to show a want of chastity in the woman, Lizzie Stewart, at the time of her alleged seduction. This class of evidence is proper to be received for the purpose of mitigating the damages; for, surely, if she was unchaste previously to defendant's intercourse with her, the plaintiff would be less damaged than if a previously chaste daughter had been debauched. Besides, it tends to make doubtful that the defendant is responsible for the pregnancy and the loss of service consequent upon it. Want of previous chastity may be proved by general reputation and specific acts of unchastity, not only, but by evidence which tends to show impure conversation, and improper and familiar association with men. West v. Druff, 55 Iowa, 335, 7 N. W. 636. The court in that case very cogently remarks, "Conversations, acts, and associations are manifestations of character, and constitute the true index of the heart." Even acts of an equivocal character may be competent to be received on this question; for it is the province of the jury to determine what such acts indicate, and to give to them their proper value, in the light of all the circumstances. This principle seems to have been recognized by the trial court, but he seems to have applied it with exceeding illiberality towards the defendant. The following are some examples:

The defendant asked the witness James Hayes, who was a hack driver, this question: "I will ask you, Mr. Hayes, if at any time prior to June, 1893, you drove Lizzie in your hack, in company with a certain gentleman, whose name you need not mention, with the curtains of the hack closed, and drove around the city, going to no particular place?" This question was objected to as "incompetent, irrelevant, and immaterial." The court asked, "How is this material?" Defendant's counsel, "As evidence tending to show a lack of chastity." The objection was sustained. The proposed testimony certainly tended to show that the young woman had placed herself in a compromising situation, and an improper association with a man, indicating, at least, levity of character. It was a situation unusual to modest women, and subject to animadversion. It was evidence proper to be considered by the jury on the question of her previous chastity, in the light of all the evidence on that question. * * *

A witness, W. H. Nichols, who testified that in the summer of 1893, and previous to August of that year, he saw the woman, Lizzie, accompanied by a young woman of the town, several times, in the evening and nighttime, going to certain rooms, over the store of his employer, which were kept by young men who "didn't live there, and didn't have any place of business there," and "were not club rooms."

[59] Part of opinion omitted.

To a question whether he knew the reputation of the young woman who accompanied her on these occasions, an objection was interposed, when the court remarked: "I am expecting you to bring this within the rule I have announced,—the rule which would be in vogue in bastardy cases, as to access. It has no bearing upon chastity." To this remark exception was taken. The witness then answered that he had heard people say that she was "a regular loose character,—what is commonly known as a 'chippie.'" It is not obvious why this evidence had "no bearing upon chastity." It related acts of a compromising character, with other men, at about the time of her alleged seduction by the defendant. Lizzie is sure that the seduction took place in the month of June. That is, of course, only her estimation of date, for no close date for it is fixed. It was not an event of which the date was noted, for certainty of remembrance; and there is a margin to be allowed for errors in the comparison of events, in order to fix the date even approximately. And, if the acts narrated by the witness really occurred at about the uncertain date of an actual seduction, it would be a fair question for the consideration of the jury whether they transpired before it, and were not fair indicia of real character at its actual date. * * *

It is evident, from the whole case, that the defendant did not have a fair trial. The judgment of the circuit court is reversed, and the cause remanded for a new trial.[60]

CONSOLIDATED COAL CO. OF ST. LOUIS v. SENIGER.

(Supreme Court of Illinois, 1899. 179 Ill. 370, 53 N. E. 733.)

CARTWRIGHT, J.[61] * * * The suit is for damages on account of injuries received by plaintiff while employed in defendant's coal mine, at Staunton, Ill. On the morning of May 14, 1897, the plaintiff, with seven others, got into the cage at the top of the shaft, which is 305 feet deep, to be lowered into the mine. After the cage had descended halfway, as it passed the other cage, which was ascending, it began to run down very rapidly; and, after being checked for an instant, it continued downward at great speed to the bottom of the shaft, injuring the plaintiff. The first count of the declaration charged that the injury was occasioned by defendant's failure to provide a sufficient brake on the drum to hold the cage in case the machinery gave out. The second charged that it was negligent in the employment of an incompetent,

[60] Compare Verdi v. Donahue, 91 Conn. 448, 99 Atl. 1041 (1917), that in an action for malicious prosecution evidence of plaintiff's general reputation as a peaceable, orderly citizen could not be rebutted by proof of specific acts. See, also, Scott v. Sampson, L. R. 8 Q. B. D. 491 (1882), where the plaintiff's character was important on the question of damages.

[61] Part of opinion omitted.

inexperienced, and intemperate engineer, who was placed in charge of the engine. * * *

Various witnesses were asked by plaintiff's counsel as to what the manner of the engineer was in handling the cage, or letting men down or bringing them up from the mine; and answers were given, against objection of defendant, showing that he frequently ran the machinery so fast that it was impossible to properly control the cage by a brake; that sometimes he would let the cage almost drop, and sometimes seem to catch it before it reached the bottom, and then let it go bumping to the bottom; that sometimes he would run it up swiftly above the landing; that sometimes the men could hardly stand on the cage, and stood on tiptoe to lessen the shock and internal jar; that the cage would strike the bottom of the shaft very hard, so that the bread would jump out of their pails; and that sometimes, in landing the cage at the bottom, the men would be thrown off or knocked off. It is objected that the court erred in permitting this testimony to go to the jury. If we understand counsel, the claim is—First, that the incompetency of the engineer could only be shown by a general bad reputation for incompetency; and, secondly, that the fact of incompetency could not be proved by his conduct, because it contradicted his certificate of competency given him by the state board of mine examiners.

We do not think the evidence incompetent on either ground. It is true that a competent engineer may be negligent on a particular occasion, and not be above the ordinary frailties of human nature, and that incompetency is not shown by some particular act of negligence; and yet one who knows how to run and handle an engine properly, and who has the physical strength to do so, cannot be said to be competent for the position of engineer, if he is habitually imprudent, careless, and reckless. One is incompetent who is wanting in the requisite qualifications for the business intrusted to him. Rasor was incompetent for the business of engineer, if he was wanting in the qualifications required for the performance of the service, whether arising out of a lack of knowledge or capacity, or through imprudence, indolence, or habitual carelessness; and evidence which tended to bring before the jury his particular qualities in that respect, and to show his fitness or unfitness for the position of engineer, was competent. The occurrences were sufficiently frequent to answer such a requirement, and they were connected with other evidence tending to show that defendant had knowledge of his actions, and the manner in which he handled the cage and the men. Stone Co. v. Whalen, 151 Ill. 472, 38 N. E. 241, 42 Am. St. Rep. 244. * * *

Judgment affirmed.[62]

[62] But see Frazier v. Pennsylvania R. Co., 38 Pa. 104 (1860), ante, p. 656, and cases there cited; Park v. New York Cent. & H. R. R. Co., 155 N. Y. 215, 49 N. E. 674, 63 Am. St. Rep. 663 (1898), ante, p. 658.

ZUCKER v. WHITRIDGE, RECEIVER.

(Court of Appeals of New York, 1912. 205 N. Y. 50, 98 N. E. 209, 41 L. R. A. [N. S.] 683, Ann. Cas. 1913D, 1250.)

VANN, J.[88] Third avenue in the city of New York, running nearly north and south, crosses Eighteenth street almost at right angles. The defendant has two railroad tracks laid on the surface of the avenue at the point where it crosses the street; the easterly track being used for cars going north, and the westerly for those going south. On the 18th of December, 1908, at about half past 8 in the evening, the plaintiff's intestate, while walking easterly on the northerly crosswalk of Eighteenth street, as he was about to step over the westerly rail of the north-bound track, was struck by a north-bound trolley car and fatally injured. In this action, brought by his administratrix under the statute, the jury found a general verdict in her favor, and the Appellate Division affirmed the judgment entered thereon; two of the justices dissenting.

As the negligence of the defendant is not now denied, the primary question is whether the decedent was negligent as matter of law. This question depends on the testimony given in behalf of the plaintiff; for no witness was called by the defendant. * * *

One other question requires attention on account of its importance and novelty. A witness who had known the decedent for eight years, and during that period had walked with him through the streets of the city of New York, and had crossed railroad tracks with him, was asked by the plaintiff: "State what you observed as to his manner of crossing railroad tracks while in your company." Objection was made to the question as incompetent and immaterial; but it was overruled and an exception noted. The witness then answered: "When we were about to cross railroad tracks, he usually looked to the right and to the left of him, and put a restraining hand on my arm before crossing, to make sure that there were no vehicles of any kind coming." The defendant's counsel moved to strike out the answer as incompetent and not relevant to the issues in the case; but the motion was denied and an exception taken. * * *

In some states such evidence is regarded as competent. In New Hampshire it was held that the fact that a person, killed at a grade crossing, customarily stopped, looked, and listened for trains at that point is competent to prove similar conduct at the time of the injury, in the absence of testimony by any eyewitness as to his behavior on that occasion. Tucker v. Boston & Maine R. R. Co., 73 N. H. 132, 59 Atl. 943. No argument was made, but the bare conclusion announced; earlier cases being cited which involved the custom of those

[88] Part of opinion omitted.

running trains and of those injured at railroad crossings with reference to general care or carelessness. State v. Railroad, 52 N. H. 528, 549; Smith v. Boston & Maine R. R. Co., 70 N. H. 53, 82, 47 Atl. 290, 85 Am. St. Rep. 596. The argument used in the earlier case was that "it would seem to be axiomatic that a man is more likely to do or not to do a thing, or to do or not to do it in a particular way, as he is in the habit of doing or not doing it. But this must be understood of acts which are done or omitted to be done without any particular intent or purpose to injure one." * * *

In Illinois evidence that the deceased was "habitually cautious and temperate" was held to be competent, where there was no eyewitness of the accident, but otherwise not. Chicago, R. I. & P. R. R. Co. v. Clark, 108 Ill. 113, 117.

On the other hand, similar evidence has been held incompetent in several different states, as follows: In Wisconsin, to show that the person injured "was an habitually careless man" (Propsom v. Leatham, 80 Wis. 608, 612, 50 N. W. 586, 587); in Pennsylvania, that the deceased "had made a practice of jumping from the elevator while in motion" (Baker v. Irish, 172 Pa. 528, 531, 33 Atl. 558); in Connecticut, that the intestate "was a careful and prudent driver" (Morris v. Easthaven, 41 Conn. 252); in Illinois, "that the deceased was in the habit of jumping on trains" (Peoria & Pekin Co. v. Clayberg, 107 Ill. 644, 648); in Iowa, in a case where there was some evidence that the deceased was asleep in his buggy when he drove on the track, "that he had been found asleep in his buggy on other occasions" (Dalton v. Chicago, R. I. & P. R. R. Co., 114 Iowa, 257, 259, 86 N. W. 272, 273); in Maine, "that, in the opinion of those who knew the deceased well, he was a cautious and careful man," no witness having seen the accident (Chase v. Maine Cent. R. R. Co., 77 Me. 62, 65, 52 Am. Rep. 744); in Massachusetts, specific instances of want of care in the engineer in his business of running trains within three months of the injury, before or after (Robinson v. Fitchburg & Worcester R. R. Co., 7 Gray, 92, 95); also "previous specific acts of negligence on the part of defendant's engineer known to its superintendent." Connors v. Morton, 160 Mass. 333, 335, 35 N. E. 860.

Professor Wigmore seems to appreciate "the probative value of a person's habit or custom as showing the doing on a specific occasion of the act which is the subject of the habit or custom;" but he points out difficulties which arise in connection with such evidence. Section 92. Thus he says: "Can there be a habit of not doing?" Section 97. "Is it possible to believe that careless action can ever be anything more than casual or occasional? If it is, are we not really predicating a careless disposition, rather than a genuine habit, and then are we not violating the rule against character in a civil action in employing such evidence? These doubts serve to explain the precedents that exclude such evidence; but it would seem that the doubts are not always well founded, and that such evidence is often of pro-

bative value, and is not attended by the inconveniences of character evidence." 1 Wigmore on Evidence, § 97. * * *

The weight of authority seems to be against admitting evidence of general conduct under proven circumstances to show conduct of the same kind under similar circumstances on a particular occasion, when there were eyewitnesses of the occurrence, including the person injured, if he survived the accident. We are not now called upon to decide whether evidence of the habits of a decedent in crossing railroads is competent when there is no eyewitness of the event. In this case, there were four witnesses who saw what happened, and described the conduct of the deceased as he walked to his death. A question of evidence, to some extent, is a question of sound policy in the administration of the law. Sometimes it is necessary to weigh the probative force of evidence offered, compare it with the practical inconvenience of enforcing a rule to admit it, and decide whether, as matter of good policy, it should be admitted. Uniform conduct under the same circumstances on many prior occasions may be relevant as tending somewhat to show like conduct under like circumstances on the occasion in question. All relevant evidence, however, is not competent. Hearsay, although relevant, is held incompetent from public policy, because there is safer and better evidence to establish the fact. Parol evidence to vary a written agreement is relevant, but incompetent, because sound policy requires that the writing should be presumed to express the final agreement of the parties.

So, assuming the evidence in question to be relevant, I think it should be held incompetent under the circumstances, because its probative force does not outweigh the inconvenience of a multitude of collateral issues, not suggested by the pleadings, the trial of which would take much time, tend to create confusion and do little good. As was said by Chief Justice Peters, in Chase v. Maine Central R. R. Co., supra: "In many litigations, under such a test, there would arise a wager of character which would as unfairly settle the dispute as did formerly the wager of battle." The rule of the average life is care, or else it would not long continue, yet the average man is conscious that he is not always careful; and hence habit on general occasions is uncertain evidence of care on a particular occasion. It is not enough of itself to establish the fact sought to be proved, and at the most simply bears upon the probability. Habit is an inference from many acts, each of which presents an issue to be tried, and necessarily involves direct, and naturally invites, cross examination. The circumstances surrounding each act present another issue, and thus many collateral issues would be involved which would not only consume much time, but would tend to distract the jury and lead them away from the main issue to be decided. From the want of previous notice, the other party would not be prepared to meet such evidence; and after all the testimony of this character was in the fact would remain that, as no one is always careful, the subject of

inquiry, although careful on many occasions, might have been careless on the occasion in question.

We are of the opinion that the evidence objected to should be held incompetent, and that, under the circumstances, the error in admitting it should not be disregarded as harmless; for it may have led to the verdict.

The judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, HISCOCK, CHASE, and COLLIN, JJ., concur. WILLARD BARTLETT, J., concurs on second ground discussed in the opinion.

Judgment reversed, etc.

SECTION 3.—MISCELLANEOUS FACTS

PIGGOT v. EASTERN COUNTIES RY. CO.

(Court of Common Pleas, 1846. 3 C. B. 229.)

The cause was tried before Alderson, B., at the last assizes for the county of Essex, when the following facts appeared in evidence: The plaintiff was the occupier of a farm called Porter's farm, abutting upon the Eastern Counties Railway in the parish of Boreham, about midway between Witham and Chelmsford. On the 27th of August last, between the hours of twelve and one, at noon, the thatch of a cart-lodge or shed in the plaintiff's farm-yard, distant about forty-five feet from the nearest line of rails, was immediately after the passing of the mail-train from London to Colchester, observed to be on fire; and, notwithstanding every exertion, on the part of the plaintiff and those in his employ, to extinguish it, the fire communicated with several other farm-buildings and farming implements, and totally destroyed them. At the time of the accident there was a strong wind blowing from the direction of the railway towards the plaintiff's premises; and the train was proceeding at an ordinary speed, viz. twenty-five miles an hour.

In order to show that the fire was probably caused by sparks or particles of ignited coke emitted from the funnel or chimney, or from the fire box of the engine by which the train was being propelled, the plaintiff's counsel proposed to ask a witness whether he had not on other occasions observed sparks or ignited matter to proceed from engines of the defendants passing along the line adjoining the plaintiff's farm.

It was objected, on the part of the defendants, that this was not a proper question, inasmuch as it was not competent to the plaintiff in this case to prove the emission of sparks or ignited matter from other

engines, passing the spots on other occasions, without showing them to have been under the care of the same driver, driven at the same speed, with the same number of carriages and passengers, and of the same construction as the engine in use at the time of the accident. * * *

The learned baron being of opinion that the question might properly be put, the witness stated, that he had frequently seen pieces of ignited coke fall from the lower part of the engine, (the fire-box,) but not from the chimney, the day-light rendering it difficult, if not impossible, to see sparks issuing thence. Other witnesses also proved that they had frequently seen sparks and small particles of coke, about the size of a hazle-nut or a walnut, proceed from the chimneys of the company's engines when passing along the line at dark, and fall in an ignited state on the plaintiff's premises, near the buildings in question; and that it sometimes happened that pieces of ignited coke falling from the fire-box on to the driving wheels of the engine, were thrown by them to a considerable distance. * * *

The jury returned a verdict for the plaintiff. The amount of damages was referred.

Shee, Serjt., having, in Easter term last, obtained a rule nisi for a new trial, on the grounds that the answer to the question objected to at the trial was improperly received, and that the verdict was against the weight of evidence—the learned judge reported to the court, that he held the evidence admissible for the purpose of ascertaining whether or not sparks or ignited particles of coke could be thrown to so great a distance from the line as the spot in question.

TINDAL, C. J.[64] * * * With respect to the evidence that was objected to, I think it clearly was admissible for the purpose for which it was received, viz. to ascertain the possibility of fire being projected from the engine to such a distance from the railway as the building in question. Whether or not it was admissible for any other purpose, it is unnecessary to inquire.

COLTMAN, J. I am of the same opinion. It appears, from the report of the learned judge, that the evidence in question was admitted, not for the purpose of showing a general habit of negligence on the part of the company, but to show that the injury might have been caused in the way suggested. It appears to me that the jury might reasonably infer that the fire was occasioned by sparks from the engine, and that the fact of the buildings being fired by sparks emitted from the defendants' engine, established a prima facie case of negligence, which called upon them to show that they had adopted some precautions to guard against such accidents. None, however, appeared to have been attempted.

MAULE, J. I also am of opinion that this rule should be discharged. It was obtained on two grounds—first, that certain evidence was im-

[64] Statement condensed and part of opinion, Tindal, C. J., omitted.

properly received at the trial—secondly, that the evidence did not warrant the verdict. The evidence objected to was, that other engines used on the defendants' line, of the same description as that which was said to have caused the injury here, had on various other occasions been seen to throw particles of ignited matter to a distance from the lines as great or greater than the spot in question. The matter in issue was, whether or not the plaintiff's property had been destroyed by fire proceeding from the defendants' engine: and involved in that issue was the question whether or not the fire could have been so caused. The evidence was offered for the purpose of showing that it could: and for that purpose it was clearly material, and admissible. As to the other point, it appears that the plaintiff was possessed of certain farm-buildings adjoining the railway, and that, in consequence of the sort of management adopted by the company, fire was thrown from a passing engine upon those buildings, and destroyed them. I am far from saying that it is impossible that this could have occurred without negligence on the part of the company. But it at least affords a strong presumption of negligence, in the absence of evidence to show that something had been done by the company to lessen the chances of danger. It appeared that no steps of that sort had been taken, and that the company might have in a great measure prevented the emission of ignited matter, by using guards of wire, or perforated plates, as suggested by Professor Farey, or by employing engines of larger power. Upon the whole, I think the verdict would have been wrong had it been the other way.

Rule discharged.

SHELDON v. HUDSON RIVER R. CO.

(Court of Appeals of New York, 1856. 14 N. Y. 218, 67 Am. Dec. 155.)

DENIO, C. J.[65] The plaintiff owned and possessed a building, used as a storehouse, in Greenburgh, Westchester county, standing on the easterly side of the defendants' railroad, and about sixty-seven and one-half feet from the track. It was in the charge of two of the plaintiff's servants. The outer doors were kept locked, and no fire was used in it. On the 7th February, 1852, it took fire and was consumed. It was proved that, about twenty-five minutes before the fire was discovered, a train of cars of the defendants, drawn by a locomotive engine called the "Oneida," passed the place. On the first floor of the building there was a parcel of shavings and a quantity of lumber, and some of the glass in the windows of that story had been broken. As I understand the testimony, the place where the fire was first seen was on this floor, and not far from one of the windows. Having proved these facts, and that the day on which the fire took place was

[65] Part of opinion of Hubbard, J., omitted.

windy, the direction of the wind being toward the building, and the persons in charge having sworn that no person, to their knowledge, had been in it during that day, the plaintiff proposed to prove, by a witness who lived close to the railroad and about one-fourth of a mile from the building, that shortly before it was burned he had seen sparks and fire thrown, from the engines used by the defendants in running their trains, through the witness' premises, a greater distance than this building stood from the track of the railroad, and that he had picked up from the track after the passage of the trains lighted coals more than two inches in length. The evidence was objected to by the defendants' counsel and excluded by the court. The plaintiff's counsel excepted. The plaintiff also gave evidence which, as his counsel insists, tended to show that the engines used by the defendants lacked some apparatus which was in use upon some other locomotive engines, and which rendered the latter less liable to communicate fire to substances at the side of the road than those which were without that apparatus. The judge, in the first instance, denied a motion made by the defendants for a nonsuit; but after the defendants had proceeded at some length in the examination of witnesses in their behalf, he stopped the further examination of a witness and nonsuited the plaintiff.

It is argued by the defendant's counsel that the evidence offered and rejected was too remote and indefinite to have a just influence upon the particular question in issue in the case; that it did not refer to any particular engine, and that it may be that the one which ran past the plaintiff's premises, just before the discovery of the fire, was quite a different one from those which scattered fire on the occasion to which the evidence offered would apply. This argument is not without force; but at the same time I think it is met by the peculiar circumstances of this case. These engines run night and day, and with such speed that no particular note can be taken of them as they pass. Moreover, there is such a general resemblance among them, that a stranger to the business cannot readily distinguish one from another. It will, therefore, generally happen that when the property of a person is set on fire by an engine, the owner, though he may be perfectly satisfied that it was caused by an engine, and may be able to show facts sufficient legitimately to establish it, yet he may be utterly ignorant what particular engine, or even what particular train did the mischief. It would be, practically, quite impossible by any inquiries to find out the offending engine, for a large proportion of those owned by the company are constantly in rapid motion. The business of running the trains on a railroad supposes a unity of management and a general similarity in the fashion of the engines and the character of the operation.

I think, therefore, it is competent prima facie evidence, for a person seeking to establish the responsibility of the company for a burning upon the track of the road, after refuting every other probable cause

of the fire, to show that, about the time when it happened, the trains which the company was running past the location of the fire were so managed in respect to the furnaces as to be likely to set on fire objects not more remote, than the property burned. It is presumed to be in the power of the company, which has intimate relations with all its engineers and conductors, to controvert the fact sworn to if it is untrue, or, if true in a particular instance, that it was not so in respect to the engines which passed the place, at a proper time, before the occurrence of the fire. The effect of the evidence would only be to shift the onus probandi upon the company, and that, under the circumstances of this case, seems to me to be unavoidable. The rule respecting the onus often depends upon the special circumstances of the case, and it not unfrequently happens that a party is obliged to establish a negative proposition. Cow. & Hill's Notes, 490, and cases. For instance, if it were proved to be universally true that the engines on the defendants' road scattered fire upon both sides, so as to endanger property as near the track as this building was, and it was established, as was done in this case, that the property claimed to have been set on fire by the negligence of the defendants was actually burned without any known cause or circumstance of suspicion besides the engines, it would clearly be incumbent on the defendants to show that they were not the cause. The present case is only less strong in degree. It was offered to be shown that a practice on the part of the company, which would have endangered this building, was indulged in about the time and near the place where the building was burned. That fact rendered it probable to a certain degree that the injury was attributable to that cause, but it left it in the power of the defendants not only to controvert the evidence generally, but to show that the special facts applicable directly to the occurrence of the fire were such as to overcome the general inference from the plaintiff's evidence, and avoid the presumption which that evidence created. I am of opinion, therefore, that the judge erred in this ruling.

The evidence excluded had a bearing upon both branches of the case which the plaintiff undertook to establish. It not only rendered it probable that the fire was communicated from the furnace of one of the defendants' engines, but it raised an inference of some weight, that there was something unsuitable and improper in the construction or management of the engine which caused the fire.

It is unnecessary to express an opinion upon the case as it stood, without the evidence of which the plaintiff was deprived. It may be that, when the case is tried upon the principle indicated, it will present no question or a very different one from that which is now before us.

The judgment must be reversed, and there must be a new trial.

HUBBARD, J. * * * The theory on the trial was that the sparks or cinders causing the fire originated from the smoke-pipe or ash-pan of the engine "Oneida," attached to a train of passenger cars which passed about twenty-five minutes before the fire was discovered. No

other engine passing about that time, it may be assumed, for the present purpose, that if the defendants are responsible at all, the liability is chargeable to the "Oneida" as the offending engine. It was not proposed to show, on the trial, that sparks and cinders, capable of ignition, had been seen, on other occasions, to issue from the "Oneida." Such evidence would have been clearly admissible, I think, from the necessity of the case. It generally or frequently happens, as may have been the fact in this case, that engine sparks cause fire, without the sufferer being able to prove the fact by positive testimony. Circumstantial evidence must, of necessity, be resorted to or injustice must be suffered, without redress, in very many instances.

The proof offered and rejected related to the emission of igneous matter by the defendants' engines generally, without designating any one in particular. This evidence, I think, was competent, and should have been received upon the proposition whether the defendants caused the fire. It was a primary fact to trace the fire to the defendants, as a ground of liability. There is no pretense in this case that the construction of the "Oneida," as it respects the emission of sparks or cinders, differed from that of every other engine used by the defendants on their road. It must follow, therefore, that under the same circumstances, the same amount of sparks and coals of fire would issue from every other engine as from the "Oneida." The proof offered was, therefore, practically the same as though it had been proposed to show that the "Oneida" frequently or generally made emissions when running at the usual speed.

The competency of this evidence has been directly decided in the English Court of Common Pleas. Piggot v. The Eastern Counties Railway Co., 10 Jurist, 571; Aldridge v. Great Western Railway Co., 3 Man. & Gr. 515. These cases, upon this point, are well decided. The principle is essential in the administration of justice, inasmuch as circumstantial proof must, in the nature of things, be resorted to, and inasmuch as the jury cannot take judicial cognizance of the fact that locomotive engines do emit sparks and cinders which may be borne a given distance by the wind. The evidence was competent to establish certain facts which were necessary to be established in order to show a possible cause of the accident, and to prevent vague and unsatisfactory surmises on the part of the jury. * * *

Judgment reversed.

COLLINS v. NEW YORK CENT. & H. R. R. Co.

(Court of Appeals of New York, 1888. 109 N. Y. 243, 16 N. E. 50.)

PECKHAM, J.[66] The plaintiff sought to recover from the defendant damages which he sustained from the loss of certain property by fire which he alleged was caused by the negligence of defendants in permit-

[66] Part of opinion omitted.

ting sparks from one of their engines to escape, the result of which was the fire in question. Plaintiff is a farmer residing near La Salle, county of Niagara, and his property lies contiguous to defendant's road-bed. The Erie Railway runs parallel with the defendant's near the plaintiff's premises, and for some distance east and west of them. It is alleged that this fire was set by defendant's engine No. 113. It appeared in evidence that there was an Erie train which passed plaintiff's premises a short time prior to defendant's engine No. 113, and the claim was made on the part of defendant that the fire in question was set by sparks from the Erie engine. It was claimed on the part of the plaintiff that the spark-arrester on defendant's engine was out of order, and had been negligently allowed to remain out of order for some time, in consequence of which larger sparks than could have otherwise escaped were emitted from it, and that such sparks remained alive longer than smaller ones, and that they were the cause of the damage in question. * * *

Evidence was given on the part of the plaintiff, under objection by defendant, of the emission of sparks from this same engine, No. 113, of a very large size, several months after the happening of the fire in question. At the time of its admission there was no proof in relation to the manner of the construction of that engine. The subsequent proof showed pretty clearly that the plan of its construction was such that if it were in good order no such sized sparks could be emitted from it. If sparks the size described were emitted from this engine several months after the fire in question, it would seem quite clear that they came through the spark-arrester by reason of its being out of repair. In order to permit evidence such as this, of what happened six months after the fire, it would be necessary to show, either that through the fault of its construction sparks of that size could be emitted, or else that the engine was in the same condition of repair that it was when the fire in question occurred.

As we have said, the evidence is pretty clear that the plan of construction would not permit sparks of that size to escape, and therefore, the more important it would be to show—if such evidence is to be admitted—that the engine was in the same condition that length of time after the happening of the fire that it was in when the fire occurred. It will rest with the trial court upon the new trial to satisfy itself upon this state of things before permitting evidence of that nature to be given. * * *

Judgment reversed.

FIRST NAT. BANK OF HOOPESTON v. LAKE ERIE & W. R. CO.

(Supreme Court of Illinois, 1898. 174 Ill. 36, 50 N. E. 1023.)

MAGRUDER, J.[67] There is only one question in this case which counsel for appellant press upon our attention, and that question is whether or not the court below erred in refusing to allow appellant to show in rebuttal that other fires had been set by appellee's engines at other times in the immediate vicinity of the elevator both before and after it was destroyed. The engine or locomotive which was alleged to have caused the fire was identified as the engine which drew the freight train passing the elevator near the noon hour of August 31, 1892. It is conceded by counsel for appellant that the testimony was confined to one certain engine of the appellee. In cases of this kind it often happens that the proof does not identify the particular engine which caused the loss, but is confined to negligence in the operation and construction of the engines generally which run on the road. The rule seems to be settled by the weight of authority that when a fire has been caused by sparks from a particular locomotive, which is identified, or by one or the other of two locomotives, "evidence of other fires, kindled by different locomotives, before and after the fire complained of, is not admissible." 8 Am. & Eng. Enc. Law, p. 9, note. The rule is thus stated by Shearman and Redfield on the Law of Negligence (section 675): "When the particular engine which caused the fire cannot be fully identified, evidence that sparks and burning coals were frequently dropped by engines passing on the same road upon previous occasions is relevant and competent to show habitual negligence, and to make it probable that the plaintiff's injury proceeded from the same quarter. * * * If the engine which emitted the fire is identified, then evidence on either side as to the condition of other engines, and of their causing fires, has been held irrelevant, but not so if it is not fully identified."

In Gibbons v. Railroad Co., 58 Wis. 335, 17 N. W. 132, the court said: "Where there is no proof of what particular engine set the fire, and the circumstantial evidence is such that there is a strong probability that some engine on the road did set the fire, then it may be proper to show that the engines on that road generally emitted sparks, or that some one or more of them did so at other times and places." In Henderson v. Railroad Co., 144 Pa. 461, 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. Rep. 652, it was said: "Where the injury complained of is shown to have been caused, or, in the nature of the case, could only have been caused, by sparks from an engine which is known and identified, the evidence should be confined to the condition of that engine, its management, and its practical operation. Evidence tending to prove defects in other engines of the company is irrelevant, and should be

[67] Statement and part of opinion omitted.

excluded. * * * It may therefore be considered as settled in cases of this kind, where the offending engine is not clearly or satisfactorily identified, that it is competent for the plaintiff to prove that the defendant's locomotives generally, or many of them, at or about the time of the occurrence, threw sparks of unusual size, and kindled numerous fires upon that part of their road, to sustain or strengthen the inference that the fire originated from the cause alleged." In Campbell v. Railway Co., 121 Mo. 340, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. Rep. 530, it was said: "If the issue had been of negligence in the construction or management of the engine only, and the engine which could only have caused the damage had been clearly identified, evidence that other engines emitted sparks and set fires would have been inadmissible under the decisions of this court."

Counsel for appellant refer to certain cases which, as it is claimed, hold to the contrary of this doctrine, but we think that, upon a careful examination of such cases, the facts therein stated will be shown to be such as not to bring them in conflict with the rule here laid down. For instance, in Thatcher v. Railroad Co., 85 Me. 502, 27 Atl. 519, where it was held that evidence was admissible to show that fires were communicated by defendant's locomotives at different times within a certain period in the vicinity where the plaintiff's lumber was destroyed, it did not appear that the plaintiff, by his own testimony or that of his witnesses, was able to identify the locomotive claimed to have set the fire. So, in Railroad Co. v. Richardson, 91 U. S. 454, 23 L. Ed. 356, which upon its face seems to sustain the contention of appellant, it is said by Mr. Justice Strong: "The particular engines [which caused the fire] were not identified." The case of Railroad Co. v. Richardson, supra, is commented upon in Gibbons v. Railroad Co., supra, and its reasoning upon this subject is criticised. In view of the rule thus announced, and inasmuch as the evidence in the case at bar tended to identify a particular engine as the cause of the injury, there was no error in the action of the court below in refusing to admit the offered testimony.[68]

Appellant, however, contends that the testimony should have been admitted upon the alleged ground that it was proper evidence in rebuttal of the case made by the defendant below. * * *

Evidence that other engines had caused other fires about the same time was merely evidence tending to show that this fire may have been caused by a spark from the particular engine in question. Therefore the testimony should have been introduced, if at all, as a part of plaintiff's original[69] case. It was, however, offered as a part of plaintiff's

[68] Accord: Coale v. Hannibal & St. J. R. Co., 60 Mo. 227 (1875); Baltimore & S. R. Co. v. Woodruff, 4 Md. 242, 59 Am. Dec. 72 (1853); Erie R. Co. v. Decker, 78 Pa. 293 (1875).

[69] That in such cases the evidence is not admissible in chief, any more than in rebuttal, see Illinois Cent. R. Co. v. Bailey, 222 Ill. 480, 78 N. E. 833 (1906), semble.

rebutting testimony. Where testimony which might properly have been introduced as proof in chief is offered by the plaintiff in rebuttal, it is discretionary with the trial court whether such testimony shall be admitted or not, and the action of the court in this regard is not assignable as error. City of Sandwich v. Dolan, 141 Ill. 441, 31 N. E. 416; Railroad Co. v. Richardson, supra; 8 Enc. Pl. & Prac. p. 132. Inasmuch, therefore, as the offered evidence, if competent at all, would have been, in strictness, a part of the plaintiff's original case, its admission or exclusion upon the rebuttal was a matter of discretion, and, whether right or wrong, cannot be reviewed here. The fact that the defendant sought to show in defense that the fire was caused by some agency inside of the elevator did not make the offered testimony strictly rebutting in its character, but it was none the less on that account a part of plaintiff's original case, as going to show that the fire was caused by a spark from the engine. Nor can it be said that the testimony was admissible merely because one of defendant's witnesses, in stating what kind of appliance for the arresting of sparks was upon the engine in question, also stated that the same [70] kind of appliance was on all the other engines of the road. As the engine causing the injury was identified, the question was whether it was properly equipped or managed. It was immaterial how other engines may have been equipped or managed. And, even if it had been shown that other fires had occurred caused by other engines, such fires may have been caused by the careless management of the engines, rather than the defective character of their equipment. Surely, proof tending to show that other engines were managed improperly could throw no light upon the question whether the engineer managing this particular engine was skillful or not. * * *

Judgment affirmed.

[70] McReynolds, J., in Texas & P. Ry. Co. v. Rosborough, 235 U. S. 429, 35 Sup. Ct. 117, 59 L. Ed. 299 (1914): "While insisting that sparks or cinders from only three identified engines could have caused the fire, the railway company nevertheless introduced some evidence tending to show that all locomotives were properly equipped. In rebuttal, and over objection, a witness was permitted to testify that within a few days after the accident he saw engines while passing near the scene emit large cinders; and the admission of such evidence constitutes the principal subject of complaint here. In view of the pleadings and the statements of preceding witnesses this action was not improper. Texas & Pacific Railway v. Watson, 190 U. S. 287, 289 [23 Sup. Ct. 681, 47 L. Ed. 1057 (1903)]; Goodman v. Lehigh Valley R. Co. of New Jersey, 78 N. J. Law, 317, 325, 326 [74 Atl. 519 (1909)]."

TEXAS & P. R. CO. v. HARTFORD FIRE INS. CO. et al.

(Circuit Court of Appeals, Fifth Circuit, 1916. 230 Fed. 801, 145 C. C. A. 111.)

WALKER, Circuit Judge. This was an action to recover damages for the destruction on a date stated, of cotton by fire, which was attributed to sparks from a locomotive or locomotives of the defendant, which were alleged not to have been properly provided with appliances for preventing the escape of sparks or fire; it being also alleged that the defendant did not exercise proper care to keep said locomotives in good and proper condition and repair as regards the escape of fire therefrom, and that its employés in charge of said locomotives negligently and improperly operated them, so as to cause large quantities of sparks and cinders to escape. After the plaintiffs had introduced direct evidence tending to prove that, on the date mentioned, the cotton, which was on a platform adjoining the defendant's track, was discovered to be on fire very shortly after three locomotives of the defendant had passed, one or more of which was seen emitting large cinders in unusual quantities, and that there was no means for the fire being set other than the passing locomotives, they were permitted, over objections duly made by the defendant, to introduce testimony to the effect that two or three days after the fire a locomotive of the defendant, which was admitted not to be either one of the three which passed the platform shortly before the fire was discovered, was seen emitting large cinders, which, as it was passing the platform, fell on cotton and scorched it.

In the case of Grand Trunk Railroad Company v. Richardson, 91 U. S. 454, 23 L. Ed. 356, in which, so far as the report of the case indicates, there was an absence of any direct evidence as to the emission of sparks by either of the two locomotives which passed the scene of the fire shortly before it started, and those locomotives not being identified, it was held that error was not committed in admitting evidence that some locomotives of the same defendant, at other times during the same season, prior to the time of the fire in question, had scattered fire while passing the same place. It seems that there was a necessity in that case to resort to circumstantial evidence to prove that sparks were scattered by either of the two engines which could have started the fire, and it was not made to appear that the scattering of sparks testified to was by a locomotive or locomotives which had no part in causing the fire in question. In the instant case there was direct evidence to support a finding that one or more of the locomotives which, shortly before the fire was discovered, passed the platform upon which the cotton was, then emitted sparks which might have started the fire, and it was admitted that the locomotive which, several days after the fire, was seen emitting large sparks was in no way responsible for the injury complained of.

We are not of opinion that the ruling in the case cited furnishes support for the proposition that evidence is admissible as to the construction, condition or operation, at a date subsequent to the fire complained of, of a locomotive which confessedly did not contribute to the starting of that fire. Where, as in the instant case, the facts of the starting of the fire complained of are so far disclosed by direct evidence introduced by the plaintiffs as to make it apparent that, if it was started by sparks from a passing locomotive, it was so started by one or more of three locomotives which passed shortly before the fire was discovered, further inquiry to support the charge made should be limited to the construction, condition, and operation of those locomotives, so shown to be the only ones by which the fire might have been caused. In such a situation it is apparent that evidence as to the emission of sparks several days later by a locomotive which was admitted not to be either of three which might have started the fire has reference to a matter which is entirely foreign to the issue to be passed on, namely, the negligence vel non of the defendant with reference to the construction, maintenance, or operation of the locomotive or locomotives which might have caused the fire. That evidence could have no logical or rational tendency to prove how those locomotives were constructed, in what state of repair they were, or how they were operated. It could shed no light on the inquiry as to what caused the fire. That evidence as to the excessive emission, several days after the fire in question, of sparks by a locomotive of the defendant which is identified as one that had no part in causing that fire, is inadmissible to support a charge that the fire was negligently caused by some other locomotive or locomotives of the defendant is supported by reason and by abundant authority. Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co., 114 Fed. 133, 52 C. C. A. 95; Henderson, Hull & Co. v. Philadelphia & Reading R. Co., 144 Pa. 461, 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. Rep. 652; Alabama G. S. R. Co. v. Johnston, 128 Ala. 283, 29 South. 771; Gibbons v. Wisconsin Valley Railroad Co., 58 Wis. 335, 17 N. W. 132; San Antonio & A. P. Ry. Co. v. Home Insurance Co. of New York (Tex. Civ. App.) 70 S. W. 999; W. A. Morgan & Bros. v. Missouri, K. & T. Ry. Co. of Texas, 50 Tex. Civ. App. 420, 110 S. W. 978; Moose v. Missouri, K. & T. Ry. Co. of Texas (Tex. Civ. App.) 179 S. W. 75; 4 Chamberlayne on Evidence, § 3191.

In another case which grew out of the same fire it has been held that error was not committed in admitting evidence which was substantially the same as that above considered. Texas & Pacific Ry. v. Rosborough, 235 U. S. 429, 35 Sup. Ct. 117, 59 L. Ed. 299; Texas & P. Ry. Co. v. Rosborough, 209 Fed. 205, 126 C. C. A. 299. In that case that evidence was introduced by the plaintiff in rebuttal after the defendant had introduced evidence tending to show that its locomotives were all equipped with a standard spark arrester, and were kept in order and well handled, and it was held to be admissible as rebutting evidence. The ground upon which the admission of the evidence in

that case was sustained does not exist in the instant case. Here the testimony complained of was introduced as a part of the evidence by which the plaintiffs undertook to sustain the averments of their petition. The conclusion is that it was not competent for the purpose for which it was offered and admitted, and that the admission of it was prejudicial error.

The judgment is reversed.[71]

KNICKERBOCKER ICE CO. v. PENNSYLVANIA R. CO. AMERICAN ICE CO. v. SAME.

(Supreme Court of Pennsylvania, 1916. 253 Pa. 54, 97 Atl. 1051.)

POTTER, J.[72] We have here two appeals, in cases which were tried together in the court below, were argued together here, and will be disposed of in one opinion.

The principal question here presented for consideration is whether there was sufficient evidence of the cause of the fire, and of the negligence of the defendant company, to justify the submission of these questions to the jury. The point is fairly raised in the first and second assignments of error, which are respectively to the refusal by the court below of binding instructions for defendant, and to the refusal of defendant's motion for judgment n. o. v. * * *

From the evidence in the present case, the possibility of the fire having reached plaintiffs' property from sparks negligently escaping from defendant's passing engines, was manifest. The real question to be determined was whether the fire was probably due to that cause, and to no other.

The testimony of a number of witnesses tended to show that the fire started on the outside of plaintiffs' fence next to the railroad; that

[71] Woodward, J., in Buhrmaster v. New York Cent. & H. R. R. Co., 173 App. Div. 62, 158 N. Y. Supp. 712 (1916): "* * * But if it does we are persuaded that the authority relied upon (Sheldon v. Hudson River Railroad Co., 14 N. Y. 218 [67 Am. Dec. 155 (1856)]), is not controlling at this time. That determination was made in the primitive days of railroading, in 1856, when the engines were known by name, and when there was only one type in common use, and all were equipped alike, substantially, and evidence of what these engines usually did under ordinary conditions was a very different thing from taking the testimony to-day, with the great variety of engines in use, and particularly when it is not shown that the conditions were the same when the alleged sparks were thrown a greater distance. Obviously, with the wind blowing a gale, a defective engine might have thrown sparks which would be carried alive a distance of several hundred feet, while another engine, in good condition, and in a comparatively light wind, would not throw off sparks of any danger whatever; and so the mere fact that some witness had found large sparks a considerable distance from the line of the railroad would prove nothing of value in determining whether the fire in question was lighted by a spark from an engine in passing, and the case of Chandler v. Rutland Railroad Company, 140 App. Div. 68 [124 N. Y. Supp. 1046 (1910)], seems to us controlling upon the point now under consideration, if it be assumed to have been fairly presented by the ruling of the court."

[72] Part of opinion omitted.

it was very small when first seen, and under the influence of a strong northwest wind, which blew from the direction of defendant's tracks towards plaintiffs' premises, the fire spread over the entire plant; in the 2½ hours preceding the fire, over 30 passenger trains, in addition to freight trains and drill engines, passed the point where the fire occurred; there was a heavy grade at that point and defendant's locomotives, during the 2 weeks previous to the fire and 2 weeks afterward, were seen to throw out sparks, many of them of larger size than could pass through a spark arrester in proper condition and repair; these sparks were hot and burned holes in clothing, set fire to combustible things on which they lighted, burned the persons of two individuals on which they fell, and caused horses in plaintiffs' yard to run away. At times when the wind was from the direction of the railroad, they would be blown over to and light upon plaintiffs' buildings, and in the yard; about 5 minutes before the fire was discovered, a heavy freight train went up the grade past the premises, pulling hard and emitting a dense smoke; there were also two shifting engines at work on the railroad near plaintiffs' plant and in a lumber yard across the railroad. No witness testified to seeing a locomotive actually throwing out sparks on the day of the fire, though numerous witnesses said they had seen them doing so within a few days, some of them on the day before.

There was also evidence tending to show that the fire did not originate in any other way. * * *

After careful examination of all the evidence, we are satisfied that it was sufficient to justify its submission to the jury, upon the question of the origin of the fire. The decision in the case of American Ice Company v. Penna. R. R. Co., 224 Pa. 439, 73 Atl. 873, is cited as bearing against this conclusion. The language there used was appropriate to the facts of that case, but it should be limited to those facts, in order to be consistent with the trend of our other decisions. The later case of Oakdale Baking Co. v. Philadelphia & Reading Ry. Co., 244 Pa. 463, 91 Atl. 358, restates what must be regarded as the established rule.

In the third assignment of error, complaint is made of the admission in evidence of the testimony of James G. Corcoran, a detective employed by plaintiffs after the fire to investigate its cause, to the effect that on June 13, 1913, four days after the fire, at 3:12 p. m., he saw defendant's locomotive, No. 997, passing plaintiffs' premises and throwing out smoke and large sparks, some of which fell in the ice plant, and that, on June 25th, he saw the same locomotive in defendant's shop at Jersey City, and saw holes which had been burned in the screen, one being, as the witness said, a 2-inch, the other a 3½-inch, hole.

Under the decisions above cited this was competent evidence. If a locomotive was seen throwing out sparks larger than would escape

through a spark arrester properly constructed and in good repair, it was proper to show the cause of such emissions. If it was owing to the bad condition of the spark arrester, it might fairly be inferred that similar emissions from other locomotives were due to the same cause. A statement of the general principle applicable to such conditions is found in 33 Cyc. 1373, as follows:

"Where the engine alleged to have caused the fire is not clearly or satisfactorily identified, evidence as to the general condition of other engines of defendant of the same general appearance and construction and under similar conditions, at about the same time and place, in respect to throwing sparks or coals capable of setting fire, is admissible as tending to show a negligent habit on the part of defendant as to the construction, equipment, and management of its engines and therefore as tending to show negligence in that respect in the particular case, and as tending to show a probability that the fire originated from an engine of defendant."

The same principle is stated in 3 Elliott on Railroads (2d Ed. 1907) § 1243, where it is said:

"If the particular engine cannot be identified evidence is admissible that other engines of the defendant similarly constructed and operated set fires or threw igniting sparks equally far at other times, within a reasonable period, and at other places in the vicinity along the line, and the great weight of authority appears to be to the effect that such evidence is admissible without proof on the part of the plaintiff that the engines were similarly constructed and operated and without confining it to the exact time or day of the fire in question." * * *

Judgment affirmed.[78]

HUBBARD v. ANDROSCOGGIN & K. R. CO.

(Supreme Judicial Court of Maine, 1855. 39 Me. 506.)

On exceptions from nisi prius; Rice, J., presiding.

Trespass quare clausum.

The defendant's railroad passed in the vicinity of the plaintiff's premises; and the latter proved that the defendants had dug down and widened the wrought part of the highway, between their location on the west, and his tavern house on the east, and had thereby rendered difficult the access from the highway to his house.

There was some evidence tending to show a breach of plaintiff's close.

The plaintiff also proved, that on two occasions the carriages of travelers had been upset in attempting to pass from the highway to his tavern house.

[78] For a collection of the fire cases, see note to Alcott v. Public Service Corp. of New Jersey, 32 L. R. A. (N. S.) 1084 (1909).

This evidence was objected to, but admitted by the Court.

A verdict was returned for plaintiff.

APPLETON, J. The condition of the road, as left by the defendants was a matter for the consideration of the jury. That condition was to be ascertained from the testimony of witnesses. If the fact, that one or more persons had been upset in driving over the road in question, were to be regarded as admissible in evidence, then it would necessarily be proper to receive the testimony to show that the accidents which may have occurred, were the results of carelessness or negligence on the part of those sustaining the injuries of which complaint is made. It would be equally proper to show the number of carriages which may have safely passed over. But if proof of this description should be received, then the opposing party would obviously have the right of showing, that in all of those instances extraordinary care had been used, for the purpose of rebutting the inference which might otherwise arise, that the road was safe and convenient. As many distinct issues might thus be raised as there were instances of carriages passing over the road. The attention of the jury would be thus diverted from the questions really in dispute and directed to what is entirely collateral. Neither can such evidence be regarded as necessary. The width of the road, the smoothness of its surface, its elevations and depressions, the obstructions remaining thereon and their size and position, are all susceptible of exact admeasurement, and from these facts as disclosed with more or less of accuracy, it will be for the jury to determine how far and to what extent the condition of the road may have been the case of injury to the party complaining. The evidence of carriages having been upset in attempting to pass from the highway to the plaintiff's tavern, was improperly received and a new trial must be granted. Collins v. Dorchester, 6 Cush. (Mass.) 396; Aldrich v. Pelham, 1 Gray (Mass.) 510.

Exceptions sustained.

New trial granted.[74]

TENNEY, J., was unable to be present at the hearing and took no part in the opinion.

CROCKER et ux. v. McGREGOR.

(Supreme Judicial Court of Maine, 1884. 76 Me. 282, 49 Am. Rep. 611.)

LIBBEY, J. This action comes before this court on exceptions and motion. It is for an injury to the female plaintiff, alleged to have been caused by the fright of her horse by steam escaping from the defendant's mill, situated on the margin of the public highway, which the plaintiff alleges was a public nuisance to the travel over the way.

The exception is to the admission of evidence produced by the plain-

[74] Accord: Moore v. City of Richmond, 85 Va. 538, 8 S. E. 387 (1888), where a number of the cases are reviewed.

tiff. Witnesses for the plaintiff were permitted to testify that, when traveling by the mill with horses well broken and ordinarily safe, their horses were frightened by the escaping steam. This evidence was limited to a short time before and after the plaintiff's injury, when the mill was in the same condition as when she was injured; and was admitted for the sole purpose of showing the capacity of the escaping steam to frighten ordinary horses. We think it was properly admitted.

The issue was, whether the mill as constructed and used, with the steam escaping into the way, was a nuisance to the public travel. Evidence showing that it naturally frightened ordinary horses when being driven by it, was competent to show its effect upon the public travel, its character and its capacity to do mischief. Its effect on horses was not dependent upon the acts of men, which may be the result of incapacity or negligence, but was caused by action of the inanimate thing upon an animal acting from instinct. It was not to show that other parties were injured at the same place by the same cause, and is, therefore, distinguishable from cases against towns for injury from defects in a highway, in which this court has held that evidence of accidents to others at the same place is inadmissible, because it raised too many collateral issues. Here the only issue is the effect of the sight and sound of the steam upon ordinary horses, as tending to show that travel over the way was thereby rendered dangerous. Hill v. P. & R. Railroad Co., 55 Me., 439, 92 Am. Dec. 601; Burbank v. Bethel Steam Mill Co., 75 Me. 373, 46 Am. Rep. 400. We think the competency of the evidence rests upon the same principle as evidence, in actions against railroad corporations for damage by fire, alleged to have been set by coals or sparks from a passing locomotive, that the same locomotive, or others similarly constructed and used, have emitted sparks and coals, and set fire at other places and on other occasions. It tends to show the capacity of the inanimate thing to do the mischief complained of. Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 23 L. Ed. 356; Whitney v. Inhabitants of Leominster, 136 Mass. 25, 17 Rep. 153.

We have carefully examined the evidence reported, upon which the motion to set aside the verdict is based, and while we think the verdict might properly have been for the defendant, still there is sufficient in favor of the plaintiff, if the jury believe it, to authorize the verdict for her. We cannot say that the verdict is so clearly wrong as to require the court to set it aside.

Exceptions and motion overruled.[75]

[75] On the objection that such evidence involves collateral issues as to the gentleness of the other horses, see House v. Metcalf, 27 Conn. 631 (1858). For a collection of the cases, see note in 32 L. R. A. (N. S.) 1159.

The insufficiency of a cattle guard may be shown by the fact that other animals passed over it. O'Mara v. Newton & N. W. Ry. Co., 140 Iowa, 190, 118 N. W. 377 (1908).

SHEA v. GLENDALE ELASTIC FABRICS CO.

(Supreme Judicial Court of Massachusetts, 1894. 162 Mass. 463, 38 N. E. 1123.)

Tort, for personal injuries occasioned to the plaintiff by lead poisoning from inhaling dust containing white lead, coming from the rubber thread on which he worked in the defendant's mill.

At the trial in the Superior Court, before Mason, C. J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The material facts appear in the opinion.

KNOWLTON, J. The only exception in this case was to the admission of certain testimony on the question whether the plaintiff's illness was caused by lead poisoning from inhaling dust containing white lead coming from the rubber thread on which he worked in the defendant's mill, or whether it arose from other causes. This question may be divided into two branches: First, the inquiry whether the defendant's mill was a place in which one would be likely or liable to be poisoned by inhaling lead in the form of dust; and, secondly, if so, whether the plaintiff was so poisoned. The plaintiff was allowed to introduce evidence to show that other persons who worked at the same time in the same room in the defendant's mill, and under similar conditions, were ill from lead poisoning, and that other persons who worked there under similar conditions a few months before and a few months after were also ill from the same cause. There was also evidence from a physician, who could not fix the time exactly, that he had a number of like cases in patients coming from the same room of the defendant's mill. One Wood was permitted to testify that after working in this mill 3½ or 4 months, a short time before the plaintiff was there, he was ill, and had the same symptoms. All this testimony was introduced subject to the same general exception of the defendant.

The question in dispute was whether there was an impalpable poison in the atmosphere of the defendant's mill, which would be likely to have a certain effect upon the human body. The most natural way of obtaining the true answer to the question was by inquiring what effects, if any, had been produced upon persons accustomed to breathe this atmosphere. The conditions under which the different persons in the room were exposed were similar, and, so far as that factor in the problem is concerned, we should expect precisely the same effect. These persons had bodies similar in form and structure, with the same organs, governed by the same laws, and with like susceptibilities. Of course there were diversities in their previous experiences, and in their condition outside of the mill, and on that account the effects upon the different persons might differ slightly. But, so far as appears, the symptoms of their illness were so distinctive and peculiar as to point almost conclusively to the same cause. We are of opinion that

this evidence tended to show that there was exposure in the defendant's mill which caused the same illness in them all. There was undoubtedly evidence in regard to the symptoms and nature of the plaintiff's illness which is not reported on the bill of exceptions, all of which, presumably, was considered by the presiding justice in determining whether the evidence should be admitted.

In deciding questions of this kind much depends on the circumstances of each particular case, and much is therefore left to the discretion of the judge. To express this conclusion in another way: whenever the competency of evidence depends on the view to be taken of any doubtful question of fact which appears of record, or on facts and evidence not reported, this court will not attempt to revise the decision of the trial judge. Com. v. Gray, 129 Mass. 474, 37 Am. Rep. 378; Hunt v. Gaslight Co., 8 Allen, 169–171, 85 Am. Dec. 697; Robinson v. Railroad Co., 7 Gray, 92–95. In Baxter v. Doe, 142 Mass. 558, 8 N. E. 415, which was an action for damages against the owner of a vessel for neglect to furnish proper food to a sailor, evidence that other members of the crew, exposed to similar conditions, were sick at about the same time, was held to be competent. Hunt v. Gaslight Co., 8 Allen, 169, 85 Am. Dec. 697, and 1 Allen, 343, was an action for negligently suffering gas to escape into a house occupied by the plaintiff, whereby he was made sick; and it was decided that the sickness of other persons in the same house, exposed to the same conditions, might be introduced by the plaintiff. Similar principles were involved in the judgments in Hodgkins v. Chappell, 128 Mass. 197, in Brierly v. Davol Mills, 128 Mass. 291, and in Reeve v. Dennett, 145 Mass. 23, 11 N. E. 938. See, also, Crocker v. McGregor, 76 Me. 282, 49 Am. Rep. 611; Boyce v. Railroad Co., 43 N. H. 627; Darling v. Westmoreland, 52 N. H. 401, 13 Am. Rep. 55; Cleaveland v. Railroad Co., 42 Vt. 449; House v. Metcalf, 27 Conn. 631; Field v. Railroad Co., 32 N. Y. 339; Railroad Co. v. Richardson, 91 U. S. 454, 23 L. Ed. 356; District of Columbia v. Armes, 107 U. S. 519–524, 2 Sup. Ct. 840, 27 L. Ed. 618; Brown v. Railway Co., 22 Q. B. Div. 391–393.

The objection that such testimony is likely to lead into collateral inquiries in order to establish its force or to show its weakness is one that may be made to almost all circumstantial evidence, and which addresses itself to the sound discretion of the court. If it seems probable that a line of inquiry will lead into side issues not anticipated by the parties, and which will be likely to distract and confuse the jury, and unreasonably protract the trial, the questions should be excluded; but if, on proofs of identity or likeness of conditions, a fact will have important probative force, it should not be excluded if its relation to the case can easily be shown. It must be assumed in this case, in the absence of anything to show the contrary, that there was no great practical difficulty in presenting and considering the evidence which was

objected to, and that the presiding justice found that the similarity of conditions was so clearly and so easily shown as to made the testimony proper.

Exceptions overruled.

DISTRICT OF COLUMBIA v. ARMES.

(Supreme Court of the United States, 1882. 107 U. S. 519, 2 Sup. Ct. 840, 27 L. Ed. 618.)

FIELD, J.[76] This was an action to recover damages for injuries received by the plaintiff's intestate, Du Bose, from a fall caused by a defective sidewalk in the city of Washington. In 1873 the board of public works of the city caused the grade of the carriage-way of Thirteenth street, between F and G streets, to be lowered several feet. The distance between the curbstone of the carriage-way and the line of the adjacent building was 36 feet. At the time the accident to the deceased occurred, this portion of the street—sidewalk it may be termed, to designate it from the carriage-way, although only a part of it is given up to foot passengers—was, for 48 feet north of F street, lowered in its whole width to the same grade as the carriage-way. But, for some distance beyond that point, only 12 feet of the sidewalk was cut down, thus leaving an abrupt descent of about 2 feet at a distance of 12 feet from the curb. At this descent—from the elevated to the lowered part of the sidewalk—there were 3 steps, but the place was not guarded either at its side or end. Nothing was placed to warn foot passengers of the danger.

On the night of February 21, 1877, Du Bose, a contract surgeon of the United States army, while walking down Thirteenth street, towards F street, fell down this descent, and, striking upon his knees, received a concussion which injured his spine and produced partial paralysis, resulting in the impairment of his mind and ultimately in his death, which occurred since the trial below. * * *

On the trial, a member of the Metropolitan police, who saw the deceased fall on the sidewalk and went to his assistance, was asked, after testifying to the accident, whether, while he was on his beat, other accidents had happened at that place. The court allowed the question, against the objection of the city's counsel, for the purpose of showing the condition of the street, and the liability of other persons to fall there. The witness answered that he had seen persons stumble over there. He remembered sending home in a hack a woman who had fallen there, and had seen as many as five persons fall there.

The admission of this testimony is now urged as error, the point of the objection being that it tended to introduce collateral issues and thus mislead the jury from the matter directly in controversy. Were such the case the objection would be tenable, but no dispute was

[76] Part of opinion omitted.

made as to these accidents, no question was raised as to the extent of the injuries received, no point was made upon them, no recovery was sought by reason of them, nor any increase of damages. They were proved simply as circumstances which, with other evidence, tended to show the dangerous character of the sidewalk in its unguarded condition. The frequency of accidents at a particular place would seem to be good evidence of its dangerous character—at least, it is some evidence to that effect. Persons are not wont to seek such places, and do not willingly fall into them. Here the character of the place was one of the subjects of inquiry to which attention was called by the nature of the action and the pleadings, and the defendant should have been prepared to show its real character in the face of any proof bearing on that subject.

Besides this, as publicity was necessarily given to the accidents, they also tended to show that the dangerous character of the locality was brought to the attention [77] of the city authorities.

In Quinlan v. City of Utica, 11 Hun (N. Y.) 217, which was before the supreme court of New York, in an action to recover damages for injuries sustained by the plaintiff through the neglect of the city to repair its sidewalk, he was allowed to show that while it was out of repair other persons had slipped and fallen on the walk where he was injured. It was objected that the testimony presented new issues which the defendant could not be prepared to meet, but the court said: "In one sense every item of testimony material to the main issue introduces a new issue; that is to say, it calls for a reply. In no other sense did the testimony in question make a new issue. Its only importance was that it bore upon the main issue, and all legitimate testimony bearing upon that issue, the defendant was required to be prepared for." This case was affirmed by the court of appeals of New York, all the judges concurring, except one, who was absent. 74 N. Y. 603.

[77] McClain, J., in Potter v. Cave, 123 Iowa, 98, 98 N. W. 569 (1904): "Throughout the trial, except in one instance, the court consistently sustained objections to evidence offered for plaintiff to show previous accidents on this stairway and warnings to defendant that it was dangerous. These rulings were undoubtedly correct. Hudson v. Chicago & N. W. R. Co., 59 Iowa, 581 [13 N. W. 735, 44 Am. Rep. 692 (1882)]; Mathews v. City of Cedar Rapids, 80 Iowa, 459 [45 N. W. 894, 20 Am. St. Rep. 436 (1890)]; Croddy v. Chicago, R. I. & P. R. Co., 91 Iowa, 598 [60 N. W. 214 (1894)]. The question was not as to whether defendant had reason to believe the stairway to be dangerous, but whether it was in fact maintained in a dangerous condition. If dangerous in fact, his knowledge would be immaterial. But one witness for plaintiff was asked whether she had communicated to defendant, or any of his employés or servants in the store building, information with reference to the dangerous condition of the stairway, and defendant's objection to this question as calling for evidence that was incompetent and immaterial, and which would not tend to prove any material issue in the case, was overruled. Whereupon the witness answered that she had given such information to an employé of defendant in the store about six months before the accident. The admission of this testimony was erroneous."

In an action against the city of Chicago, to recover damages resulting from the death of a person who in the night stepped off an approach to a bridge while it was swinging around to enable a vessel to pass, and was drowned,—it being alleged that the accident happened by reason of the neglect of the city to supply sufficient lights to enable persons to avoid such dangers,—the supreme court of Illinois held that it was competent for the plaintiff to prove that another person had, under the same circumstances, met with a similar accident. City of Chicago v. Powers, 42 Ill. 169, 89 Am. Dec. 418. To the objection that the evidence was inadmissible, the court said:

"The action was based upon the negligence of the city in failing to keep the bridge properly lighted. If another person had met with a similar fate at the same place, and from a like cause, it would tend to show a knowledge on the part of the city that there was inattention on the part of their agents having charge of the bridge, and that they had failed to provide proper means for the protection of persons crossing on the bridge. As it tended to prove this fact it was admissible; and if the appellants had desired to guard against its improper application by the jury, they should have asked an instruction limiting it to its legitimate purpose."

Other cases to the same general purport might be cited. See City of Augusta v. Hafers, 61 Ga. 48, 34 Am. Rep. 95; House v. Metcalf, 27 Conn. 631; Calkins v. City of Hartford, 33 Conn. 57, 87 Am. Dec. 194; Darling v. Westermoreland, 52 N. H. 401, 13 Am. Rep. 55; Hill v. Portland & R. R. Co., 55 Me. 439, 92 Am. Dec. 601; Kent v. Town of Lincoln, 32 Vt. 591; City of Delphi v. Lowery, 74 Ind. 520, 39 Am. Rep. 98. The above, however, are sufficient to sustain the action of the court below in admitting the testimony to which objection was taken.

Judgment affirmed.

FROHS v. CITY OF DUBUQUE.

(Supreme Court of Iowa, 1899. 109 Iowa, 219, 80 N. W. 341.)

WATERMAN, J.[78] Plaintiff was hurt by falling over a loose board in a walk. After her injury, the owner of the abutting lot took up the old walk, and laid a new one. Evidence of this fact was received over defendant's objection. It is manifest, from the examination of the witnesses on this point, that the fact mentioned was elicited only incidentally. The circumstance of the old walk being taken up was not offered as evidence tending to establish that it was defective, but merely as showing how it came the witnesses knew the condition of the stringers upon which the boards were laid. The court, in admitting the evidence, stated that its scope should be so limited. The admission

[78] Part of opinion omitted.

of this evidence it is thought is contrary to the rule announced in Cramer v. City of Burlington, 45 Iowa, 627, and Hudson v. Railroad Co., 59 Iowa, 581, 13 N. W. 735, 44 Am. Rep. 687, but we cannot coincide in this view. In the first of these cases we held that the fact of a subsequent change made in the walk by defendant could not be received and considered as evidence of an admission of a previous defect. In the other case the decision was that evidence of subsequent repairs could not be received as tending to establish prior negligence. We are entirely satisfied with the doctrine announced in these cases, and do not think the action of the court in the case at bar is in any way in conflict with it. Kuhns v. Railway Co., 76 Iowa, 67–71, 40 N. W. 92. It may be that the defendant was entitled to an instruction limiting the effect of the evidence to the extent stated, but, as no such instruction was asked, the failure to give it cannot now be taken advantage of. See the case last cited.

The next ground of complaint is that evidence was received relating to the original construction of the walk, which was built some considerable time before the accident to plaintiff. This testimony was to the effect that the walk was built of old boards and stringers. It was plaintiff's claim that the material in the walk was badly decayed, and that the city should have had notice of the defect. This evidence was not introduced, as defendant's counsel seem to think, in order to show negligence in the original construction, but only as bearing upon the question of notice to the city of the condition of decay. For this purpose it was properly admitted. McConnell v. City of Osage, 80 Iowa, 293, 45 N. W. 550, 8 L. R. A. 778; Lorig v. City of Davenport, 99 Iowa, 479, 68 N. W. 717.

One French and his wife were witnesses, and they were allowed to testify that, a few days before the accident to plaintiff, Mrs. French tripped upon the same loose board of which complaint is made in this case. It is insisted that evidence of other accidents was not admissible; and this is correct, where such evidence is relied upon as substantive proof of an actionable defect. Hudson v. Railroad Co., 59 Iowa, 581, 13 N. W. 735, 44 Am. Rep. 687; Croddy v. Railway Co., 91 Iowa, 598, 60 N. W. 214; Mathews v. City of Cedar Rapids, 80 Iowa, 459, 45 N. W. 894, 20 Am. St. Rep. 436; Langhammer v. City of Manchester, 99 Iowa, 295, 68 N. W. 688. But in the case at bar the evidence was offered to show the existence of this particular loose board in the walk prior to plaintiff's injury, and the manner in which it was discovered by the witnesses. For this purpose the testimony was properly admissible.

In Hunt v. City of Dubuque, 96 Iowa, 314, 65 N. W. 319, the question presented here was raised, and we said upon the subject: "The witness was also permitted to state that she had seen people stumble at the defective part of the walk, and that she saw an old gentleman stop, and push the board down with his cane. The testimony tended

to show the condition of the walk, and was material for the purpose of showing that the condition continued until the accident occurred." Smith v. City of Des Moines, 84 Iowa, 685–688, 51 N. W. 77, also supports the ruling of the trial court in the case at bar. We also call attention, in this connection, to Alberts v. Village of Vernon, 96 Mich. 549, 55 N. W. 1022; Moore v. City of Kalamazoo, 109 Mich. 176, 66 N. W. 1089.

Three of the authorities noted above as cited by appellant are cases where the defect complained of was in the original construction, and in the other (Croddy v. Railway Co.), which involved an accident at a railway crossing one element of the negligence complained of was the excessive speed of the train. It is manifest that in none of these instances does the same reason obtain for admitting this kind of evidence as in the case at bar, where the defect was caused by time and changing conditions, and notice of it to defendant had to be shown; and when also the evidence related to it specifically, and not to a general bad condition of the walk. * * *

Judgment affirmed.

WOODWORTH v. DETROIT UNITED RY.

(Supreme Court of Michigan, 1908. 153 Mich. 108, 116 N. W. 549.)

CARPENTER, J.[79] About 3½ miles east of Farmington Junction defendant's railway crosses the roadbed of Grand River road at an acute angle. This crossing is called the "Voleny Smith crossing." As Rex Woodworth, plaintiff's intestate, attempted to drive over this crossing, the left front wheel of his wagon caught in a vacant space between the rail and the planking, his horse could not move it, and a car operated by defendant collided with his vehicle and killed him. This suit was brought to recover compensation. The issue was submitted to a jury, who rendered a verdict in plaintiff's favor. We are asked to reverse the judgment entered upon said verdict for several reasons.

1. Plaintiff was permitted to prove by one of defendant's employés, a sectionman, that at least a dozen rigs had been stuck in this crossing in the same way as was that of plaintiff's intestate; that the first of these occurrences happened about two years before, the others from time to time up to about a month before the disaster in suit, and on one of these occasions a wagon wheel was broken. This testimony was received, notwithstanding the circumstance that counsel for defendant admitted in open court that, "whatever the condition of that crossing at the time in question, defendant had full knowledge of it, and had full knowledge of it at least six months prior thereto. We do not admit that it was defective."

[79] Part of opinion of Carpenter, J., and opinion of Grant, C. J., omitted.

Defendant relies upon the case of Gregory v. Detroit United Railway, 138 Mich. 368, 101 N. W. 546. That case was very similar to this, and we there decided that testimony like that under consideration was inadmissible. We said: "Evidence was received, under objections and exception, to show prior accidents of a similar character at this same place. Such testimony is only admissible to show notice and knowledge of the defects. Grand Rapids, etc., R. Co. v. Huntley, 38 Mich. 537, 31 Am. Rep. 321; Corcoran v. City of Detroit, 95 Mich. 84, 54 N. W. 692; Alberts v. Village of Vernon, 96 Mich. 549, 55 N. W. 1022. Defendant's counsel upon the trial admitted that the condition of the rails and street at this point was the same as it had been from the 1st of December previous. The sole question, therefore, was the condition of the street, and whether its condition was negligence. Proof of prior accidents was immaterial, and would naturally tend to prejudice the defendant." I participated in that decision, and approved the foregoing reasoning, and am bound to admit that I am as responsible for it as if I had written it. I am compelled now to say that, in my judgment, the decision was erroneous, and I think we should take this, the first opportunity, of overruling it.

It is apparent from the above quotation that it was our opinion that testimony of prior accidents was admissible for the purpose of establishing defendant's knowledge of the condition of the street, but not for the purpose of proving negligence. Here is where I think we erred. I think such testimony has a bearing upon the question of negligence. None of the authorities cited in the opinion in Gregory v. Detroit United Ry., supra, touch this question. None of the authorities of other states which hold that testimony of prior accidents is not admissible have any bearing, for we hold it admissible, and with the exception of Gregory v. Detroit United Ry., there is nothing in our decisions which indicates that it is not admissible for all legitimate purposes. Such testimony has a legitimate bearing upon the issue of negligence.

In this case the burden rested upon plaintiff to prove, not only the existence of this space between the rail and the planking, but also to prove that it was negligent for the defendant to leave that space in that condition. In determining the question of negligence, it becomes important to inquire, should defendant have anticipated that the wheels of wagons attempting to cross its railway would get caught in this space? Testimony that wagons had actually been so caught a dozen times in two years, especially if, as may be inferred, these occurrences were known to defendant, answers this question, or at least affords great aid in answering it. In Hoyt v. Jeffers, 30 Mich. 181, this court said: "With actual notice of the danger from this cause (the throwing of sparks from the chimney of a sawmill) the defendant might justly be held to a somewhat stricter measure of diligence than if ignorant of it, and to some extent this might make that negligence which oth-

erwise would not be so." In Smith v. Sherwood Township, 62 Mich. 165, 28 N. W. 806, plaintiff brought suit to recover for damages resulting from his horse shying at a hole in a bridge. This court held that testimony proving that other horses had shied at this hole was properly admitted saying: "The evidence was therefore competent to show the existence of the defect for some time, and that it was calculated to frighten horses. It tended to show the dangerous character of the hole in the bridge, and, as more or less publicity would naturally be given to such occurrences, it also tended to show that knowledge of such dangerous character was brought to the attention of the township authorities." Lombar v. East Tawas, 86 Mich. 14, 48 N. W. 947; Retan v. Railway Co., 94 Mich. 146, 53 N. W. 1094. See, also, Darling v. Westmoreland, 52 N. H. 401, 13 Am. Rep. 55; House v. Metcalf, 27 Con. 631; District of Columbia v. Armes, 107 U. S. 519, 2 Sup. Ct. 840, 27 L. Ed. 618. I conclude, therefore, that no error was committed in receiving the testimony under consideration. * * *

Judgment affirmed.[80]

WILLIAMS v. INHABITANTS OF WINTHROP.

(Supreme Judicial Court of Massachusetts, 1913. 213 Mass. 581, 100 N. E. 1101.)

Tort for personal injuries alleged to have been suffered by the plaintiff on August 7, 1902, by reason of a defect at or near the intersection of Hutchinson Street and Revere Street, public ways of the defendant, and to have been caused by depressions which caused a carriage that the plaintiff was driving to tip, throwing out the plaintiff. Writ dated August 18, 1902.

In the Superior Court, the case was tried before Harris, J. The material facts are stated in the opinion. There was a verdict for the plaintiff in the sum of $2,500. The defendant alleged exceptions, which, after the resignation of Harris, J., were allowed by Jenney, J.

RUGG, C. J.[81] This is an action of tort to recover compensation for injuries received through an alleged defect in a public way upon which the plaintiff was a traveler.

1. There was evidence tending to show that the plaintiff was an

[80] Accord: Alcott v. Public Service Corp. of New Jersey, 78 N. J. Law, 482, 74 Atl. 499, 32 L. R. A. (N. S.) 1084, 138 Am. St. Rep. 619 (1909), annotated.

Compare Ellison, J., in Smart v. Kansas City, 91 Mo. App. 586 (1902): "* * * But in cases like this and the Goble Case, the question is not so much whether a defect is such as that one could fall over it, as it is whether in the particular instance complained of, the injured party would have fallen over it if exercising ordinary care in the particular circumstances in which he was placed. The fact that a man falls on a sidewalk shows that he can fall there, but it does not show any of several other conditions necessary to make a case against the municipality. It thus leads to an investigation of a number of collateral issues which should, when possible, be avoided."

[81] Part of opinion omitted.

experienced driver, and that as she turned her horse from one street to another she was looking at the street ahead, and saw nothing about the surface of the street to indicate a defect. It was for the jury to determine, upon this evidence and upon all the circumstances, as men of common experience, whether the plaintiff was in the exercise of due care. Thompson v. Bolton, 197 Mass. 311, 83 N. E. 1089; Stoliker v. Boston, 204 Mass. 522, 534, 90 N. E. 927; Cutting v. Shelburne, 193 Mass. 1, 78 N. E. 752.

2. There was evidence tending to show that there were two depressions in the street described by some witnesses as holes, one of which was six or more inches deep, with a mound between. It was for the jury to say whether this was a defect, taking into account the season of the year, precedent weather conditions, the amount of travel upon the street, and all the other attendant conditions. * * *

A witness who lived near the place of accident called by the plaintiff was permitted to testify, against the objection and exception of the defendant, that between the day of the accident and the preceding Sunday she observed that "if an express wagon or grocery team would come that way they would always go down and jump up and go down again, and some came around with one wheel in the air." The judge admitted this as tending to prove notice to the defendant. It is plain that such evidence is not admissible for the purpose of showing a defect in the way. This has been decided too many times to require more than a reference to one or two authorities. Collins v. Dorchester, 6 Cush. 396; Marvin v. New Bedford, 158 Mass. 464, 33 N. E. 605. The question of difficulty is, was it admissible on the issue whether the defendant "had or by the exercise of proper care and diligence might have had reasonable notice of the defect or want of repair" (R. L. c. 51, § 18) in the way. Generally in this commonwealth evidence of this character has been excluded. We are aware of no instance heretofore in which it has been admitted against objection. In Yore v. Newton, 194 Mass. 250, 80 N. E. 472, evidence of like character was held to have been excluded properly and it was said that it might have been done in the exercise of judicial discretion. But that case is no authority for the proposition that such evidence is competent or that it may be admitted under any circumstances.

Such evidence has been held in other cases to have been properly rejected, on the ground of raising collateral issues. Merrill v. Bradford, 110 Mass. 505; Blair v. Pelham, 118 Mass. 420. In Kidder v. Dunstable, 11 Gray, 342, it was said: "In an action for injury sustained in a highway by reason of an alleged defect therein evidence is not admissible, either that a person not a party to the action has received an injury at the same place or has safely passed over it." These cases treat the matter as a positive rule of law. Even if it were to be regarded as matter of judicial discretion, it would be unfortunate if the discretion should "not be exercised in the same way under the same circumstances." Sargent v. Merrimac, 196 Mass. 171, 175, 81 N. E.

970, 971 (11 L. R. A. [N. S.] 996, 124 Am. St. Rep. 528). No hardship will befall a plaintiff because notice or reasonable ground to infer notice to a municipality of a defect in a highway is commonly susceptible of ready proof by other evidence. Reed v. Northfield, 13 Pick. 94, 23 Am. Dec. 662; Chase v. Lowell, 151 Mass. 425, 24 N. E. 212. Under these circumstances, we think it better to adhere to that which has been declared and understood generally to be the law of this commonwealth, and hold that such evidence is inadmissible.

Exceptions sustained.

PEORIA GASLIGHT & COKE CO. v. PEORIA TERMINAL RY. CO.

(Supreme Court of Illinois, 1893. 146 Ill. 372, 34 N. E. 550, 21 L. R. A. 373.)

BAILEY, J.[82] This was a proceeding under the eminent domain law, brought by the Peoria Terminal Railway Company against the Peoria Gaslight & Coke Company, to condemn for right of way a portion of the premises owned and occupied by the defendant with its buildings and other improvements and machinery, constituting its gas works. The premises of the defendant consist of one block of ground, bordering upon the Illinois river, and being something over 400 feet in length along the river, and about 300 feet in width, and containing about three acres. The land sought to be condemned consists of a strip 50 feet in width, along the margin of the river, and running the whole length of the defendant's premises, and containing 48-100 of an acre. At the trial the jury, after hearing the evidence and viewing the premises, rendered their verdict, fixing the compensation to be paid the defendant for the strip of land taken at $4,550, and assessing the damages to the land not taken at $2,750, making the total of the compensation and damages $7,300. Upon this verdict judgment was entered in the usual form, and the defendant brings the record to this court by appeal.

As furnishing evidence of the value of the land proposed to be taken, the petitioner was permitted, against the objection and exception of the defendant, to prove by several witnesses what the petitioner had paid other property owners for right of way along the same line, and the decision of the court admitting that evidence is assigned for error. The propriety, in cases of this character, of admitting proof of sales of other similar property, made at or about the same time, though doubted, and even denied, in some of the states, seems to us to be supported by the better reason, as well as by the greater weight of authority.[83]

[82] Part of opinion omitted.

[83] Accord: Markowitz v. Kansas City, 125 Mo. 485, 28 S. W. 642, 46 Am. St. Rep. 498 (1894); Smith v. Sanitary District of Chicago, 260 Ill. 453, 103 N. E. 254 (1913).

Lewis, Em. Dom. § 443, and cases cited in notes. In this state its admissibility has been expressly affirmed in a few cases, and indirectly recognized in many others. Thus, in Provision Co. v. City of Chicago, 111 Ill. 651, a witness was permitted to give evidence as to the price at which another lot had been sold, without testifying as to the value of either that lot or of the one sought to be condemned, and it was held that there was no error in the admission of the evidence, it being said: "From the very necessities of the case, actual sales of property in the vicinity, and near the time, are competent evidence so far as they go. On cross-examination, all circumstances can be drawn out showing that the given sale fails, and how much, of being a fair criterion of value." * * *

The theory upon which evidence of sales of other similar property in the neighborhood at about the same time is held to be admissible is that it tends to show the fair market value of the property sought to be condemned; and it cannot be doubted that such sales, when made in the free and open market, where a fair opportunity for competition has existed, become material and often very important factors in determining the value of the particular property in question. But it seems very clear that, to have that tendency, they must have been made under circumstances where they are not compulsory, and where the vendor is not compelled to sell at all events, but is at liberty to invite competition among those desiring to become purchasers. Accordingly, among the various decisions in this or other states to which our attention has been called, or which our own researches have discovered, we find none in which the price paid at a forced or compulsory sale has been admitted as competent evidence of value.

On the other hand, in Dietrichs v. Railroad Co., 12 Neb. 225, 10 N. W. 718, evidence of the price paid at an administrator's sale for the very lots sought to be condemned was held to be incompetent. In discussing this subject, Mr. Lewis, in his treatise on the Law of Eminent Domain, says: "What the party condemning has paid for other property is incompetent. Such sales are not a fair criterion of value, for the reason that they are in the nature of a compromise. They are affected by an element which does not enter into similar transactions made in the ordinary course of business. The one party may force a sale at such price as may be fixed by the tribunal appointed by law. In most cases the same party must have the particular property, even if it costs more than its true value. The fear of one party of the other to take the risk of legal proceedings ordinarily results in the one party paying more, or the other taking less, than is considered to be the fair market value of the property. For these reasons, such sales would not seem to be competent evidence of value in any case, whether in a proceeding by the same condemning party or otherwise." Lewis, Em. Dom. § 447.

The text of the learned author here quoted seems to be well supported by the authorities.[84] * * *

We are referred to no decision in this state in which the opposite view as to the admissibility of evidence of the character of that now under consideration has been taken. In fact, so far as we are aware, the question has never been passed upon by this court, and we are therefore at liberty to adopt the rule which seems to us to be most fully supported by reason and authority. Acting upon that principle, we are disposed to concur in the rule supported by the authorities above cited, and to hold that the evidence of the prices paid by the railroad company to other property owners for right of way along its line was incompetent, and was improperly admitted. * * *

Judgment reversed.[85]

ROBINSON v. NEW YORK ELEVATED R. CO. et al.

(Court of Appeals of New York, 1903. 175 N. Y. 219, 67 N. E. 431.)

BARTLETT, J.[86] This is the usual elevated railroad case, to recover fee and rental damages, and, under the unanimous decision, the defendant railway companies are confined to the argument of legal errors duly raised by exceptions.

The counsel for the appellants insists that the learned trial judge admitted, over objection and exception, evidence regarding sales and rentals of specific pieces of property on Pearl street, other than the premises in suit in violation of the rule laid down by this court in the case of Jamieson v. Kings County Elevated Railway Co., 147 N. Y. 322, 325, 41 N. E. 693. Judge Finch there said: "The plaintiff sought to prove the evil effect of the road in diminishing values by the process of calling the owners of property in the vicinity, and proving in each case what the particular premises owned by the witness rented for before the road was built, and what thereafter. There were objections and exceptions. Such a process is not permissible. Each piece of evidence raised a collateral issue (Gouge v. Roberts, 53 N. Y. 619), and left the court to try a dozen issues over as many separate parcels of

[84] In the omitted passage the court reviewed Kelliher v. Miller, 97 Mass. 71 (1867); Fall River Print Works v. City of Fall River, 110 Mass. 428 (1872); Cobb v. City of Boston, 112 Mass. 181 (1873); Presbrey v. Old Colony & N. Ry. Co., 103 Mass. 1 (1869); Donovan v. City of Springfield, 125 Mass. 371 (1878); Tyler v. Mather, 9 Gray, 183 (1857); Howard v. City of Providence, 6 R. I. 514 (1860); City of Springfield v. Schmook, 68 Mo. 394 (1878); Brunswick & A. R. Co. v. McLaren, 47 Ga. 546 (1873); Amoskeag Mfg. Co. v. Worcester, 60 N. H. 522 (1881).

[85] Contra: Curley v. Mayor, 83 N. J. Law, 760, 85 Atl. 197, 43 L. R. A. (N. S.) 985 (1912), annotated.

[86] Part of opinion omitted.

property. We have held such a mode of proof to be inadmissible. Huntington v. Attrill, 118 N. Y. 365, 23 N. E. 544; Matter of Thompson, 127 N. Y. 463, 28 N. E. 389, 14 L. R. A. 52. The elevated railroad cases in this court, to which the plaintiff refers us, give no warrant for such a mode of proof, but indicate that the general course and current of values must be shown by persons competent to speak, leaving to a cross-examination any inquiry into specific instances, if such be deemed essential. Almost all the evidence of depreciation was of the erroneous character, and we cannot say that it may not have worked harm to the defendant." The rule thus laid down was followed in Witmark v. New York Elevated R. Co., 149 N. Y. 393, 44 N. E. 78, and other cases.

The course of procedure under this rule may be thus briefly stated: Plaintiff, having called as a witness an expert, is permitted to show the general course and current of values in the immediate vicinity, leaving to a cross-examination any inquiry into specific instances, if such be deemed essential; the reason for the rule being that to permit evidence of the rental or fee value of other premises would raise in each case a collateral issue to be tried. When the plaintiff's expert witness is cross-examined by the defendant as to specific instances, it is competent, upon a redirect examination, for the plaintiff to make such full inquiry as he may be advised as to each one of the specific instances brought out on cross-examination. In the case at bar the plaintiffs swore their expert and conducted the direct examination in compliance with the rule. On cross-examination the defendants made inquiry as to about 12 pieces of other property in the immediate neighborhood. On redirect examination the plaintiffs examined the witness, over the objection and exception of the defendants, in regard to the fee or rental value of some 16 additional pieces of property in the vicinity of the premises in suit. We are of opinion that the introduction of evidence by the plaintiffs in regard to these additional pieces of property in the immediate neighborhood was in direct violation of the rule we have discussed. It was for the plaintiffs to prove the general course of values, and for the defendants to give evidence of specific instances. If it be true that such evidence on the part of the defendants opened the door, as the respondents' counsel claims, for the introduction of as many additional pieces of property as they saw fit, it would result in raising numerous collateral issues, and lead to the utter subversion of the rule laid down in the Jamieson Case. * * *

Judgment reversed.[87]

[87] Followed in Rourke v. Holmes St. R. Co., 221 Mo. 46, 119 S. W. 1094, 133 Am. St. Rep. 468 (1909).

SHARP v. UNITED STATES.

(Supreme Court of the United States, 1903. 191 U. S. 341, 24 Sup. Ct. 114, 48 L. Ed. 211.)

The plaintiff in error has sued out this writ for the purpose of reviewing a judgment of the United States circuit court of appeals for the third circuit, which affirmed a judgment of the district court of New Jersey, awarding damages to plaintiff in error for the taking of certain property of his on the Delaware River, near Fort Mott, in that state. The award of the jury was, in the opinion of the plaintiff in error, entirely inadequate as just compensation to him as the owner of the land for its taking by the government. * * *

Mr. Justice PECKHAM,[88] after making the foregoing statement of facts, delivered the opinion of the court. * * *

The errors assigned and upon which the argument was had in the circuit court of appeals were twelve in number. They are in substance the same here. The first seven refer to the rejection of evidence in regard to offers to purchase the lands from the plaintiff in error. It was held by the trial court, in response to the proposal to give such evidence, that the plaintiff in error could not testify to different offers he had received to purchase the property for hotel, residential, or amusement purposes, or for a ferry, or a railroad terminal, or to lease the property for hotel purposes.

Upon principle, we think the trial court was right in rejecting the evidence. It is, at most, a species of indirect evidence of the opinion of the person making such offer as to the value of the land. He may have so slight a knowledge on the subject as to render his opinion of no value, and inadmissible for that reason. He may have wanted the land for some particular purpose disconnected from its value. Pure speculation may have induced it, a willingness to take chances that some new use of the land might, in the end, prove profitable. There is no opportunity to cross-examine the person making the offer, to show these various facts. Again, it is of a nature entirely to uncertain, shadowy, and speculative to form any solid foundation for determining the value of the land which is sought to be taken in condemnation proceedings. If the offer were admissible, not only is it almost impossible to prove (if it exist) the lack of good faith in the person making the offer, but the circumstances of the parties at the time the offer was made as bearing upon the value of such offer may be very difficult, if not almost impossible, to show. To be of the slightest value as evidence in any court, an offer must, of course, be an honest offer, made by an individual capable of forming a fair and intelligent judgment, really desirous of purchasing, entirely able to do so, and to

[88] Statement condensed and part of opinion omitted.

give the amount of money mentioned in the offer, for otherwise the offer would be but a vain thing. Whether the owner himself, while declining the offer, really believed in the good faith of the party making it, and in his ability and desire to pay the amount offered, if such offer should be accepted, or whether the offer was regarded as a mere idle remark, not intended for acceptance, would also be material upon the question of the bona fides of the refusal.

Oral and not binding offers are so easily made and refused in a mere passing conversation, and under circumstances involving no responsibility on either side, as to cast no light upon the question of value. It is frequently very difficult to show precisely the situation under which these offers were made. In our judgment they do not tend to show value, and they are unsatisfactory, easy of fabrication, and even dangerous in their character as evidence upon this subject. Especially is this the case when the offers are proved only by the party to whom they are alleged to have been made, and not by the party making them. There is no chance to cross-examine as to the circumstances of the party making the offer in regard to good faith, etc. Evidence of this character is entirely different from evidence as to the price offered and accepted or rejected for articles which have a known and ready sale in the market. The price at the stock exchange of shares of stock in corporations which are there offered for sale or dealt in is some evidence of the value of such shares. So evidence of prices current among dealers in those commodities which are the subject of frequent sales by them would also be proper to show value. This evidence is unlike that of offers to purchase real estate, and affords no ground for the admissibility of the latter.

A reference to the authorities shows them to be almost unanimous against receiving evidence of this kind. Counsel have cited many cases on this subject and they are contained in the margin.[89] Most of them are clearly against the admissibility of the evidence, while

[89] Fowler v. Middlesex County Com'rs, 6 Allen (Mass.) 92, 96 (1863); Wood v. Firemen's Fire Ins. Co., 126 Mass. 316, 319 (1879); Thompson v. Boston, 148 Mass. 387, 19 N. E. 406 (1889); Anthony v. New York, P. & B. R. Co., 162 Mass. 60, 37 N. E. 780 (1894); Cochrane v. Com., 175 Mass. 299, 56 N. E. 610, 78 Am. St. Rep. 491 (1900); Hine v. Manhattan R. Co., 132 N. Y. 477, 15 L. R. A. 591, 30 N. E. 985 (1892); Keller v. Paine, 34 Hun (N. Y.) 167 (1884); Lawrence v. Metropolitan Elev. R. Co., 8 N. Y. Supp. 326 (1890); Young v. Atwood, 5 Hun, 234 (1875); Parke v. Seattle, 8 Wash. 78, 35 Pac. 594 (1894); Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224 (1893); St. Joseph & D. C. R. Co. v. Orr, 8 Kan. 419, 424 (1871); Minnesota Belt Line R. & Transfer Co. v. Gluek, 45 Minn. 463, 48 N. W. 194 (1891); Louisville, N. O. & T. R. Co. v. Ryan, 64 Miss. 399, 8 South. 173 (1886).

As distinguished from the general rule, see Whitney v. Thacher, 117 Mass. 523 (1875); Cliquot's Champagne, 3 Wall. 114, 141, sub nom. 125 Baskets of Champagne v. United States, 18 L. Ed. 116, 120 (1865); Chaffee v. United States, 18 Wall. 516, 542, 21 L. Ed. 908, 912 (1873), explaining Cliquot's Champagne; Muller v. Southern Pacific Branch R. Co., 83 Cal. 240, 23 Pac. 265 (1890), overruled by Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224 (1893); Harrison v. Glover, 72 N. Y. 451 (1878).

some, which at first sight might be regarded as exceptional, will be found upon closer examination to recognize the general rule as already stated. * * *

Judgment affirmed.

SECTION 4.—PHYSICAL OBJECTS [90]

HOOK v. PAGEE et al.

(Supreme Court of Appeals of Virginia, 1811. 2 Munf. 379.)

In a suit for freedom, the jury returned a verdict in the following words: "We of the jury find that the plaintiff Nanny Pagee was brought into the commonwealth of Virginia from the state of North Carolina, by Thomas Jones, subsequent to the fifth of October, 1778; that if the said plaintiff was a slave, it doth not appear to the jury that the said Thomas Jones did comply with the provisions of the act, entitled 'An act for preventing the further importation of slaves.' (a) We of the jury also find, from inspection, that the said plaintiff Nanny Pagee is a white woman. We of the jury, therefore, find that the plaintiffs are free persons and not slaves; and we find for them one penny damages."

Judgment for the plaintiffs, and appeal. * * *

COALTER, J.[91] * * * But, if I am wrong as to this, and if the first point is found under circumstances that would require another trial, if that were the only point on which the plaintiffs could succeed, yet I am clear that there can be no objection to the other finding, to wit, "that the plaintiff Nanny is a white woman."

The jury find this fact upon their own knowledge, in other words, by inspection. Was this improper?

The jury are to ascertain the fact one way or the other and from evidence.

"All certainty is a clear and distinct perception; and all clear and distinct perceptions depend upon a man's own proper senses; and, as all demonstration is founded on the view of a man's own proper senses, by a gradation of clear and distinct perceptions, so all probability is

[90] This topic might properly have been treated as a separate problem, rather than as a subdivision of circumstantial evidence, because it involves a distinct method of furnishing the jury with information, and in some instances a thing produced in court might directly establish an ultimate fact in issue; but since in most instances inspection of a thing is used, instead of a description of it, as a basis for some further inference, and in general the questions that arise are those of relevancy, undue prejudice, practical inconvenience, and the like, it seemed to the Editor that it might fairly be placed in the present chapter.

[91] Statement condensed and part of opinion of Coalter, J., and opinions of Cabell and Brooke, JJ., omitted.

founded upon obscure and indistinct views, or upon report from the sight of others."

If the plaintiff Nanny had not been before the jury, they must have found their verdict upon the testimony of others, which would have amounted only to a probability. But here, they have the highest evidence, the evidence of their own senses; and upon that they find a verdict: in other words, the jury find a verdict upon their own knowledge. They find a fact which makes it impossible for the defendant rightfully to hold this woman and her children as slaves; and they superadd to this finding, "that, therefore, they are free persons, and not slaves." Touching the evidence, as to this fact, there is no objection, or exception. The defendant introduces witnesses to prove that she is not a white woman. Those witnesses give their opinions from the evidence of their senses: no person proves her birth, or parentage. The jury believe their own senses, in preference to the opinions of the witnesses; and, if the court were in error on every other point, this fact, being fairly and legally found, must conclude the case.

I am, therefore, in favour of affirming the judgment.

Judgment affirmed.

MORTON v. FAIRBANKS.

(Supreme Judicial Court of Massachusetts, 1831. 11 Pick. 368.)

This was an action on the case for a fraud in the performance of a special contract, alleged to have been made by the defendant with the plaintiff, to manufacture a certain quantity of shingles for the plaintiff. * * *

Among other evidence introduced by the plaintiff to show a fraud in the manufacture and packing of the shingles, a trunk full of what was alleged by the defendant to be shingles was brought into court and exhibited to the court and jury. These were proved to have been taken out of bunches of shingles made by the defendant for the plaintiff. Upon inspection of them the court considered that they could in no sense be deemed shingles; that no prudent person would ever think of using them as shingles upon any building; that they were mere chips. The defendant contended that it was the province of the jury, and not of the court, to determine the nature of the things brought into court in the trunk, and whether they were or were not to be considered as shingles. But the judge ruled that as it was apparent by inspection that they were not shingles, and there was no doubt about it, it was proper that the court should decide the question. * * *

It was proved that the shingles were delivered to the plaintiff in bunches, that the outsides of the bunches appeared well, and that the plaintiff, at the time of the delivery and until he had paid the defendant, had no knowledge that any of the shingles were defective.

The jury found a verdict for the plaintiff.

The defendant filed exceptions to the foregoing decisions of the judge.

PER CURIAM.[92] * * * The second exception relates to the decision of the judge, that the articles brought into court were not shingles. The defendant contended, that whether they were shingles or not, was a question of fact for the jury, and that his rights were not to be affected by the circumstance of the evidence being more or less strong on that question; but it was ruled, that as the point was clear upon inspection, it was to be decided by the court. As the jury would have the whole case before them, this may seem to be a speculative objection; but we think that in strictness the point thus decided was a question of fact, and the jury may have been unduly influenced, for they may have considered themselves not at liberty to find contrary to the decision of the court. * * *

Exceptions sustained.[93]

CLOSE et al. v. SAMM et al.

(Supreme Court of Iowa, 1869. 27 Iowa, 503.)

Action to recover damages for flowing water back upon plaintiffs' mill-wheels, premises, etc., and injury thereby to his water power. The mills and dams of the respective parties are situated on the Iowa river, a short distance above Iowa City, and about two miles apart. * * *

The cause was tried to a jury, and a large amount of testimony was introduced by the respective parties; and the jury, by direction of the

[92] Statement condensed and part of opinion omitted.

[93] Compare Kennedy, J., in Duncan v. Duncan, 1 Watts (Pa.) 322 (1833): "It has been contended that the riband inserted in the parchment, in the manner described, was sufficient in law to constitute a seal, if so intended by the party; and that it ought, therefore, to have been received in evidence, and submitted to the jury as a matter of fact to be decided on by them, whether the riband was used with that intent or not. This argument may be ingenious, and, at first view, somewhat plausible; but a moment's reflection will show, as it appears to me, that it is not solid, and cannot answer the design of the law in regard to seals. I apprehend that whether an instrument of writing be under seal or not, is a question of law to be solved by the court from the inspection of the instrument itself. It is highly important to the interests of society, that every man should be able to determine with certainty upon looking at an instrument of writing, whether, if genuine, it is a deed or not, that is, whether it has what the law denominates a seal affixed to it or not; but it must be obvious that unless the true character of a seal is fixed by the law, which is uniform and certain, and may be known by every one, it will be oftentimes impossible to determine whether an instrument of writing is a deed or not. If parties are permitted to substitute any mark or device which their imagination may suggest for a seal, and it is to be made a question of fact to be decided by a jury whether it was so intended or not; it will not only introduce great confusion and uncertainty, but a principle which cannot be carried into effect without repealing some of the provisions of our statutes providing for the recording of deeds."

court proceeded, under the charge of the sheriff, to inspect the dams, wheels and premises testified about, and did inspect them. The jury returned a verdict for defendants. The plaintiffs appeal.

COLE, J.[94] * * * The next error assigned is upon the giving of the eighth instruction, which is as follows: "You will determine from all the evidence in the case, and all the facts and circumstances disclosed on the trial, including your personal examination, whether the water was by the act of the defendant backed up on the premises of the plaintiffs to the damage of their water power, as alleged. If you find that it was backed up to, or about, the line or beyond the line of plaintiff, but not in such a manner or to such a depth as to, at that time, or the commencement of this suit, cause any perceptible damage to the water power of plaintiffs, you will inquire no further, but find a verdict for the defendants."

Two points are made in argument upon this instruction: First. In allowing the jury to base their verdict, in any degree, upon their personal examination. Second. In requiring them to find perceptible damage to the water power of plaintiffs before they could return a verdict for them. During the progress of the trial, "the jury, by consent of parties and by direction of the court, proceeded, under charge of the sheriff, to inspect the dams, wheels and premises testified about, and did so inspect," as shown by the transcript. This inspection by the jury was ordered under the Revision, section 3061.[95] Whenever, in the opinion of the court, it is proper for the jury to have a view of the real property which is the subject of controversy, or of the place in which any material fact occurred, it may order them to be conducted in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose; while the jury are thus absent, no person other than the person so appointed shall speak to them on any subject connected with the trial." (A similar provision is made as to criminal trials. See section 4800.)

The question then arises as to the purpose and intent of this statute. It seems to us that it was to enable the jury, by the view of the premises or place, to better understand and comprehend the testimony of the witnesses respecting the same, and thereby the more intelligently to apply the testimony to the issues on trial before them, and not to make them silent witnesses in the case, burdened with testimony unknown to both parties, and in respect to which no opportunity for cross-examination or correction of error, if any, could be afforded either party. If they are thus permitted to include their personal examination, how could a court ever properly set aside their verdict as

[94] Statement condensed and part of opinions omitted.

[95] That at common law, independent of any statute, the court might properly in its discretion order a view by the jury, see Springer v. Chicago, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609 (1891), and cases there cited.

being against the evidence, or even refuse to set it aside without knowing the facts ascertained by such personal examination by the jury? It is a general rule, certainly if not universal that the jury must base their verdict upon the evidence delivered to them in open court, and they may not take into consideration facts known to them personally, but outside of the evidence produced before them in court. If a party would avail himself of the facts known to a juror, he must have him sworn and examined as other witnesses.[96]

WRIGHT, J. (dissenting). * * * The language of the same instruction, however, which allowed the jury to use their "personal examination" of the premises in determining whether there was back water, etc., is the material error relied upon in this connection.

As to this, I say briefly, that the jury had a view of the premises, and that by order of the court. This the law allows. That they had any thing else than this view is not pretended. If the only object of the statute was to enable the jury to better understand, and the more intelligently to apply the testimony of the witnesses, then I confess that I do not see why, upon this basis alone, they might not, in determining the ultimate facts, "include," or made use of, this "personal examination." If they use it to enable them to understand and apply the testimony, then, it seems to me, they are possessed of facts unknown to the parties—and whether the impressions received and the application of the testimony are true or false, can no more be discovered than if they have actually "burdened" themselves with testimony. And even in this view, therefore, the construction of the instruction would be unwarranted.

But I believe the statute intended that this personal examination or view should be used with the facts and circumstances, to aid in the determination of the cause. Thus, to take an illustration drawn from the criminal statute (which is similar to that provided for civil cases, Revision, §§ 3061, 4800)—if, in a homicide, the witnesses differ as to the distance between the parties as at the time of the fatal shot, those on one side placing it at fifty, and those on the other at one hundred, feet, and there is no disagreement as to the exact locality, I say the jury, having a view of the premises, have a perfect right to—that they must, that they cannot help calling to their aid their view of the locality and distance; and from these, with the testimony, they reach their conclusions. So, too, in a civil case, they may view "the place where any material fact occurred." A. charges that B. assaulted him in a building near to an inhabited dwelling to the north, but that the building had no window or other opening on that side, and that his cries for help were, hence, not heard. The existence or non-existence of such window becomes material, and the testimony is in direct con-

[96] Accord: Roberts v. City of Philadelphia, 239 Pa. 339, 86 Atl. 926 (1913), semble. See, also, cases collected in note to People v. Thorn, 42 L. R. A. 368 (1898).

flict. The jury are conducted to the place, and now, I ask, what are they to do? Make use of the view to apply the testimony, or see and know for themselves the exact condition of the wall—whether there is or not such an opening? I say the latter. Or to take another illustration, drawn from this case: There was disagreement as to whether there was or was not a perceptible current immediately below plaintiffs' dam. One party attempted to establish that there was, and, hence, that there was no back-water; the other, that there was not, and hence, interference with plaintiffs' power. Now, by no means claiming that the jury could do more than view the premises, I maintain that they could not do otherwise than look at the actual condition of the water, and that the view thus had becomes an aid; is to them, and for them, and for each and every man, testimony. It is said there is no chance for cross-examination; that the basis of the juror's conclusion may be erroneous. I answer, "All this is equally true, if he is to have the view only to better" understand and explain the testimony. And so I might illustrate my views in many other ways, but this must suffice. And if to this conclusion, the objection is that a court could not properly set aside a verdict, as being against evidence, because it could not know what it was, I answer, first, that this "view" is not allowed, except in the opinion of the court it is proper. And, second, the legislature doubtless considered this very difficulty, and yet deemed it better to give this power—the court, judging when it should be exercised—even though the difficulty of knowing upon what the verdict was based might be really increased, than to withhold it entirely. And especially so as the parties can be heard before the order is made, when this very objection, as applied to the particular case, can be fully presented and as fully considered. * * *

Judgment reversed.

HINNERS et al. v. EDGEWATER & FT. L. R. CO.

(Court of Errors and Appeals of New Jersey, 1908. 75 N. J. Law, 514, 69 Atl. 161.)

GARRISON, J.[97] This writ of error is brought by the railroad company to reverse the judgment rendered in the circuit court of Bergen county upon an appeal from the award of commissioners in a condemnation proceeding. * * *

A subject of more general interest is presented by the assignment based upon the exception to the language in which the trial court instructed the jury touching the use to be made by them of the view of the premises which in accordance with the requirement of the statute had been had. What the court said upon this point was as follows:

"You have listened to all the evidence in this case, but you may use your own judgment in connection with the testimony that is before

[97] Part of opinion omitted.

you. The whole question is a question of opinion, and the very object in sending you to look at this property was to enable you to form your own opinion as to the question which you are now called upon to decide, giving due consideration, of course, to the evidence which has been presented, and giving it such weight as you think it is entitled to. But nevertheless beyond that you have a right to use your own judgment in connection with the testimony, and say what you think the landowners ought to have for the value of the strip taken, and the cost of restoring their plant on some other part of the property."

On the part of the plaintiff in error, it was insisted that by this charge the jury were instructed that they might "bring in a verdict in accordance with their own opinions irrespective of the evidence." The defendant in error, on the other hand, contends that the jury was not instructed to give any such probative force to their view independently of or without due regard to the evidence, but that they were, on the contrary, expressly told to use their view in forming their judgment of the evidence and in reaching an opinion with reference thereto.

We think that the latter is the fair interpretation to be put upon the language in question, and that the trial judge did not fall into the error imputed to him by the former construction of his charge. Thus interpreted the instruction was a proper one. The view of the premises in condemnation cases is made not under the thirty-first section of the jury act (Gen. St. p. 1851), but under the express direction of the condemnation act (P. L. 1900, p. 79). Considering the radical differences that exist between the complex issues submitted to ordinary trial juries and the single question raised upon the appeal in condemnation cases, it may well be doubted whether the stringent rule laid down as to the limited function of an ordinary jury of view is at all applicable to condemnation proceedings. Speaking for myself, I think that it is not; and in many jurisdictions the distinction has been observed and acted upon. It is not, however, necessary in the present case to lay any especial emphasis on this distinction, for the reason that the charge under review does not when reasonably interpreted give any undue weight or latitude to the view that, under the statute, the jury is expressly required to make. In effect, the jury were told that they might make use of their view of the premises in forming their judgment of the testimony and in reaching an opinion upon its consideration, and that their opinion upon the questions they were to decide should be based upon the testimony as thus understood by them and applied to what they had seen. This I think is a correct charge. If the jury may not make this use of their view, it is impossible for me to conceive of any reason for the imperative requirement of the statute that a view must be had.

The circumstance that the jury's judgment of the testimony may in some instance be modified, and in extreme instances perhaps controlled by the result of their view, instead of militating against the construction contended for is the strongest reason for its adoption; for it is

admitted on all sides that one of the legitimate uses of a view is that the jury may understand the testimony. This being so, it may well follow as to some testimony that to understand it is to discredit it, while as to other testimony to understand it is to accept it even in the face of contradiction or denial. For instance, if the testimony were that a building was of insignificant size and in a tumble-down condition and the jury upon viewing the building saw that it was of large dimensions and in perfect repair, the testimony that contradicted the jury's observation would go for nothing, not because it had been overpowered by illicit evidence, but simply because it was understood by the jury for what it was worth. Instances may be multiplied in which the jury might properly use its view to check up the testimony adduced by the parties without any infringement by the jury of the rule that prohibits the importation into the case of outside, or even of inside, information through some other channel than that recognized by the law. The language of the charge in the present case is entirely consistent with this legitimate use by the jury of its view of the premises, and can only by the most strained construction be held to do violence to it. In what is thus said it must not be inferred that the condemnation act may not be subject to an even broader construction of its requirement for a view of the premises by the jury.

The case of De Gray v. N. Y. & N. J. Tel. Co., 68 N. J. Law, 454, 53 Atl. 200, relied upon by the plaintiff in error is entirely without application. That case was not at all concerned with the question of a view; indeed, neither the word nor the subject is once mentioned by Mr. Justice Fort in the opinion delivered by him in the Supreme Court. What that case held was that "the experiences of the jurors" as to whether telephone poles detracted from the market value of abutting land was an extrajudicial and improper means of arriving at a verdict. But obviously a decision upon that point can have no bearing upon a view that is expressly required by a statutory proceeding.

A discriminating and comprehensive statement of judicial decision upon this subject is contained in 15 Cyc. p. 880, subtit. "Eminent Domain"; and a similarly instructive summary will be found under the same caption in 7 Ency. Pl. & Pr. p. 581.

Our conclusion is that the points relied upon by the plaintiff in error direct our attention to no ground for the reversal of the judgment before us, which is therefore affirmed.

Judgment affirmed.[98]

[98] In Carpenter v. Carpenter (N. H.) 101 Atl. 628, L. R. A. 1917F, 974 (1917), the judge before whom a case was tried without a jury made a personal examination of a place in controversy which was beyond the state line, and it was urged that in so doing he conducted a part of the trial outside of the jurisdiction. In overruling this objection, Walker, J., said:

"In some sense the purpose of a view is the acquisition by the jury of a special and restricted kind of evidence, which the trial court in its discretion finds may be of use to the jury in reaching a verdict. The jury are not sent out to get evidence generally, or to examine physical facts not authorized in

the order. They do not hear oral testimony; no witnesses are examined; no arguments are made. They merely see such physical objects as are properly shown to them, and receive impressions therefrom. They get a mental picture of the locality, which as sensible men they carry back to the courtroom and use in their deliberations as evidence. It would therefore be senseless to say that in this restricted sense the information thus gained by actual inspection is not evidence which the trier of the fact is authorized to use in reaching a verdict, and which counsel are entitled to comment upon in argument. The acquisition of such evidence does not depend upon the oaths of witnesses, is not tested by cross-examination, and presents no questions of law calling for a ruling of the court on the grounds of admissibility or relevancy. The court as such has no function to perform when such evidence is presented, for it depends entirely upon the jury's ability to observe what is pointed out to them. No trial is had while the view is in progress, and the court is not in session at the place of the view for the trial of the case.

"The procedure by which special evidence of the character indicated becomes available is in fact based upon a useful rule of necessity, without which much valuable information clearly bearing upon the trial of cases would be withheld from the tribunal charged with the duty of deciding the facts. It provides a method by which evidence of a peculiar and restricted character may be obtained in the absence of the court and without the observance of the rules deemed essential in the production of evidence given in court. It may not be inaccurate to say that this procedure is anomalous, but is justified in fact as a necessary exception to the general rule that evidence must be produced in court subject to numerous judicial restrictions and directions.

"There is much apparent conflict in the language used by courts in defining the object or purpose of ordering or permitting views to be taken. In some of the authorities it is said that a view is, in no proper sense, intended to furnish evidence, but to afford a means by which the jury can better understand and apply the strictly legal evidence already in the case or to be thereafter submitted. This restrictive language is derived from St. 4 & 5 Anne, c. 16, § 8, where in the discretion of the court jurors may be ordered to take a view of the 'place in question, in order to their better understanding the evidence that will be given upon the trials of such issues.' Similar expressions occur in the statute law of many of the states. In this state the statute provides that: 'In the trial of actions involving questions of right to real estate, or in which the examination of places or objects may aid the jury in understanding the testimony, the court, on motion of either party may, in their discretion, direct a view of the premises by the jury, under such rules as they may prescribe.' P. S. c. 227, § 19. It is not clear how this distinction proves the proposition that the information derived from a view is not for all practical purposes evidence, or that it is not as much evidence as similar information conveyed by an inspection of a physical object exhibited to the jury in court.

"Other authorities hold that the information obtained by the jury upon a view is as much evidentiary in its character as the sworn testimony of witnesses regularly received in court, while still other courts regard it as evidence to be considered like sworn testimony, subject to the qualification that alone it is not sufficient to support a verdict. For cases in support of these differing opinions see note in 42 L. R. A. 385. While the purpose of a view is not to obtain 'evidence' in the broad sense of that term or to permit the jury to use their power of observation while taking a view to discover material facts not apparent from the actual situation of the things under observation, it is difficult to understand why the impressions made upon their minds by an inspection of a physical object regularly pointed out to them should not be permitted, in a legal sense, to have the force of evidence, when as a matter of simple mental reasoning honest jurymen could reach no other result. If the object is black when seen by the jury it would be absurd to expect them to find that it was white, in the absence of evidence indicating that they had been imposed upon. An instruction that although they knew from an authorized observation of it that it was black, they could not, as a matter of law, find it was of that color, because they had no legal evidence of it, would strike the ordinary mind as a strange and unreasonable doctrine,

ORSCHELN v. SCOTT.

(Court of Appeals of Missouri, 1901. 90 Mo. App. 352.)

ELLISON, J.[99] This is an action for damages alleged to have resulted to plaintiff by reason of defendant's assault upon him with a knife whereby one of his eyes was cut out. The verdict and judgment in the trial court was for plaintiff in the sum of $3,000. Of this sum the verdict stated that $2,500 was for compensatory, $500 was for punitive damages. The answer, besides a general denial, pleaded plaintiff's own first assault. * * *

The court gave an instruction that in estimating the damages the jury could consider the age of plaintiff. He was before the jury, and, as already stated, was a witness in the cause. Yet there was no evidence offered as to his age, and the defendant claims that such omission rendered the instruction improper. It was held by this court in two personal injury cases that in the absence of evidence offered in that behalf, it was error to give such instruction. Hinds v. City of Marshall, 22 Mo. App. 208; Gessley v. Railroad, 26 Mo. App. 156. Notwithstanding these cases, we are of the opinion that in a case of this nature, calling for a character of damages which are not the subject of ascertainment with mathematical precision, the inspection and observation of the jury is all that is necessary as a base upon which to place an instruction as to age. The question of age has its influence chiefly as to prospective damages during the life of the party. Such damages are necessarily uncertain and their mode of ascertain-

based upon a refinement in legal reasoning subversive of the just and practical administration of justice. 'There is no sense in the conclusion that the knowledge which the jurors acquired by the view is not evidence in the case.' 1 Thomp. Trials, § 893; 2 Wig. Ev. § 1168; Tully v. Railroad, 134 Mass. 499 [1883]; 7 Enc. Pl. & Pr. 581. There is little merit in the contention that the libelant had no means of knowing what impressions the evidence produced by the view had upon the justice, and hence that no way was open to meet or explain them; for this is equally true when a jury takes a view.

"A more extended discussion of this subject or a critical examination of the cases outside this jurisdiction which seem to be germane is unnecessary, because the unquestioned practice in this state shown by the cases is determinative of the question. A view is one means of obtaining a certain class of evidence. Information thus acquired by the jury, which is material to the issue and necessarily involved in the subject-matter of the view, has been recognized as evidence in the following cases, among others, without a suggestion that its use as such was open to doubt: Cook v. New Durham, 64 N. H. 419, 420, 13 Atl. 650 [1887]; Concord Land & Water Power Co. v. Clough, 70 N. H. 627, 47 Atl. 704 [1900]; Flint v. Company, 73 N. H. 483, 485, 62 Atl. 788 [1906]; Lane v. Manchester Mills, 75 N. H. 102, 106, 71 Atl. 629 [1908]; City Bowling Alleys v. Berlin, 78 N. H. 169, 170, 97 Atl. 976 [1906]; Osman v. Company, 78 N. H. 597, 99 Atl. 287 [1916]."

Whether a view by the jury is such a part of the trial as to require the presence of the defendant in a criminal case, see People v. Thorn, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368 (1898), annotated.

[99] Part of opinion omitted.

ment is necessarily indefinite, and much is necessarily left to the sound sense and discretion of the jury. This is constantly repeated in adjudicated cases in this State and elsewhere. It is not necessary to fix an exact age in order that the jury may estimate the future. In cases of this character, it is of no practical importance to know the precise age. It is not a case of that kind. It would make no appreciable or substantial difference in the jury's estimate of probable future damages, whether the injured party was ten, or twelve years of age; or, whether he was forty or forty-one, two, three or four years old. Mortality tables are not necessary as evidence. If this is not true, then the age to the month and day should be proven. And if the age is not known, even by the plaintiff himself, as is sometimes the case, the jury would not be at liberty to make any estimate, in that respect of future damages. Their observation of the person himself during the trial would be of no importance. It seems to me, therefore that the observation of plaintiff by the jury was sufficient as a basis from which to estimate the damages.

"Inspection is to be regarded rather as a means of dispensing with evidence than as evidence itself. That which the court or jury sees, need not be proved. The appearance of a defendant, for instance, so as to make up a basis of comparison in cases of identity, need not be proved by testimony, when the defendant appears in person at the trial. By the Romans, this method of proof is frequently noticed. * * * Nor is it only the immediate object presented to the eye that is thus proved. Inferences naturally springing from such appearances are to be accepted; age, bodily strength, being thus inferred. * * *" 1 Wharton on Evi., § 345.

Greenleaf (volume 1, § 13a) says, that the court has at its disposal for the ascertainment of fact "self-perception or self-observation, autoptic proference; i. e., the presentation of the object itself for the personal observation of the tribunal." And in sections 13b to 13d he approves of establishing age by observation. So it has been decided, and that, too, in criminal cases, that observation of the jury could be relied upon to establish the age of an accused. Com. v. Emmons, 98 Mass. 6 (approved in Keith v. Railroad, 140 Mass. 175, 3 N. E. 28); State v. Arnold, 35 N. C. 184; State v. McNair, 93 N. C. 628. We regard this view as having met the approval of our Supreme Court in the case of State v. Thompson, 155 Mo. 300, 55 S. W. 1013. In that case it was necessary to establish that the defendant was over sixteen years of age. He was a witness and Judge Gantt said: "Not only could they (the jury) use their eyes in determining that fact, but the defendant testified that he was a graduate," etc. And so, on kindred subjects, the same rule had frequently been laid down. Thus, observation of resemblance between father and child, when the latter is old enough to have distinctive features, will establish the paternity of the party alleged to be the father. State v. Smith, 54 Iowa, 104, 6 N. W. 153, 37 Am. Rep. 192; State v. Horton, 100 N. C. 443, 6 S. E.

238, 6 Am. St. Rep. 613; Clark v. Bradstreet, 80 Me. 454, 15 Atl. 56, 6 Am. St. Rep. 221; Gilmanton v. Ham, 38 N. H. 108; State v. Woodruff, 67 N. C. 89; Gaut v. State, 50 N. J. Law, 490, 14 Atl. 600. And observation will suffice to show race or color of person. Garvin v. State, 52 Miss. 207; Warlick v. White, 76 N. C. 175.

Indeed, it is universally conceded that where the party in question is absent, the opinion of the witness as to his age, formed from his appearance, is competent evidence: Lawson on Expert and Opin. Evi. 528; Rogers on Expert Test. 10; Elsner v. Sup. Lodge K. of H., 98 Mo. 645, 11 S. W. 991; State v. Douglass, 48 Mo. App. 39; Commonwealth v. O'Brien, 134 Mass. 198; State v. Bernstein, 99 Iowa, 5, 68 N. W. 442; Jones v. State, 32 Tex. Cr. R. 108, 22 S. W. 149; Bice v. State, 37 Tex. Cr. R. 38, 38 S. W. 803; Garner v. State, 28 Tex. App. 561, 13 S. W. 1004; Benson v. McFadden, 50 Ind. 431; State v. Grubb, 55 Kan. 678, 41 Pac. 951. Now it is manifest that if an ordinary nonexpert witness may form an opinion of an absent person's age from his appearance, and may give that opinion in evidence, the jury also can form an opinion from the appearance of the party who is present before them during the trial, especially when he is both a party and a witness. Why should a witness testify to that which the jurymen see for themselves? If a black man is before a jury as a party and witness, must others be called upon to tell the jury that he is black? Where a jury has as much opportunity for knowledge of a non-expert subject as anyone else, it is idle to call others to tell them what they already see and know. If the witness agrees with the jury's observation, his testimony is useless and if he testifies in the face of what they see for themselves, they will refuse to credit him. The very question now before us was decided in Commonwealth v. Emmons, 98 Mass. 6, supra. That case was a prosecution charging the defendant with permitting two minors to play billiards at his place. One of them was a witness, but there was no proof of his age, and the trial court "ruled that the jury might determine by personal inspection of him whether or not he was a minor." On appeal, the Supreme Court of Massachusetts said:

"There is nothing in the bill of exceptions from which it can be inferred that the defendant was aggrieved by the ruling of the court in permitting the jury to judge whether one of the alleged minors was under age, from his appearance on the stand. There are cases where such an inspection would be satisfactory evidence of the fact. It certainly was not incompetent for the jury to take his appearance into consideration in passing on the question of his age; and, as it does not appear that this may not have afforded plenary evidence of the fact, the defendant fails to show that he was convicted on insufficient evidence, or that he has been prejudiced by the ruling of the court." * * *

It follows from the foregoing that defendant's objection to the want of evidence as to age is not well founded.

During the trial, plaintiff was permitted, over defendant's objection, to exhibit the empty eye-socket to the jury with the scar above and below. It is said in support of defendant's objection that it was admitted that defendant had cut and destroyed the eye and that the exhibition to the jury could serve no other purpose than to excite their pity and sympathy. Undoubtedly such was the tendency. But if plaintiff was entitled to make the showing, such result can only be regarded as an unavoidable consequence. It is a result which follows, in greater or less degree, the mere entrance of a maimed litigant into the courtroom. It was a species of real evidence, or, to use Greenleaf's language, of autoptic proference. There was no better way to show the extent of the injury, thereby aiding in the estimate of damages. Haynes v. Trenton, 123 Mo. 335, 27 S. W. 622; Thompson on Trial, § 858; Carrico v. Railroad, 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50. Such exhibition is generally and rightly treated as a proper process of proof, subject to occasional exclusion in cases of abuse. 1 Greenleaf on Evi. § 13f; 2 Taylor on Evi. 3656. * * *

ELLISON, J. Since the foregoing opinion was written, but before it was promulgated, we have been cited to the case of Phelps v. City of Salisbury,[100] * * * just reported in 161 Mo. 1, 61 S. W. 582, wherein it is held by the Supreme Court that an instruction as to a plaintiff's age when there was no evidence thereof introduced was error, notwithstanding he was present before the jury. Our conclusion on that subject, as expressed in the foregoing opinion, must therefore be considered not authority.[101]

WISTRAND v. PEOPLE.

(Supreme Court of Illinois, 1904. 213 Ill. 72, 72 N. E. 748.)

This is a writ of error, sued out of this court by Charles Wistrand, the plaintiff in error, to review a judgment of the criminal court of Cook county whereby plaintiff in error was adjudged guilty of the crime of rape and sentenced to the penitentiary for a term of two years.

The indictment consisted of three counts. The first and third charged rape by force upon one Eva Goldstein. There was no evidence of the use of force to sustain these counts. The second count charged the commission of the crime without force, alleging that the defendant was a male person above the age of 16 years, that the female was under the age of 14 years, and that the act was committed with the consent of the female. * * *

[100] In this case the Supreme Court apparently held that inspection alone did not furnish a sufficient basis to determine age for this purpose.

[101] In State v. Gebhardt, 219 Mo. 708, 119 S. W. 350 (1909), it was held that the jury might properly find that defendant was over sixteen from inspection and the fact that he was an attorney.

SCOTT, J.[102] * * * In this case the fact that the female had not reached the age of 14 was shown by the evidence of her father. The fact that the sexual intercourse took place was shown by the evidence of the female herself, and by the written confession of the male, made shortly after his arrest. This confession contained also a statement that he was 44 years old, and his age was not otherwise proven. It is elementary that the corpus delicti cannot be proven by the confession of the defendant alone. May v. People, 92 Ill. 343; Williams v. People, 101 Ill. 382; Gore v. People, 162 Ill. 259, 44 N. E. 500. Unless the defendant was above the age of 16 at the time of the alleged commission of the offense, there was no violation of the statute. It was as essential to prove his age as it was to establish the age of the female, or to show that fornication occurred. Either of the three elements lacking, the corpus delicti is not established. Consequently, there should be evidence tending to establish each of these three necessary facts, aside from the confession of the defendant. So far as proving his age was concerned, there was no evidence except his confession. It follows, therefore, that without his confession there was no proof that a crime had been committed, because, except he was more than 16 years of age, no crime was committed. For the purpose of fixing the age of the defendant, persons who had seen him would have been competent to testify relative to his appearance, and such testimony would have been proper for the consideration of the jury on the question of age.

Defendant in error suggests that the defendant was present in court on the trial, and that this, together with the confession, was sufficient to justify the jury in finding him to be more than 16 years of age. The defendant did not take the witness stand except on a preliminary question in reference to the admission of his confession in evidence, and the jury was excluded from the courtroom while he was testifying on that subject. But whether he did or did not testify, the law does not allow the jury to fix his age by inspecting his person. Stephenson v. State, 28 Ind. 272. While the appearance of the defendant might be conclusive evidence to the jury, there would be some difficulty in having evidence of that character preserved in the bill of exceptions for the inspection of a court of review. "To allow a jury to make up their verdict upon a disputed fact from their own individual observation would be most dangerous and unjust." Seaverns v. Lischinski, 181 Ill. 358, 54 N. E. 1043.

There is no merit in the other errors assigned. The judgment will be reversed, and the cause will be remanded to the criminal court of Cook county.

Judgment reversed.[103]

[102] Statement condensed and part of opinion omitted.

[103] See Quinn v. People, 51 Colo. 350, 117 Pac. 996, 40 L. R. A. (N. S.) 470 (1911), suggesting that whether a person was under age might be determined

HANAWALT v. STATE.

(Supreme Court of Wisconsin, 1885. 64 Wis. 84, 24 N. W. 489, 54 Am. Rep. 588.)

TAYLOR, J. This was an action to charge the plaintiff in error with the support and maintenance of a bastard child. On the trial in the circuit court the state was permitted, against the objection of the plaintiff in error, to bring into court, and exhibit to the jurors for their inspection, as evidence in the case, the child of which he was charged with being the father; such child then being less than one year old. This is assigned as error in this court. The plaintiff also assigns as error that the counsel for the state was permitted to comment to the jury and draw their attention to the alleged similarity of the ears of the child to the ears of the plaintiff in error, as well as to the ears of the plaintiff's father, who was also in court, and in the presence of the jury, the child, at the time, being absent. Upon the question of the propriety of exhibiting the child to the jury as evidence in cases involving its paternity, the decisions of the courts are not in harmony. In North Carolina the supreme court of that state hold that such exhibitions may properly be made. See State v. Woodruff, 67 N. C. 89; State v. Britt, 78 N. C. 439; Warlick v. White, 76 N. C. 175; and State v. Bowles, 52 N. C. 579. The same was held by the supreme court of Iowa in State v. Smith, 54 Iowa, 104, 6 N. W. 153, 37 Am. Rep. 192. In this last case the child was over two years old; but, in the case of State v. Danforth, 48 Iowa, 43, 30 Am. Rep. 387, the same court held it was improper to exhibit to the jury a child only three months old. In Eddy v. Gray, 4 Allen (Mass.) 435, Jones v. Jones, 45 Md. 144, and Keniston v. Rowe, 16 Me. 38, the court hold that testimony of witnesses that the child looks like or resembles in appearance the person charged to be the father is not admissible, and in Reitz v. State, 33 Ind. 187, and Risk v. State, 19 Ind. 152, it was held error to allow the prosecution to give the child in evidence, so that the jury might compare it with the defendant who was present in court.

In the Douglas Case, Lord Mansfield is reported as saying: "I have always considered likeness as an argument of a child's being the son of a parent; and the rather as the distinction between individuals in the human species is more discernible than in other animals. A man may survey ten thousand people before he sees two faces perfectly alike, and in an army of a hundred thousand men every one may be known from another. If there should be a likeness of feature, there may be a discriminancy of voice, a difference in the gestures, the

in some cases by mere inspection, but not unless attention was called to the matter, and hence where nothing appeared beyond the fact that the alleged minor was before the jury a general verdict could not be supported.

It would seem that appellate courts might assume that the trial judge could use his eyes and determine whether there was any real question which required something more than inspection.

smile, and various other things, whereas a family likeness runs generally through all these, for in everything there is a resemblance; as of features, size, attitude, and action." This language attributed to Lord Mansfield is taken from Wills on Circumstantial Evidence, p. 123. This author, on the next page, says that in a Scotch case, when the question was who was the father of a certain woman, an allegation that she had a strong resemblance in the features of the face to one of the tenants of the alleged father was held not to be relevant as being too much a matter of fancy and of opinion to form a material article of evidence. In the case of Jones v. Jones, supra, the learned judge who wrote the opinion refers to the language used by Lord Mansfield in the Douglas Case, and disapproves of it as authority, and thinks it has not been followed as a precedent in the English courts; and he quotes with approval the language of Justice Heath in the case of Day v. Day, decided in 1797, in which the learned judge stated to the jury "that resemblance is frequently exceedingly fanciful, and he therefore cautioned the jury as to the manner of considering such evidence." The learned judge in the case of Jones v. Jones, supra, in disapproving of the language used by Lord Mansfield, says: "We all know that nothing is more notional in the great majority of cases. What is taken as a resemblance by one is not perceived by another with equal knowledge of the parties between whom the resemblance is supposed to exist."

It should be remembered that in the Douglas Case, and the Maryland case, the question of parentage was as to a person who was full grown. So that if there is anything certain in family likeness it would be fully developed, and if in any case such claimed likeness could be considered by a jury in determining the question of parentage, it would be in a case of that kind. In the case of Jones v. Jones, the court seemed to be of the opinion that, "when the parties are before the jury, and they can make the comparison for themselves, whatever resemblance is discovered may be a circumstance, in connection with others, to be considered." In any case this kind of evidence is inherently unsatisfactory, as it is a matter of general knowledge that different persons, with equal opportunities of observation, will arrive at different conclusions, even in the case of mature persons, where a family likeness will be fully developed if there be any. And when applied to the immature child its worthlessness as evidence to establish the fact of parentage is greatly enhanced, and is of too vague, uncertain, and fanciful a nature to be submitted to the consideration of a jury.

The learned author of "Beck's Medical Jurisprudence" says: "It has been suggested that the resemblance of a child to the supposed father might aid in deciding doubtful cases. This, however, is a very uncertain source of reliance. We daily observe the most striking differences in physical traits between parent and child, while individuals born in different parts of the globe have been mistaken for each other. And even as to malformations, although some remarkable resemblances in this respect have been noticed between father and child, yet we

should act unwisely in relying too much on them. There is, however, a circumstance connected with this which, when present, should certainly defeat the presumption that the husband or paramour is the father of the child, and that is when the appearance of the child evidently proves that its father must have been of a different race from the husband or paramour, as when a mulatto is born of a white woman whose husband is also white, or of a black woman whose husband is a negro." In a case where the question of race is concerned, the child may be exhibited for the purpose of showing that it is or is not of the race of its alleged father. Warlick v. White, 76 N. C. 175. In a case like the one at bar, we think no exhibition should be made.

Justice Lyon, in the case of Washburn v. Railroad Co., 59 Wis. 364–370, 18 N. W. 328, says: "To allow jurors to make up their verdict on their individual knowledge of disputed facts material to the case, not testified to by them in court, or upon their private opinions, would be most dangerous and unjust. It would deprive the losing party of the right of cross-examination and the benefits of all the tests of credibility which the law affords. Besides, the evidence of such knowledge or the grounds of such opinions cannot be preserved in a bill of exceptions or questioned on appeal. It would make each juror the absolute judge of the accuracy and value of his own knowledge or opinions, and compel the appellate court to affirm judgments on the facts when all the evidence is before it, and there is none whatever to support the judgment." This reasoning clearly shows the impropriety of permitting the jury to base their judgment, in whole or in part, upon their inspection of the child exhibited to them in court. If the child itself, when presented to the jury for inspection, is or may be evidence tending to prove its parentage, then this court upon appeal could not reverse their verdict, although the written bill of exceptions entirely fail to support such verdict, for the reason that this court would not have before it all the evidence in the case upon which the jury acted.

The learned attorney general says the bill of exceptions does not show that the child was exhibited to the jury as evidence in the case. In this he appears to be mistaken, as, in the part of the bill of exceptions which follows the reporter's notes of the evidence, it is clearly stated that "in course of the trial the plaintiff produced in court the child claimed to have been begotten by the defendant, and proposed to exhibit the same to the jury as evidence that it was the defendant's child. The defendant objected, and the court ruled that the child might be exhibited in evidence, but that no comments should be made." This statement, it will be seen, is made a part of the bill of exceptions.

The comments made by the counsel for the state to the jury in his argument, calling the attention of the jury to a peculiarity of the ears of the defendant and of his father, and his assertion that the child had the same peculiarity as to the ears, in the absence of the child, and without its appearing that the attention of the jury had been before called to such alleged peculiarity of the ears of the child, the defendant,

or his father, was highly improper and was likely to prejudice the rights of the defendant. This impropriety on the part of the prosecuting attorney might, in itself, be sufficient ground for a reversal of the judgment, in the absence of any direction on the part of the presiding judge to the jury to disregard entirely the statements so made by the counsel, and a clear statement to the jury by such judge of the impropriety of such comments on the part of the counsel in his argument.

For the errors in permitting the child to be exhibited to the jury as evidence in the case, tending to prove its paternity, and on account of the impropriety of the counsel for the prosecution in calling the attention of the jury to the alleged peculiarity of the child, the defendant's, and his father's ears, as above set forth, the judgment of the circuit court must be reversed.

The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

STATE ex rel. RISON v. BROWNING.

(Supreme Court of Kansas, 1915. 96 Kan. 540, 152 Pac. 672.)

BURCH, J. The proceeding was one for bastardy. The defendant was found guilty, and the principal errors assigned are that the child was exhibited to the jury as evidence in the case, and that the county attorney in his closing argument discussed the subject of its resemblance to the defendant.

The child was born on December 24, 1913, and the trial occurred on May 11, 1914. There are instances in which physical characteristics of a father are stamped upon his child so definitely that they distinctly appear at birth, or even before birth. In some instances resemblances may not appear until late in the course of the child's independent development, and in still other instances resemblances may never appear with recognizable certainty. Sometimes a child may strongly resemble one not its father, and not related to it. The result is that the evidence of paternity furnished by the features of the child may be strong or weak, or inconclusive, or worthless.

No arbitrary age limit for the exhibition of a child in evidence can be fixed, because maturity and permanence of feature may be of slow or of rapid attainment, and because marked resemblances appearing early may fade with the changes incident to growth. There is no other test that can be applied, and it becomes the province of the trial court to exercise its discretion in the matter. If in the judgment of the trial court the exhibition of the child to the jury would appreciably tend to promote the purpose of the proceeding, the exhibition should be permitted. If, however, the trial court should be satisfied that no substantial advancement toward the truth would result from the exhibition, it should be forbidden.

An exercise of the trial court's discretion can seldom be reviewed by this court, because it can seldom be shown either that power was abused or that prejudice resulted. Like a scene viewed by the jury or the demeanor of a witness while testifying, the matter cannot be presented to this court in such a way that it is authorized to substitute its judgment for that of the district court. Should it be admitted that the evidence was weak, or inconclusive, or worthless, the presumption would be that the jury appreciated the fact, and gave it no more weight than it was entitled to receive.

Substantially the foregoing conclusions respecting the authority of the trial court and the attitude of this court toward an exercise of such authority were reached in the case of Shorten v. Judd, 56 Kan. 43, 48, 42 Pac. 337, 338, 54 Am. St. Rep. 587, in which it was said:

"While in most cases evidence of family resemblance by view and comparison of the jury is of little value in proof of parentage, yet it has often been held admissible where the child has attained an age when its features have assumed some degree of maturity and permanency. Where the child is a young infant, it has been held best not to exhibit it to the jury. Much must be left to the discretion of the trial court, however, as to the proper age, and we would not feel warranted in a reversal of the judgment in this case on account of the child's appearance before the jury."

Whenever the child is exhibited to the jury as proof of paternity, counsel are at liberty to discuss the subject.

The judgment of the district court is affirmed. All the Justices concurring.[104]

WAGNER v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Illinois, 1917. 277 Ill. 114, 115 N. E. 201.)

CARTWRIGHT, J.[105] * * * The action was for damages in the loss of a part of the plaintiff's foot while coupling cars as foreman of a switching crew in the service of the defendant. * * *

The court permitted the plaintiff to exhibit his foot to the jury, and also to exhibit the shoe which he wore at the time of the accident and to offer the shoe in evidence. Whether one who is injured may exhibit an injured member to the jury is primarily in the discretion of the trial court, and it is properly exercised in any case where the personal view will aid the jury in understanding the evidence, and that may be so where there is no controversy concerning the injury nor the extent of it, as was the fact in this case. Chicago & Alton Rail-

[104] Contra: In case of a child three months old, Flores v. State (Fla.) 73 South. 234, L. R. A. 1917B, 1143 (1916), annotated.

See People v. Kingcannon, 276 Ill. 251, 114 N. E. 508 (1916), admitting proof that a child and its alleged father had similar malformations of the hand.

[105] Part of opinion omitted.

road Co. v. Clausen, 173 Ill. 100, 50 N. E. 680. Where, however, the only purpose and effect of an exhibition of that kind is to excite feeling rather than to enlighten the jury as to any fact or to aid in settling any disputed question of fact, it should not be permitted. In this case there was not only no controversy concerning the injury nor the extent of it, as was stated at the time of the proposed exhibition, but the evident purpose was to excite in the minds of the jury pity and commiseration for the condition of the plaintiff and thereby to increase the damages. The exhibition for the purpose which the record shows was intended should not have been allowed, and if it now appeared that the damages allowed were excessive it would be necessary to reverse the judgment. In view, however, of the amount of the recovery, it would seem that substantial injury did not result from what was done. * * *

Judgment affirmed.[106]

[106] See Evans v. Chicago, M. & St. P. R. Co., 133 Minn. 293, 158 N. W. 335 (1916), where a new trial was granted because the court permitted plaintiff's amputated hand to be shown to the jury. And so in Melton v. State, 47 Tex. Cr. R. 451, 83 S. W. 822 (1904), where the widow was permitted to make a dramatic display of blood-stained clothing worn by the deceased.

CHAPTER VI

THE BEST EVIDENCE

SECTION 1.—CONTENTS OF A DOCUMENT

DOCTOR LEYFIELD'S CASE.

(Court of the Exchequer, 1611. 10 Coke, 88a.)

John Leyfield, Doctor of Divinity, brought an action of trespass in the King's Bench, Hil. 8 Jac. Regis, Rot. 1282, against Henry Hillary, for corn and hay taken and carried away at Old Cleve in the county of Somerset. The defendant pleaded in bar, that Queen Elizabeth was seised of the Rectory of Old Cleve in the same county in her demesne as of fee, as in right of the Crown of England; and by her letters patent 20 Junii 35 of her reign (without saying [1 Bulstr. 154. Cr. Jac. 317. 2 Roll. Rep. 172, 191. 1 Rol. Rep. 221. 5 Co. 74a. Lane, 32] "here shewed forth") demised the said rectory to Conand Prowse for his life, who 16 Jan. anno. 3 Jac. Regis demised the said rectory to George Pincomb for eight years, if the said Conand tam diu viveret; and that the defendant as servant to the said George, took the corn and hay as tithes severed from the nine parts, and averred the life of the said Conand: upon which the plaintiff demurred in law, and shewed the cause of his demurrer, because the defendant's plea amounted to the (Winch. 20. Jenkins Cent. 133) general issue. And it was adjudged in the King's Bench, that the bar was insufficient, because the defendant in his plea (Cr. Eliz. 146, 217. 1 Leon. 178. 1 Bulstr. 155. Cr. Jac. 317. Lit. Rep. 306) did not shew the Court the letters patent of Queen Elizabeth made to Conand Prowse, which the Court took to be matter of (Co. Lit. 72a.) substance, and which the defendant ought to have shewed forth, although he, in whose right he justified, had but part of the estate. Whereupon a writ of error was brought in the Exchequer-Chamber, and there two errors were moved.[1] * * *

As to the other error which was assigned, the said two points were argued. 1. If the letters patent ought to be shewed by the defendant, who justifies as servant to him who has but parcel of the estate of him to whom the letters patent were granted. 2. Admitting that he ought to shew them, if the omission of this clause (Cur' hic porlat') be matter of substance or matter of form; for if it be but matter of

[1] Part of report of case omitted.

form, then forasmuch as the plaintiff has not shewed it particularly and expressly for this cause of demurrer, he shall not take advantage of it by the said statute of 27 El. cap. 5. And as to the first, Austin's Case, in 1 & 2 P. & M. Dy. 115, was cited, where in an information of intrusion in the manor of East Farleigh in Kent, the defendant pleaded the letters patent of King Henry 8. to Sir Thomas Wyat in tail, and that Sir Thomas leased to him for thirty-six years, without shewing forth to the Court the letters patent; and the Lord Dyer in reporting the case, saith, nota hoc; and this stands, as it was said, upon great reason, for the lessee having but parcel of the estate, the letters patent do not belong to him, but to his lessor, and therewith agrees 29 Ass. p. 2, J. Eatbread's Case, and the reason there given, is, because the patent doth not remain with him who has but parcel of the estate. And in 28 H. 8, Dy. 29 b, in trespass the defendant said, that the place where, was ten acres of land, whereof the King was seised in fee in the right of his Crown; and by his letters patent granted the land to the Lady Carew for term of life, who leased to the defendant for years, and averred the life of the first lessee, and so justified, and it was moved if the plea was good without shewing the first letters patent; and it was held by Brown, Willowby, and Baldwin, that he shall not be compelled to shew them, because the letters patent do not belong to him, no more than a sub-collector, under-sheriff or incumbent, because they have not any means to make their grantors or masters shew them: and by them there is a difference, when the patentee grants over his whole interest, there the patent belongs to him, and therefore he shall shew it forth, but when he grants by parcel, it is otherwise: and with the case of the incumbent agree 31 E. 3. Monstrans des Faits 177 & 31 H. 6, 14, and the case of the sub-collector and under-sheriff, 22 H. 7, 42 a. & 3. 1 H. 6, 14 b. 12 E. 3. Monstrans de Faits 65. A subtaxer shall justify the taking of goods without shewing the commission; but if a man will justify the imprisonment of the body of a man by warrant, he ought to shew the warrant.

But it was resolved, that the lessee for years in the case at Bar ought to shew the letters patent made to the lessee for life: for it is a maxim in the law, that if he who is party or privy in estate, or interest, or he who justifies in the right of him who is party or privy pleads a deed, although he who is privy claims but parcel of the original estate, yet he ought to shew the original deed to the Court.

And the reason that deeds being so pleaded shall be shewed to the Court, is, that to every deed two things are requisite and necessary; the one, that it be sufficient in law, and that is called the legal part, because the judgment of that belongs to the Judges of the law; the other concerns matter of fact, sc. if it be sealed and delivered as a deed, and the trial thereof belongs to the country. And therefore every deed ought to approve itself, and to be proved by others; approve itself upon its shewing forth to the Court in two manners. 1. As to the composition of the words to be sufficient in law, and the

Court shall judge that. 2. That it be not razed or interlined in material points or places, and upon that also in ancient time the Judges did judge upon their view, the deed to be void, as appears in 7 E. 3, 57. 25 E. 3, 41. 41 E. 3, 10. &c. but of late times the Judges have left that to be tried by the jury, s. if the razing or interlining was before the delivery. 3. That it may appear to the Court and to the party, if it was upon condition, limitation, or with power of revocation, &c. to the intent that if there be a condition, limitation, or power of a revocation in the deed, if the deed be poll, or if there wants a counterpart of the indenture, the other party may take advantage of the condition, limitation, or power of revocation, and therewith Litt. c. Conditions, f. 90 & 91, 40 Ass. 34, agree. And these are the reasons of the law, that deeds pleaded in Court, shall be shewed forth to the Court. And therefore it appears, that it is dangerous to suffer any who by the law in pleading ought to shew the deed itself to the Court, upon the general issue to prove in evidence to the jury by witnesses that there was such a deed, which they have heard and read; or to prove it by a copy, for the viciousness, rasures, or interlineations, or other imperfections in these cases, will not appear to the Court; or peradventure the deed may be upon condition, limitation, with power of revocation, and by this way truth and justice, and the true reason of the common law would be subverted. But yet in great and notorious extremities, as by casualty of fire, that all his evidences were burnt in his house, there if that should appear to the Judges, they may, in favour of him who has so great a loss by fire, suffer him upon the general issue to prove the deed in evidence to the jury by witnesses, that affliction be not added to affliction; and if the jury find it, although it be not shewed forth in evidence, it shall be good enough, as appears in 28 Ass. p. 3, but in 12 Ass. p. 16, the Judges would not suffer a deed to be given in evidence which was not shewed forth to the jury. Vide 26 Ass. p. 2, the like. But the copy of a record may be shewed and given in evidence to the jury for records are of so high a nature, and such credit in law, that they cannot be proved by other means than by themselves and no rasure or interlineations shall be intended in them. And therefore a copy of a record being testified to be true, is permitted to be given in evidence; but the sure way is, to exemplify it under the Great Seal, or at least under the seal of the Court. And in the said case of casualty by fire there ought to be great care and discretion in the Judges, for notwithstanding any such casualty by fire, he in pleading ought to shew forth the deed to the Court, otherwise his plea will be insufficient and judgment shall be given against him; for the law will rather suffer a mischief in a private case, than an inconvenience, which by the breaking of the rule of law, should be brought upon the public. Also the deed ought not only, as hath been said, to approve itself, but it ought to be proved by others, sc. by witnesses, that it was sealed and delivered; for otherwise although the fabric and composition of the deed be legal, yet without

the other it is of no effect; and all of this which has been said of deeds, as to the legal part, may be also affirmed of the King's letters patent. * * *

Judgment affirmed.[2]

SIR EDWARD SEYMOUR'S CASE.

(Court of Queen's Bench, 1711. 10 Mod. 8.)

In a trial of ejectment between Sir Edward Seymour and his mother-in-law, the Court allowed the contents of a deed to be given in evidence, by witnesses; nay witnesses who put the contents of the deed in writing upon memory, four or five days after reading the deed.

The Court seemed of opinion, that in case a deed was lost by some inevitable accident, that there it might be proved by a copy. But in case there was no copy, the contents of it could not be proved from the memory of those that knew the deed; and though it were hard for a man that had no copy, to lose the benefit of his deed, yet the inconveniences of admitting that sort of evidence would be greater.

But here the opinion of the Court was founded upon a particular reason, for the deed by which the plaintiff was to prove his title was not lost, but proved to be in the hands of the defendant; so that in this case the danger of allowing this sort of evidence was none at all; for if the defendant was wronged by the parol evidence, it was in his power to set all right by producing the deed.

JONES v. RANDALL.

(Court of King's Bench, 1774. 1 Cowp. 17.)

This was an action upon a wager, whether a decree of the court of Chancery would or would not be reversed in the house of lords? Verdict for the plaintiff, damages fifty guineas.

Upon a rule to shew cause, why there should not be a new trial in this case, three objections were made to the sufficiency of the evidence given at the trial. 1st. That a copy of the reversal only, and not the minute book itself, was produced. 2dly. If such copy was admissible,

[2] After the rule became settled that the accidental destruction of a deed was a sufficient excuse for its nonproduction in evidence, it was inevitable that the same situation should be recognized as an excuse for failure to make profert in pleading. Read v. Brockman, 3 Term R. 151 (1789).

By the middle of the eighteenth century, the rule requiring the production of the original instrument was understood to cover unsealed writings as well as sealed, and without regard to whether they formed the basis of the action or defense, or were merely used for some subsidiary purpose. Cole v. Gibson, 1 Ves. 503 (1750).

The same rule came to be applied to criminal cases. Atty. Gen. v. Le Merchant, 2 Term R. 201 (1772).

yet it ought to have been upon stamps. 3dly. That the previous proceedings ought to have been shewn, whereas the decree only was produced.

LORD MANSFIELD.[3] The minutes of the judgment are the solemn judgment itself: not a word is added upon the journals: and a copy of them may certainly be read in evidence; for the inconvenience would be endless, if the journals of the house of lords were to be carried all over the kingdom. As to such copy being upon stamps, it was decided in Queen Anne's time by the opinion of all the judges of England, that copies of the proceedings of parliament need not be stamped. Formerly a doubt was entertained, whether the minutes of the House of Commons were admissible, because it is not a court of record; but the journals of the House of Lords have always been admitted, even in criminal cases.

Rule discharged.[4]

JORY v. ORCHARD.

(Court of Common Pleas, 1799. 2 Bos. & P. 39.)

Trespass for taking and driving away the Plaintiff's cattle.

The cause was tried before Grose, J., at the last Summer assizes for Cornwall, when it appeared, that the Defendant took the cattle as a distress for non-payment of a poor-rate, by virtue of a warrant from a magistrate, which was produced and read. The counsel for the Defendant then called on the Plaintiff to prove a demand of a copy of the warrant pursuant to 24 Geo. 2, c. 44, s. 6,[5] upon which a paper was produced by a witness, who swore that it was a copy of the demand of the warrant. It was objected, however, that such copy would not be read in evidence without proof of notice given to the Defendant to produce the original; in answer to which it was shewn, that the Plaintiff's attor-

[3] Opinion of Ashton, J., omitted.

[4] And so in case of the books of the Bank of England. Mortimer v. McCallan, 6 M. & W. 58 (1840), where the court announced the rule as applying generally to all public and official records. In such cases it seems that a copy may be used, though in the particular instance the original might be produced without inconvenience. Marsh v. Collnett, 2 Esp. 665 (1798).

In Owner v. Bee Hive Spinning Co., [1914] 1 K. B. 105, the court invoked the principle of inconvenience to excuse the production of a printed notice required to be kept posted in a factory, because the removal might subject the party to a penalty, though it was urged in support of the objection that another notice could be substituted at the factory.

[5] That section enacts, "that no action shall be brought against any constable, headborough, or other officer, or against any person or persons acting by his order and in his aid, for any thing done in obedience to any warrant under the hand or seal of any Justice of the Peace, until demand hath been made or left at the usual place of his abode by the party or parties intending to bring such action, or by his, her, or their attorney or agent in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for the space of six days after such demand."

ney intending to deliver a demand under the above act, made out two papers for that purpose precisely to the same effect, and signed them both for his client; one of which he delivered to the Defendant, and the other, which was the paper now produced, he kept in his own possession. This the learned Judge refused to receive, because no notice had been given to produce the demand delivered to the Defendant, which he thought the best evidence; accordingly he directed a nonsuit.

A rule nisi having been obtained upon a former day for setting aside this nonsuit,

Bayley, Serjt. now shewed cause. First, The demand left with the Defendant ought to have been produced. There is no reason why the general rule, that a copy cannot be read without notice to produce the original having been given, should not apply to this case. If a letter be written, and the party writing it enter a copy in his letter-book and sign it, would it not be necessary to give notice to produce the original before the duplicate could be admitted in evidence?

Lord Eldon, C. J. With respect to the only question which arose at nisi prius, namely, whether this paper is to be considered as a copy of the original notice, or as a duplicate original, the strong inclination of my opinion is, that it is a duplicate original, which, under the circumstances of the case, afforded evidence enough for the Plaintiff to insist that the trial should proceed. I have looked into the act of parliament with a view to discover a new ground on which any distinction may be founded between the notice required by the first section, to be given to Justices of the Peace previous to the commencement of an action against them, and the demand required by the sixth section; but without success. Unless I am mistaken, it is the usual course in actions against Justices of the Peace to produce a duplicate original; and the same thing is done with respect to notices to quit. It is true, that a notice to a Justice of the Peace need not be signed either by the Plaintiff or his attorney; though on the back of it the name and place of abode of the attorney must be indorsed; but it must have certain specified contents; and the production of a copy, or duplicate of that notice, therefore, is not the very best evidence to prove that the notice had the contents specified in the act. So a duplicate of a notice to quit is not the very best evidence of the contents of the notice delivered: for in that case, also, the contents may be proved to a certainty by the production of the notice itself, and the supposed duplicate original may be inaccurate. I do not see on what ground the distinction between those cases and this can be supported, the Plaintiff having shewn, that the paper produced was signed in the manner required by the act. The practice of allowing duplicates of this kind to be given in evidence, seems to be sanctioned by this principle, that the original delivered being in the hands of the Defendant, it is in his power to contradict the duplicate original, by producing the other, if they vary. We cannot hold the paper produced in this case to be insufficient, without overturning the practice in actions against magistrates, and in cases

of notices to quit, unless I mistake as to what that practice is;—conceiving it to be as I have stated, I think this nonsuit cannot be supported.

BULLER, J. I am confident that this question has often arisen, and been decided, at nisi prius. But points of this kind pass unnoticed, unless afterwards moved in court. The attorney in this case made two copies of the paper, one of which he meant to deliver; he signed both, and it was indifferent which of them he delivered, for they were both originals. It appears clearly from the report, that the nonsuit was directed on the ground of the paper produced in evidence being a copy; but I think it clear, that both the papers were originals. With respect to the second point, I agree with my Brother Bayley, that if any thing appear upon the report, which would be the cause of a nonsuit at the second trial, the Court will take it into consideration, though not expressly reserved. But the statute in question not being a penal act, the Court are not bound to construe it strictly. I think, therefore, the demand being signed by the Plaintiff's attorney for him, is within the meaning of the statute, a demand signed by the Plaintiff.

HEATH, J. I am of the same opinion. In principle I cannot distinguish this case from that of a duplicate notice to quit, which is received in evidence.

ROOKE, J. I confess, that I cannot make up my mind to agree with my Lord Chief Justice and my Brothers. The act requires this demand to be signed. In the other cases which have been mentioned, both the notice delivered, and the duplicate retained, may be considered as originals. But here something more is to be done beyond the mere production of the paper; the signature is to be proved; and how that is to be proved, by shewing that another paper was signed by the party, I do not perceive. I think that the Plaintiff should have given notice to produce the original demand before he could entitle himself to give the counterpart in evidence.

Rule absolute.

BUTCHER et al. v. JARRATT.

(Court of Common Pleas, 1802. 3 Bos. & P. 143.)

Trover for "a certificate in writing of the register of a certain ship or vessel called the Salem, which said ship or vessel had been registered by the Plaintiffs, according to the statute in that case made and provided."

At the trial before Lord Alvanley, C. J., at the Guildhall Sittings after last Hilary Term, it appeared, that the Defendant having been employed as broker in the sale of the ship Salem by the Plaintiffs had got the certificate of registry in question into his hands, and refused to deliver it at their desire to the person who had purchased of them, so as to enable them to obtain a fresh certificate of registry. To

prove that such a certificate had been granted, an officer of the customs was called, who produced the original registry from which the certificate was copied. This evidence was objected to, on the part of the Defendant, because no notice had been given to the Defendant to produce the certificate of registry itself, without which it was insisted, that the Plaintiffs could not resort to any secondary evidence of the instrument which they sought to recover. Lord Alvanley admitted the evidence, and a verdict was found for the Plaintiffs.

A rule nisi for a new trial was obtained on a former day, on the ground of the evidence having been improperly admitted, and the case of Cowan v. Abrahams, 1 Esp. N. P. Cas. 50, was then cited, where Lord Kenyon in an action of trover for a bill of exchange, refused to admit any evidence respecting the bill, notice not having been given to the Defendant to produce the bill itself.

LORD ALVANLEY, C. J. Without controverting the rule laid down by Lord Kenyon, I think this case very distinguishable from Cowan v. Abrahams. None of the arguments used by his Lordship in that case apply to the present. There the best evidence of the contents of the bill of exchange was unquestionably to be derived from the production of the bill itself.. But the production of the certificate of registry could in this case have answered no purpose whatever, the only question being, Whether the Defendant wrongfully detained the certificate from the Plaintiffs or not? It seems to me, therefore, no violation of the rules of evidence to admit proof of the existence of the certificate, in order to charge the Defendant with a tortious conversion of that instrument.

HEATH, J. There is a material difference between an action of assumpsit on a promise contained in an instrument in writing, and an action of trover for the instrument itself. In the former, the promise must be proved as laid, and consequently can be best proved by inspection of the instrument; in the latter, the gist of the action is the tort. Undoubtedly, if a party unnecessarily take upon himself to describe the instrument, he must prove his description. But that is not the case here. In fact, the original was produced; and that which the Defendant insists ought to have been produced, was only a copy.

ROOKE, J. This action is brought to recover from the Defendant the property in a specific thing: and therefore, I think the evidence received at the trial was properly received. Where a written instrument is to be used as a medium of proof, by which a claim to a demand arising out of the instrument is to be supported, there, I admit, the instrument itself must be produced, or notice to produce it must have been given to the Defendant, before any evidence of its contents can be received. But this being an action of trover for the certificate of registry itself, I can see no sound reason why evidence should not be admitted of the existence of the certificate in the same manner as evidence of a picture, or other specific thing, is constantly admitted, where

it is sought to be recovered in the same form of action. It is true, that if a party take upon himself to describe the contents of the instrument, he must prove it as he describes it. In this case, it was not possible for the Defendant to entertain a doubt what was the thing demanded, there being but one certificate of registry to a ship existing at any one period. The original registry, which is a kind of duplicate of the certificate, was produced; and the certificate itself being in the possession of the Defendant, it was in his power to produce it, and shew that the Plaintiff's evidence respecting the certificate was not correct, if that had been the case.

CHAMBRE, J. There is an essential difference, as I conceive, between the mode of proving a very general or a very minute description of a written instrument. The rule undoubtedly is, that no evidence can be received of the contents of a written instrument but the instrument itself. But in this case the Plaintiffs declared in trover for a written instrument, describing it generally, and not referring to its contents, of which evidence could not have been received, as no notice had been given to the Defendant to produce the instrument itself. I think, therefore, the evidence was properly admitted.

Rule discharged.[6]

DWYER v. COLLINS.

(Court of the Exchequer, 1852. 7 Exch. 639.)

THIS was an action by the endorsee against the acceptor of a bill of exchange: to which the defendant pleaded, inter alia, that the bill was given for a gaming debt. On the trial, before the Lord Chief Baron, at the Middlesex Sittings after last Term, the defendant proceeded to prove his plea; and for that purpose gave evidence of the gaming, and swore that the only bill he ever gave to the drawer of the bill which was declared on, was by way of payment of the debt then incurred. The defendant's counsel, being required to prove that the identical bill declared upon was that which was given on that occasion, called for the bill, which the plaintiff's counsel declined to produce. The defendant's counsel then called as a witness the plaintiff's attorney, who was present in Court, and asked him whether he had the bill with him. The plaintiff's counsel objected that such a question need not be answered, as it would be a breach of professional confidence to do so. The Lord Chief Baron, after consulting some of the other Judges of this Court—at that time sitting in the Exchequer Chamber—decided that the question must be answered. The attorney having admitted that the bill was in

[6] In How v. Hall, 14 East, 275 (1811), the same result was reached on the theory that the pleading in such actions served the purpose of a notice to produce; and so in Com. v. Messinger, 1 Bin. (Pa.) 273, 2 Am. Dec. 441 (1808), a criminal prosecution for the larceny of a written instrument.

his possession and in Court, the defendant's counsel called for its production; which being refused, he then offered to give secondary evidence of its contents. The plaintiff's counsel objected, that there ought to have been a previous notice to produce; and the Lord Chief Baron, after consulting the same Judges, ruled in favour of the defendant. The evidence was then given, and a verdict passed for the defendant, the Judge reserving leave to the plaintiff's counsel to move to enter a verdict on the points made at the trial. On a former day in this Term,

Humfrey obtained a rule nisi accordingly.

PARKE, B.[1] [After stating the facts as set forth at the commencement of the report, his Lordship proceeded:] Mr. Humfrey obtained a rule nisi for a new trial, and the Court granted it, as we thought the subject fit to be more fully considered, notwithstanding the opinion which had been given to the Lord Chief Baron, and on which he had acted. The case has been fully argued at the bar, and all the authorities considered; and we are of opinion that the rule ought to be discharged. We do not propose to decide whether the defendant's evidence in this case, that no other bill was given to the drawer than one for this gambling debt, superseded the necessity of further proof; nor to consider the question, whether the pleadings themselves give as much notice that the bill will be the subject of inquiry as they do in an action of trover for a written instrument, where a notice to produce is unnecessary—it having been decided by the Court of Queen's Bench in Read v. Gamble, 10 A. & E. 597, n., and in Goodered v. Armour, 3 Q. B. 956, and followed by this Court in Lawrence v. Clark, 14 M. & W. 250, that in a case like the present the pleadings do not give constructive notice. We wish to decide this case upon the more general ground, the principal subject of the argument at the bar. There are, therefore, two questions to be considered.

First, whether the plaintiff's attorney was protected from answering the simple question, as to the bill being in his possession and in court.

Secondly, whether on his refusal, it was competent for the defendant to give secondary evidence of its contents, no previous notice to produce having been given.

We are of opinion that the ruling of my Lord Chief Baron was right, on both questions. The relation of attorney and client prevents the former from disclosing any communication made to him in the ordinary course of his employment, and on the faith of the confidence which the client reposes in his legal adviser. But the privilege does not extend to matters of fact which the attorney knows by any other means than confidential communication with his client, though, if he had not been employed as attorney, he probably would not have known them. Thus, he may prove the client's swearing to the truth of an answer in Chancery; and his handwriting, by seeing it in docu-

[1] Part of opinion omitted.

ments prepared by him in the name of his employer; in the same way he may prove the fact that a particular document is then in his possession and in Court—for this is not a fact professionally communicated to him; though of course he could not be compelled to disclose the contents of any document which is professionally intrusted to him, and which he is acquainted with only by virtue of professional confidence.

That the privilege of an attorney does not extend to protect him from answering whether the document is then in court, was decided by Best, C. J., at Nisi Prius, in Bevan v. Waters, 1 Moo. & M. 235. In Eicke v. Nokes, Id. 303, Lord Tenterden permitted a clerk of the defendant's attorney to be asked, whether a copy of a bill had not been given to him by the defendant; and the Court of Queen's Bench decided, in the case of Coates v. Birch, 2 Q. B. 252, that an attorney might be asked whether he had then in his possession, on the trial and in court, a warrant, though he said he had no documents which he had not received from his client in the course of their professional communications. These authorities are quite satisfactory to us: for it is obvious that the answer to the question betrays no secret, directly or indirectly communicated to him in professional confidence. * * *

The next question is, whether, the bill being admitted to be in court, parol evidence was admissible on its non-production by the attorney on demand, or whether a previous notice to produce was necessary. On principle, the answer must depend on the reason why notice to produce is required. If it be to give his opponent notice that such a document will be used by a party to the cause, so that he may be enabled to prepare evidence to explain or confirm it, then, no doubt, a notice at the trial, though the document be in court, is too late. But if it be merely to enable the party to have the document in court, to produce it if he likes, and if he does not, to enable the opponent to give parol evidence; —if it be merely to exclude the argument that the opponent has not taken all reasonable means to procure the original which he must do before he can be permitted to make use of secondary evidence, then the demand of production at the trial is sufficient. We are not able to find a trace of the reason suggested on the part of the plaintiff, until it is mentioned by Mr. Starkie, in his book on Evidence, and afterwards by Mr. Taylor, in his. There is no satisfactory authority which appears to us to support such a position. If this be the principle on which notice to produce is required, it is a solitary instance, we believe, in the law, prior to the New Rules, of its being necessary for one party to give notice of the evidence which the other means to adduce against him. If this be the true reason, the measure of the reasonable length of notice would not be the time necessary to procure the document, a comparatively simple inquiry, but the time necessary to procure evidence to explain or support it, a very complicated one, depending on the nature of the plaintiff's case, and the document itself and its bearing on the cause; and in practice such matters have never been inquired into, but only the time, with reference to the custody of

the document, and the residence and convenience of the party to whom notice has been given, and the like. We think the plaintiff's alleged principle is not the true one on which notice to produce is required, but that it is merely to give a sufficient opportunity to the opposite party to produce it, and thereby to secure, if he pleases, the best evidence of the contents; and a request to produce immediately is quite sufficient for that purpose, if it be in court. With this view the opinion of our Brother Alderson accords, as reported in Lawrence v. Clark, 14 M. & W. 253. There is no case in support of the plaintiff's position, except that of Cook v. Hearn, above referred to, which we think, for the reasons given before, quite insufficient; and a case of Exall v. Partridge, said to have been quoted by the late Lord Abinger when at the bar, mentioned in the report of Doe d. Wartney v. Grey, 1 Stark. 283, but not reported elsewhere, in which Lord Kenyon is said to have told the attorney that he need not produce the instrument, which had a subscribing witness, unless he had notice in time to enable him to produce the attesting witness. There is probably a mistake in this, as the party requiring the document would have been bound, if it were produced, to call the subscribing witness, unless in the excepted case where the party producing it claimed title under it. This case cannot be relied upon. In the case of Doe v. Grey itself, it did not appear that the attorney had received the notice to produce, which the night before was served upon his wife, or had the lease itself in court on the trial. Nor does that fact appear in either of the cases of Read v. Gamble and Lawrence v. Clark, before referred to;—the expression, that the counsel refused to produce, is not equivalent, and the fact is not so proved. We think that the rule must be discharged; and it would be some scandal to the administration of the law if the plaintiff's objection had prevailed.

Rule discharged.

KINE v. BEAUMONT.

(Court of Common Pleas, 1822. 3 Brod. & Bing. 288.)

Action by the endorsee of a bill of exchange against the endorser. At the trial, before Dallas, C. J., London sittings after last term, the plaintiff offered to prove the notice of dishonour of the bill, (which notice had been given in a letter,) by a copy of the letter, taken at the time it was written; but did not prove any notice to the defendant to produce that letter.

It was objected, that a copy of the letter ought not to be allowed in evidence, till it was proved that the defendant had received notice to produce the original letter. A verdict was found for the plaintiff, with leave for the defendant to move to set it aside and enter a nonsuit, if this objection should be thought well founded.

Bosanquet, Serjt., on a former day, obtained a rule nisi accordingly.

Bosanquet, in support of his rule. Neither a notice to quit nor a notice of action to a magistrate can be proved by a copy, where no notice has been given to produce the original notice, except in cases where the notice served was one of two duplicate originals, drawn out and signed at the same time and by the same hand. This was the ground of the decisions in Jory v. Orchard [2 B. & P. 39], Anderson v. May [2 B. & P. 237], Gotlieb v. Danvers, 1 Esp. 455; Surtees v. Hubbard, 4 Esp. 203; Philipson v. Chase, 2 Campb. 110; and forms the distinction to which the decisions by Lord Ellenborough seem always to have reference. In Surtees v. Hubbard he refers to the case of a notice to quit, and of such notices duplicate originals are usually made; but no case has decided that a copy of a notice to quit, where duplicate originals have not been drawn out, can be given in evidence, without proving notice to produce the notice served.

DALLAS, C. J.[8] It appeared to me at the trial, that the objection there taken, and now supported, was well founded. So I thought originally; so Lord Ellenborough thought at one time; so Lord Kenyon thought. But, at the suggestion of counsel, and on a reference made to some of the later cases, a verdict was taken for the plaintiff, and I saved the point for the opinion of this Court.

In the case of Roberts v. Bradshaw [1 Starkie, N. P. C. 28], Lord Ellenborough expressly says, that a letter acquainting a party with the dishonour of a bill, is in the nature of a notice, and that it is unnecessary to prove notice to produce such a letter. I own I do not see any great inconvenience which can arise, in practice, from giving notice to produce such a letter; but still the question comes to this, whether, in substance and reason, the law is not by the late determination settled, that where a copy of a letter, containing notice of dishonour of a bill of exchange is tendered in evidence, such copy is admissible, without proving a notice to the party in whose possession the letter itself may be, to produce it.

I am not now going to enter into nice distinctions between a copy and a duplicate original; though I cannot see any great difference between a duplicate original and a copy made at the time; but, feeling the necessity that there should be a uniformity in the practice of the Courts, we will inquire what the practice of the Court of King's Bench is on like occasions.

On this ground only we delay giving our judgment.

BURROUGH, J. I can see no substantial distinction between a duplicate original and a copy made at the time.

RICHARDSON, J. At present, I own I do not see any sound distinction between a duplicate original and a copy authenticated on oath.

Adjornatur.

And now,

DALLAS, C. J., said: In this case we see no reason to change the opinion we in part expressed when the question was last before the

[8] Opinion of Park, J., omitted.

Court; but, as a matter of general practice, we wished to collect the opinion of other Judges, and the result is, that the copy of an original letter, giving notice of the dishonour of a bill, is admissible, without notice to produce the original letter, and, consequently that, in this case, the verdict must stand, and the rule to enter a nonsuit be discharged.[9]

Rule discharged.

ENGLES v. BLOCKER et al.

(Supreme Court of Arkansas, 1917. 127 Ark. 385, 192 S. W. 193.)

This was an action by Blocker and another, as plaintiffs, to recover commissions for effecting a trade or sale of certain leases for defendant. There was a verdict for plaintiffs, and defendant appealed.

HART, J.[10] * * * It is also insisted that the court erred in admitting the carbon copies of the letters written by Blocker which were set out in the statement of facts. We do not think the court erred in admitting these letters in evidence. Blocker testified that they were mailed to Engles, and the letters written by Engles to Blocker show that each of these letters except one dated July 11, 1914, and that of the date of July 28, 1914, were received by Engles. The record also shows that Blocker wrote Engles a letter notifying him of the formation of the oil and gas corporation and did not keep a copy of it. His counsel asked Engles to produce the copy of this letter. Engles denied having received the letter, but admitted that he had received all the other letters written to him by Blocker. We think that a carbon copy of a letter addressed to an adversary in a lawsuit is admissible in evidence without making any effort to require the adverse party to produce the letter received by him. In this respect there is a distinction between letterpress copies and instruments produced by carbon paper. What is called the "carbon copy" is produced by placing a sheet of carbon paper between two sheets of letter paper so that the same impression produces both the letter and the carbon copy. Because the carbon copy is made at the same time by the same impression, it may be regarded as a duplicate of the original letter itself and admitted in evidence without notice to produce the letter. International Harvester Co. v. Elfstrom, 101 Minn. 263, 112 N. W. 252, 12 L. R. A. (N. S.) 343, 118 Am. St. Rep. 626, 11 Ann. Cas. 107; Chesapeake & Ohio Ry. Co. v. F. W. Stock & Sons, 104

[9] In Menasha Wooden Ware Co. v. Harmon, 128 Wis. 177, 107 N. W. 299 (1906), the court held that the contents of a letter to a third person could not be proved by letterpress copy, without showing that the original was unavailable, observing: "The original letters and letterpress copies are not regarded as being duplicates. 2 Wigmore, Ev. § 1234, subd. 2, and note 3; State v. Halstead, 73 Iowa, 376 [35 N. W. 457 (1887)]; Seibert's Assignee v. Ragsdale, 103 Ky. 206 [44 S. W. 653 (1898)]."

[10] Statement condensed and part of opinion omitted.

Va. 97, 51 S. E. 161; Cole v. Ellwood Power Co., 216 Pa. 283, 65 Atl. 678.

The letters signed by Blocker of which copies were kept were mailed to Engles as the evidence of their understanding, and Engles admits that he received them. There seems to be no good reason for Blocker, when he is seeking to enforce their obligation, to ask for the production of the letters received by Engles. If proof of the duplicate was important to Engles, he was at liberty to make use of it and could have introduced the letter received by him to show that the carbon copy was not a duplicate of it. Inasmuch as he did not do so, it is to be presumed that the carbon copy introduced by Blocker was a duplicate of the original letter received by him. * * *

Judgment affirmed.[11]

YOUNG et al. v. PEOPLE.

(Supreme Court of Illinois, 1906. 221 Ill. 51, 77 N. E. 536.)

At the June term, 1905, the grand jury of Cook county returned into the criminal court of said county an indictment against Louis Young, Edward C. Keefe, and one McCormick, charging them with unlawfully and feloniously obtaining from Patrick H. Greear, on the 15th day of June, 1905, the sum of $1,200 in cash by means of the confidence game. Louis Young and Edward C. Keefe were arrested, McCormick not being found, and upon a trial Young and Keefe were found guilty and sentenced to the penitentiary for an indeterminate period, and they have sued out a writ of error from this court to the criminal court of Cook county to reverse said judgment of conviction. * * *

HAND, J.[12] * * * The court also permitted the state to introduce in evidence a copy of a telegram purporting to have been sent by Keefe from Mankato, Wis., June 13, 1905, to Fred Gondorf (McCormick) at Chicago, requesting Gondorf (McCormick) to meet Keefe the next day at 10:30 at the Majestic Hotel, without proof of the loss or destruction of the original telegram, or even that the copy offered was a copy of the original. The copy introduced was the copy retained by the telegraph company among its files in its Chicago office, and the court seems to have entertained the view that such copy was the original. This was not the correct view. It was not shown that Fred Gondorf (McCormick) ever received said telegram, or that it was ever acted upon by either Keefe, McCormick, or Young, or that it

[11] For a collection of the cases dealing with copies produced by mechanical processes, see note to Int. Harvester Co. v. Elfstrom, 12 L. R. A. (N. S.) 343 (1907).

That a photograph of a document is regarded as secondary evidence, see Maclean v. Scripps, 52 Mich. 214, 17 N. W. 815, 18 N. W. 209 (1883).

[12] Statement abridged and part of opinion omitted.

was signed or sent by Keefe. It was introduced as the admission of Keefe that he knew McCormick and desired to have him meet him. In order to bind Keefe, it was necessary to show he signed or sent the telegram, or that he acted upon the telegram after it was received, and the best evidence of the contents of the telegram was the original [13] telegram filed at Mankato, Wis. Matteson v. Noyes, 25 Ill. 591; Morgan v. People, 59 Ill. 58. It was error to admit in evidence the copy of said telegram.

When Keefe was arrested, a card [14] was taken from his vest pocket upon which was written, "L. Y., 3030 Indiana avenue, phone Douglas 2685," which were the initials of Louis Young, the number of his residence, and his telephone number. The police officer, who received the card from the officer who took it from Keefe, testified that the last time he saw it, which was four or five days before the trial, he gave it to the assistant state's attorney. Young testified he had never seen the card, knew nothing of its contents, or how Keefe came by it. The court, without requiring the production of the card by the assistant state's attorney, or proof of its loss or destruction, over the objection of the plaintiffs in error, permitted the police officers to state what was written on the card at the time it was taken from Keefe. This evidence was exceedingly damaging to Young, as it tended to connect Keefe with him, and it was error to admit parol proof of what was written on the card without proof of the loss or destruction of the card. Mariner v. Saunders, 5 Gilman, 113; White-

[13] Compare Bailey, J., in Anheuser-Busch Brew. Ass'n v. Hutmacher, 127 Ill. 652, 21 N. E. 626, 4 L. R. A. 575 (1889): "* * * In Durkee v. Vermont Central Railroad Co., 29 Vt. 127 [1856], the rule which we consider the most reasonable one is laid down, viz., that the original, where the person to whom it is sent takes the risk of its transmission, or is the employer of the telegraph, is the message delivered to the operator, but where the person sending the message takes the initiative, so that the telegraph is to be regarded as his agent, the original is the message actually delivered at the end of the line."

[14] There is a good deal of uncertainty as to how far the best evidence rule applies to writing on chattels, or name and address or other marks on a package. Where the only purpose is to identify the article, it is generally held that it is not necessary to produce the original.

Benedict, J., in United States v. Graff, 14 Blatch. 381, Fed. Cas. No. 15,244 (1878): "* * * The witness was allowed to describe the marks upon the barrels he received, for the sole purpose of identifying the articles. To such a question, the rule in regard to parol evidence of the contents of a document, has no application. Evidence of the character under consideration is properly admitted, when the object is to identify an article. Nor is the admissibility of such evidence confined to cases where the character of the article sought to be identified forbids its production in Court. In Commonwealth v. Morrell, 99 Mass. 542 [1868], such evidence was admitted to identify a tag. See, however, Regina v. Farr, 4 Foster & Finlason, 336 [1864]."

In some cases the relaxation of the rule has been carried much farther, as in Com. v. Blood, 11 Gray (Mass.) 74 (1858), where, in a prosecution for keeping intoxicating liquors, witnesses were permitted to testify as to the labels on certain bottles and jugs which they observed at the defendant's place of business, though it did not appear that they could not have been produced. Here the labels were important, as indicating the sort of liquor in the bottles. For a criticism of this practice, see Wigmore, § 1182.

hall v. Smith, 24 Ill. 166; Wing v. Sherrer, 77 Ill. 200; Williams v. Case, 79 Ill. 356.

The plaintiffs in error have urged other grounds of reversal, but, as the matters complained of are not likely to occur on another trial, it is not necessary that they be here considered.

For the errors of the court in admitting in evidence the copy of said telegram and parol proof of the contents of said letter and the matter written upon said card without the proper foundation having been laid for the admission of secondary evidence, the judgment of the criminal court will be reversed, and the cause remanded to that court for a new trial.

Reversed and remanded.

THE KING v. INHABITANTS OF CASTLETON.

(Court of King's Bench, 1795. 6 Term R. 236.)

Two justices removed Martha Pedley from Castleton in the county of Derby to the liberty of Bomford in the same county as the place of her last legal settlement. On appeal the Sessions quashed the order, subject to the opinion of this court, on the following case.

Martha Pedley the pauper was alleged to have been bound apprentice to Nicholas Timms of Castleton, by indentures bearing date in or about the year 1780. It was proved on the part of the liberty of Castleton that there were two parts of the indenture of apprenticeship, one part whereof remained with the parish officers of Castleton, and which had been destroyed, and the other part was given to the said Timms, who delivered the same to Miss Taylor of Bomford at the time of the assignment herein-after mentioned. Application was made to Miss Taylor, not then or now residing at Bomford for that part of the indenture so delivered to her, who on such application said that she could not find the same, nor did she know where it was. Miss Taylor is living, but was not subpœnaed to the Court of Sessions as a witness to produce that part of the indenture which had been delivered to her, or to give any account of the same being lost. Timms afterwards by parol assigned the pauper to Miss Taylor in Bomford; and the pauper with Timm's consent served her in Bomford upwards of 40 days. The Court of Sessions were of opinion that the above was not sufficient evidence of the indenture of apprenticeship. The only question is whether that part of the indenture of apprenticeship which was delivered to Miss Taylor is properly accounted for.

Balguy was in support of the order of sessions; and

Clarke contra. But

THE COURT thought the case too clear for argument; that if the indenture could not be produced, evidence must be adduced to shew

that it was lost or destroyed. Here it was traced to the hands of Miss Taylor, and no further evidence was given to shew what had become of it.

Order of Sessions confirmed.

FREEMAN v. ARKELL.

(Court of King's Bench, 1824. 2 Barn. & C. 494.)

Action for malicious prosecution.

At the trial before Park, J., at the last assizes for the county of Gloucester, Dr. Timbrell the magistrate, before whom the charge was made, was called as a witness on the part of the plaintiff. He stated that the defendant came before him in March, 1823, that the examination was taken in writing; and that he, the witness, at the Easter quarter sessions delivered the examination in court, either to Mr. Bloxam the clerk of the peace or his deputy, then sitting at the table, who usually received such papers. He, the witness, had a subpœna duces tecum, but he had no papers with him respecting the matter; he said, he did not know where the information was, but it was not in his possession. Edward Bloxam the clerk of the peace stated, that he had received many papers from Dr. Timbrell at the Easter sessions, but he could not find any but recognisances; that an indictment had been presented to the grand jury on behalf of the defendant, but that it was returned ignoramus, and it was usual on such occasions to throw away or destroy the papers relating to the charge. It was insisted on the part of the plaintiff that this was sufficient evidence to show that the original papers were lost or destroyed, and that parol evidence of the contents was admissible. The learned judge was of opinion, that as Dr. Timbrell said he had delivered the information to Mr. Bloxam or his deputy, the latter ought to have been called to prove that the examination was either destroyed or not to be found; and, consequently, that it was not sufficient evidence of the destruction or loss of the document to let in parol evidence of the contents. A rule nisi for a new trial was obtained in Michaelmas term by Pearson, on the ground, that under the circumstances proved, parol evidence was admissible.

BEST, J.[15] Secondary evidence is not to be admitted until a party has taken all reasonable pains to obtain the primary evidence. The degree of trouble to be taken for that purpose depends upon the nature of the instrument. If the instrument be of value, or of such a nature that the reasonable presumption is, that it is in existence, stricter evidence is required in order to show that it is destroyed or lost. If it be an instrument of no value, then the reasonable presumption being, that it has been destroyed or lost, slight evidence only of its

[15] Statement condensed and opinions of Bayley and Holroyd, JJ., omitted.

destruction or loss is required. That principle is fully established by the case of Brewster v. Sewell, 3 B. & Ald. 296. Now it is impossible, that the plaintiff in this case should have any interest in keeping back the original information. Then has he taken all reasonable pains to procure the best evidence. In the first place, in whom ought the possession of such an instrument to be? It appears that it is not the practice in cases of misdemeanors to return these informations to the assizes or sessions. It is not required by law. The plaintiff delivered to Dr. Timbrell a subpœna duces tecum, commanding him to produce the original depositions. He ought to have told the plaintiff then that he could not comply with that subpœna, but without being told that, the plaintiff goes further and subpœnas the clerk of the peace. The plaintiff, therefore, provided himself with the testimony of the person who ought to have had the depositions if they were not returned to the sessions, and of the person who ought to have had them if they had been returned. If the deputy of Mr. Bloxam received them, he received them for his master, and in due course would have placed them among his papers, and not being found among them, the fair presumption is, that they are lost or destroyed.

Rule absolute.

GILBERT v. BOYD et al.

(Supreme Court of Missouri, 1857. 25 Mo. 27.)

This was an action against the trustees of the "African Methodist Episcopal Church" to recover the value of the services of plaintiff as sexton of said church. The plaintiff recovered before the justice of the peace. An appeal was taken to the Law Commissioner's Court. The plaintiff offered in evidence a certified copy of a deed to the defendants as trustees of the African Methodist Episcopal Church, and offered to prove that the original was not in his possession, or within his power or control. The counsel for defendants objected to the admission of the copy on the ground that no notice had been served requiring the production of the original. The objection was sustained. Plaintiff also offered to prove by a witness that defendants were the acting trustees of said church. Defendants objected to the reception of this evidence on the ground that there was better evidence, and that the books of the church should be produced. The objection was sustained. The plaintiff submitted to a non-suit.

SCOTT, Judge. The 46th section of the act concerning conveyances (R. C. 1845) provides, that when any instrument in writing, conveying or affecting real estate, is acknowledged or proved, certified and recorded, and it shall be shown to the court that such instrument is lost, or not within the power of the party wishing to use the same, the record thereof, or the transcript of such record, certified by the

recorder, under the seal of his office, may be read in evidence without further proof. As the statute prescribes the state of circumstances which authorizes the deed to be read in evidence, we do not conceive that the court had any authority to require any other fact to be proved in order to make it testimony in the cause. The party offering the transcript was entitled to read it upon proof that the original was not within his power, and the court should not have required him to prove a notice to produce the original.

As the record stands, we do not see that there was any written evidence of the appointment of the trustees. If there was none, the fact, of course, might have been proved by parol. We do not know that the rule which permits civil officers and officers of corporations to be proved to be such by reputation and their acts extends to private trustees when there is written evidence of their appointment. It is said an agent may prove his agency when it is by parol. Greenl. § 416. In general, the fact of an agency cannot be proved by parol, unless the non-production of the writing is first accounted for. Cowen's Notes, 1208. The official character of officers, both civil and corporate, may be proved by acts and reputation. Cowen's Notes, 554; United States v. Dandridge, 12 Wheat. 64, 6 L. Ed. 552. The other judges concurring, the judgment will be reversed, and the cause remanded.[16]

RIGGS v. TAYLOE.

(Supreme Court of the United States, 1824. 9 Wheat. 483, 6 L. Ed. 140.)

TODD, J.[17] This was an action on the case, brought by the plaintiff against the defendant, in the circuit court of the District of Columbia, upon a contract in writing, entered into between the plaintiff and defendant, for the sale of bank stock of the Central Bank of Georgetown. At the time that this contract was entered into, each party had a counterpart of the contract, and the plaintiff, alleging the loss of his, gave notice to the defendant to produce, upon the trial, the one which he, the defendant, had; but the defendant declined producing it, stating that he had lost his also. In consequence of these losses, the plaintiff, upon the trial of the cause, offered to prove, by a person who was a witness to the contract, and had subscribed it as such, the contents of the contract, and to entitle himself to give this testimony, made the following affidavit: "The plaintiff in this cause makes oath, in relation to the memorandum of agreement between

[16] But see Scott v. Bassett, 174 Ill. 390, 51 N. E. 577 (1898), where a much stricter showing was required as to prior deeds in the chain of title of the party offering the record copy.

The wording of the recording acts differs so greatly that it is impracticable to work out the various situations, which may arise under them.

[17] Part of opinion omitted.

the defendant and himself, relative to the stock in the declaration mentioned, that his impression is that he tore up the same, after the transfer of the stock, believing that the statements upon which the contract had been made were correct, and that he would have no further use for the paper. He is not certain that he did tear it up, and does not recollect doing so, but such is his impression. If he did not tear it up, it has become lost or mislaid; and that he has searched for it among his papers repeatedly, and cannot find it." The defendant objected to this testimony, and insisted that no evidence ought to be given of the contents of the said contract. The court sustained the objection; whereupon a verdict and judgment was given for the defendant. The plaintiff filed a bill of exceptions to the opinion of the court, excluding the evidence aforesaid from going to the jury, and the cause is brought up to this court by a writ of error.

The only question to be decided by this court is, whether the circuit court erred in rejecting the said evidence.

Whether the plaintiff in the cause was a competent witness to prove the loss or destruction of the written agreement, referred to in the bill of exceptions, need not be inquired into, as it was not objected to in the court below, and the question was waived by the defendant's counsel in this court.

The admissibility of evidence of the loss of a deed or other written instrument, is addressed to the court, and not to the jury.

The general rule of evidence is, if a party intend to use a deed, or any other instrument, in evidence, he ought to produce the original, if he has it in his possession; but if the instrument is in the possession of the other party, who refuses to produce it after a reasonable notice, or if the original is lost or destroyed, secondary evidence, which is the best that the nature of the case allows, will in that case be admitted. Phillips on Evid. 399. The party, after proving any of those circumstances, to account for the absence of the original, may read a counterpart, or, if there is no counterpart, an examined copy, or, if there should not be an examined copy, he may give parol evidence of the contents.

It is contended by the defendant's counsel that the affidavit is defective, not being sufficiently certain or positive as to the loss of the original writing. The affiant only states his impression that he tore it up; and if he did not tear it up, it has become lost or mislaid; that this is in the alternative, and not certain or positive. We do not concur in this reasoning. An impression is an image fixed in the mind—it is belief; and believing the paper in question was destroyed, has been deemed sufficient to let in the secondary evidence. Phillips on Evid. 399; 7 East, 66; 8 East, 284. The alternative alluded to is, "if he did not tear it up, it has become lost or mislaid." Now, if he tore it up it was destroyed; if it was not destroyed it was lost or mislaid; in either event it was not in the power or possession

of the affiant, which, we think, is sufficiently certain and positive to let in the secondary evidence.

It is further contended that it appears from the plaintiff's own showing the destruction or loss of the writing was voluntary and by his default; in which case he ought not to be permitted to prove its contents. It will be admitted that where a writing has been voluntarily destroyed, with an intent to produce a wrong or injury to the opposite party, or for fraudulent purposes, or to create an excuse for its non-production, in such cases the secondary proof ought not to be received; but in cases where the destruction or loss (although voluntary) happens through mistake or accident, the party cannot be charged with default. In this case the affiant states that if he tore up the paper, it was from a belief that the statements upon which the contract had been made were correct, and that he would have no further use for the paper. In this he was mistaken. If a party should receive the amount of a promissory note in bills, and destroy the note, and it was presently discovered that the bills were forgeries, can it be said that the voluntary destruction of the note would prevent the introduction of evidence to prove the contents thereof; or, if a party should destroy one paper, believing it to be a different one, will this deprive him of his rights growing out of the destroyed paper? We think not. Cases of voluntary destruction of papers, arising from mistake, as well as from accident, might be multiplied ad-infinitum. In this case, the evidence offered was that of the subscribing witness to the writing; it was the best evidence that the nature of the case admitted, which was in the possession or power of the party. This court is therefore of opinion the circuit court erred in refusing to let the said evidence go to the jury.[18] * * *

THE COUNT JOANNES v. BENNETT.

(Supreme Judicial Court of Massachusetts, 1862. 5 Allen, 169, 81 Am. Dec. 738.)

Tort brought on the 12th of June, 1860, in the name of "The Count Joannes, (born 'George Jones,')" for two libels upon him contained in letters to a woman to whom he was then a suitor, and afterwards married, endeavoring to dissuade her from entering into the marriage. * * *

To sustain the second count, the plaintiff testified that he received the letter therein set forth from his intended wife, and on the 1st of June 1860, the day before his marriage to her, he burned it and did not take a copy; and he was then allowed under objection to repeat the contents from memory.

[18] And so in Steele v. Lord, 70 N. Y. 280, 26 Am. Rep. 602 (1877), where the party destroyed certain canceled checks and vouchers in accordance with his regular practice.

The judge ruled that neither of the letters was a privileged communication; and a verdict was returned for the plaintiff. The defendant alleged exceptions.

BIGELOW, C. J.[19] (after holding that the publication was not privileged). But on another point raised at the trial, we are all of opinion that the ruling of the court was erroneous. In support of his second count, the plaintiff was permitted to testify concerning the contents of the alleged libel, after it had appeared that he had voluntarily destroyed the letter in which it was contained. This we think was a violation of the cardinal principle that, where it appears that a party has destroyed an instrument or document, the presumption arises that if it had been produced it would have been against his interest or in some essential particulars unfavorable to his claims under it. "Contra spoliatorem omnia presumuntur." In the absence of any proof that the destruction was the result of accident or mistake, or of other circumstances rebutting any fraudulent purpose or design, especially where as in the case at bar it appears that the paper was voluntarily and designedly burned by the party who relies on it in support of his action, the inference is that the purpose of the party in destroying it was fraudulent, and he is excluded from offering secondary evidence to prove the contents of the document which he has by his own act put out of existence. If such were not the rule, and a party could be permitted to testify to the language or purport of written papers which he had wilfully destroyed, in support of his right of action against another, great opportunities would be afforded for the commission of the grossest frauds. A person who has wilfully destroyed the higher and better evidence ought not to be permitted to enjoy the benefit of the rule admitting secondary evidence. He must first rebut the inference of fraud which arises from the act of a voluntary destruction of a written paper, before he can ask to be relieved from the consequences of his act by introducing parol evidence to prove his case. Thus it has been held that, when a note was burned by the holder a short time before it fell due, he was bound to show in an action upon a note that the act of destruction was honest and justifiable, or he could not recover; and even an alleged negligent destruction or loss of an instrument, unaccompanied by evidence or explanation to rebut the suspicion or inference of a fraudulent design, will not authorize secondary evidence of the contents of the instrument. Blade v. Noland, 12 Wend. (N. Y.) 173, 27 Am. Dec. 126. See, also, Broadwell v. Stiles, 8 N. J. Law, 58; Riggs v. Tayloe, 9 Wheat. 483, 487, 6 L. Ed. 140; Renner v. Bank of Columbia, 9 Wheat. 581, 6 L. Ed. 166. This doctrine is especially applicable to actions for libel, in which the language used, and the sense and meaning which properly attach to it, constitute the gist of the action.

In the case at bar, the plaintiff offered no evidence to show the

[19] Statement condensed.

circumstances under which he destroyed the letter referred to in his second count. He was not therefore entitled to offer any proof to show the contents. On this ground the verdict is set aside, and a New trial granted.

FISHER & BALL v. CARTER.

(Supreme Court of Iowa, 1916. 178 Iowa, 636, 160 N. W. 15.)

LADD, J.[20] The petition is in two counts, one alleging the employment of plaintiffs by defendant to find a purchaser for his farm in Kansas, and the reasonable value of so doing, and the other alleging an agreement to pay $1 per acre for such services. * * *

II. Henten, with whom defendant exchanged farms, resided at Albany, Mo. Fisher testified to having written Henten a letter and to have deposited it in the United States mails properly addressed to him at Albany, Mo., and that he did not have the original or know its whereabouts, and then identified a copy, unsigned, as a true copy of such letter. The copy was received in evidence over an objection that there was no sufficient excuse shown for not producing the original, and in any event that the letter was unsigned. Even though unsigned, and frequently the signature is not impressed on the copy, the witness testified that he wrote the original and mailed it, and this sufficiently identified it as his, even though not signed. Was the absence of the original sufficiently accounted for? That the best evidence of which the case is susceptible must have been adduced is the well-established rule, and our inquiry is limited to ascertaining whether a copy of a letter is to be regarded as such evidence upon a showing that the original is in the hands of a third party beyond the jurisdiction of the court. In Bullis v. Easton, 96 Iowa, 513, 65 N. W. 395, and Simons v. Petersberger, 171 Iowa, 564, 151 N. W. 392, the showing was that the originals could not be obtained and secondary evidence of their contents held rightly received; and in Waite v. High, 96 Iowa, 742, 65 N. W. 397, a remark is to be found that: "It does not follow that, because the books were in another state, their production at the trial could not have been secured."[21] * * *

[20] Part of opinion omitted.

[21] In the omitted passage the court cited the following cases as sustaining the view that the fact that a document was in the hands of a third person beyond the jurisdiction furnished sufficient ground for the admission of secondary evidence: Bowden v. Achor, 95 Ga. 243, 22 S. E. 254 (1895); Zellerbach v. Allenberg, 99 Cal. 57, 33 Pac. 786 (1893); Butler v. Mail & Express Pub. Co., 171 N. Y. 208, 63 N. E. 951 (1902); Hoyle v. Mann, 144 Ala. 516, 41 South. 835 (1905); Vinal v. Gilman, 21 W. Va. 301, 45 Am. Rep. 562 (1883); Burton v. Driggs, 20 Wall. 125, 22 L. Ed. 299 (1873).

And as sustaining the conclusion in the principal case, the court cited Shaw v. Mason, 10 Kan. 184 (1872); McDonald v. Erbes, 231 Ill. 295, 83 N. E. 162 (1907); Wiseman v. Northern Pac. Ry. Co., 20 Or. 425, 26 Pac. 272, 23 Am. St. Rep. 135 (1891); Kirchner v. Laughlin, 6 N. M. 300, 28 Pac. 505 (1892);

Secondary evidence of the contents of a writing is received as the best evidence obtainable only upon showing that the original writing cannot be produced by the party offering such evidence within a reasonable time by the exercise of reasonable diligence. Precisely what must be done to constitute such diligence depends on the facts of each case.

There is no criterion by which to measure the necessary effort, but in all cases the party asserting the loss or destruction of the paper or document is required to show: "That he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him." 1 Greenl. Ev. § 558.

It is not sufficient that the witness assert that it is lost; he must search for it in every place where there is reasonable probability that it may be found. To exact any less diligence would impair the advantage of reducing communications or agreements to writing. This much is exacted from the party tendering evidence of the contents, not because of the power of the court to order the production of the writing found, but to make sure that the court has the best evidence attainable by the party offering it on which to base its judgment.

That the instrument may be in another jurisdiction and in the custody of a third party should not relieve the party desiring to avail himself of its use in evidence from exercising reasonable diligence to procure the original writing for such purpose. The best evidence obtainable is quite as essential to the administration of justice, whether in the state or beyond its borders, and there is no sound reason for relaxing the rule exacting diligence in its production when found where its production may not be compelled. What will constitute such diligence as said depends on the facts of each case, on the character and importance of the writing, the purposes for which it is to be used, and the place it would naturally be kept. If such an one as the owner likely would preserve or one on which the action or defense is founded a more thorough search would be exacted than were the paper of little importance. Something also depends on whether the party was aware beforehand that it would be required in the course of the trial or this developed during the trial.

Manifestly there is some room for the exercise of sound discretion in determining whether the degree of diligence has been exercised. Surely the diligence exacted is not shown where no effort whatever has been put forth to obtain a document or other writing beyond the jurisdiction of the court. Ordinarily the loan or use of it for the pur-

Justice v. Luther, 94 N. C. 793 (1886); Pringey v. Guss, 16 Okl. 82, 86 Pac. 292, 8 Ann. Cas. 412 (1906); Bruger v. Princeton & St. M. Mut. Fire Ins. Co., 129 Wis. 281, 109 N. W. 95 (1906); Wood v. Cullen, 13 Minn. 394 (Gil. 365 [1868]); Kearney v. Mayor, 92 N. Y. 617 (1883); Turner v. Yates, 16 How. 14, 14 L. Ed. 824 (1853).

poses of the trial may be had for the mere asking or its production may be obtained by taking the deposition of its custodian. That the production of writings may not be compelled in another jurisdiction does not alone show that they are inaccessible, for it is a matter of common knowledge that ordinarily they may be and are procured in one of the methods suggested, and that refusal to furnish, loan, or produce the papers as required is exceptional. A somewhat extended and attentive examination of the authorities has convinced us that proof that writing is in the custody of a third party in another jurisdiction is not sufficient showing of diligence to justify a court in foregoing the advantage of the original paper in reaching a decision, that such proof does not establish inaccessibility, even though its production may not be compelled, and that reasonable effort to procure without success or conditions reasonably indicating that these would have been of no avail or refusal to deliver or something of like consequence should be shown before secondary evidence of the contents of the writing is received. No effort whatever was made by appellee to obtain the original letter either by borrowing it for use at the trial or by taking the deposition of Henten and having it attached thereto in connection with the testimony.

There is no showing that the copy introduced was a duplicate of the original, and for this reason the authorities relied on by appellee are not controlling. See International Harvester Co. v. Elfstrom, 101 Minn. 263, 112 N. W. 252, 12 L. R. A. (N. S.) 343, 118 Am. St. Rep. 626, 11 Ann. Cas. 107; State v. Albertalli, 78 N. J. Law, 90, 73 Atl. 128. But on motion for new trial it appeared by affidavit of Henten that several months prior to the trial the original letter had been delivered to defendant, and had not been returned. He must have had it then at the time of the trial, and if the copy adduced was defective in any manner might have corrected it by producing the original. The ruling then, though erroneous, was without prejudice. * * *

Judgment affirmed.[22]

HOWARD v. SMITH.

(Court of Common Pleas, 1841. 3 Man. & G. 254.)

On a rule nisi to enter a verdict for plaintiff or grant a new trial on the ground of the admission of improper evidence on the part of defendant. The facts are set out in the opinion.[23]

TINDAL, C. J. This case, which, as well as that of Bethell v. Blencowe, (3 Man. & G. 119,) involves a question on the admissibility of evidence offered to prove the terms of a tenancy, has stood over for the consideration of the court. It was an action of replevin, in which

[22] For a collection of the later cases, see note to Federal Chemical Co. v. Jennings, L. R. A. 1917D, 529 (1917).

[23] Statement condensed.

the defendant, as bailiff of one Micklethwaite, acknowledged the taking as a distress for rent due from the plaintiff as tenant to Micklethwaite at £20. per annum, payable quarterly, and in which the plaintiff pleaded non tenuit modo et formâ.

The premises in question had been before held under a written agreement by a person who was called as a witness, and who stated that the plaintiff, in a conversation with him, had expressed his willingness to take the premises upon the same terms as those upon which he, the witness, had held them. Whereupon they went together to Micklethwaite, who agreed that the plaintiff should have them on the same terms. The written agreement was mentioned in the conversation between the witness and the plaintiff, but it was not produced, either on the occasion of that conversation or at the time of the conversation with Micklethwaite. Another witness was called, who proved that the plaintiff had stated to him that he held the premises at £20. a year: and it was further proved that the plaintiff had said that he had gone to Micklethwaite and had paid him £3, towards the quarter's rent due on the 29th of September.

It was objected that after what had passed with the former tenant respecting this written agreement, these declarations were not receivable in proof of the terms on which the premises were held by the plaintiff, for the purpose of showing either the amount of the rent, or that it was payable quarterly. But we are of opinion that the statements made by the plaintiff himself of the terms upon which he was actually holding the premises, were admissible against him, notwithstanding what had passed respecting the written agreement under which the former tenant had held; and that the present case must be governed by the law as laid down in Slatterie v. Pooley, (6 M. & W. 664.)

Rule discharged.[24]

[24] The following colloquy took place on the argument: "Bompas, Serjt., contra. Where a tenant holds under a written instrument, the terms of the tenancy cannot be proved by parol,—even though the parol testimony be tendered, in an action to which the tenant is a party,—as the impression left on the mind of the witness by statements made by the tenant. [Erskine, J. What objection can there be to the reception of the tenant's own statements against himself?] The danger of misrepresentation or mistake is the same as it would be if the witness stated the impression left on his mind from having read a written document. [Tindal, C. J. Slattery v. Pooley, in the Exchequer is an authority against you.]"

In Slattery v. Pooley, 6 M. & W. 664 (1840), the court announced broadly that whatever the adverse party said had always been received against him, though it involved the contents of a writing.

The Court of Queen's Bench in Ireland refused to follow this view. Lawless v. Queale, 8 Ir. L. Rep. 382 (1845).

For a collection of the cases, see Swing v. Cloquet Lumber Co., 121 Minn. 221, 141 N. W. 117, L. R. A. 1918C, 660 (1913), annotated.

PRUSSING v. JACKSON.

(Supreme Court of Illinois, 1904. 208 Ill. 85, 69 N. E. 771.)

BOGGS, J.[25] This was an action for libel against the plaintiff in error by the defendant in error. The declaration charged that the plaintiff in error composed and caused to be published in the Chicago Times-Herald, a daily newspaper published in the city of Chicago, a certain false, scandalous, defamatory, and libelous article, set forth in hæc verba, with appropriate innuendoes, in the declaration. The article is quiet lengthy, and it is not necessary to the proper disposition of the case it should be recited in this opinion. * * *

We think, however, the plaintiff in error has lawful right to complain of an erroneous ruling of the court as to the admissibility of evidence. It was sought to maintain the action against the plaintiff in error as the author of the alleged libelous publication which appeared in the Chicago Times-Herald. He was in no wise connected with the management, control, or publication of the newspaper, and had no interest therein. The action was against him on the alleged ground that he was the author of a statement in the form of a letter, which appeared as a part of the publication, and that he had given, or permitted one Varian, a reporter for the newspaper, to take, the letter under such circumstances as that he should be held to have procured it to be published. The cause was tried before the court and a jury. * * *

Counsel for the defendant in error, however, insist that the judgment should not be reversed because of the reception in evidence of the printed[26] article, for the reason that previous to its reception in evidence declarations of the plaintiff in error had been proven, in substance, that the letter which appeared in the publication was the one which the reporter had received in the office of the plaintiff in error. The defendant in error, as a witness, had testified that the plaintiff in error admitted to him that the statement published in the newspaper was the same statement which the reporter, Varian, received in the office of the plaintiff in error. Counsel now insist—to quote from their brief—that "it is a well-settled principle of law that admissions of a party against himself as to the contents of a writing are primary evidence." This contention cannot be regarded as an open question in this state. Strader v. Snyder, 67 Ill. 404, was an action on the case brought by Snyder against the appellants for an alleged libel published in a newspaper called the Macomb Eagle. The defendants were in no way connected with the newspaper establishment, and the prosecution was on the theory that they had prepared the manuscript, and delivered it to the editor for publication. The court permitted the plaintiff's coun-

[25] Part of opinion omitted.

[26] In the omitted passage the court held that it did not sufficiently appear that the original manuscript could not be obtained, so as to admit the printed article as a copy.

sel to read the printed article in evidence without first producing the original manuscript. We there held it was error to permit the printed publication to be read to the jury without first producing or accounting for the manuscript. * * *

To hold the testimony of the plaintiff that the defendant said to or in the hearing of such plaintiff that a writing material to be produced in evidence contained certain statements to be sufficient to deprive the defendant of the right to be judged by the writing itself is to abrogate in its entirety the rule that the contents of a written instrument cannot be proved by parol in the absence of proof accounting for and excusing the nonproduction of the writing. Such testimony is proper as secondary proof of the contents of an instrument which has been shown to be lost, or its production in some legal manner excused. It is true, the defendant in error caused the plaintiff in error to be sworn as a witness, and, over the objection and exception of the plaintiff in error, asked him if he knew who composed that letter which appeared in the article, and the witness, being required by the court to answer, replied, "Yes, sir; I did." On cross-examination he said he could not say whether he wrote the article as it appeared in the newspaper, but that he wrote a letter "similar to it," which he allowed Mr. Varian, the reporter for the Times-Herald, to take from his office; that he did not authorize the publication of the article, and had never seen the original since the reporter took it. The court erred in overruling the objection to the question propounded to the plaintiff in error by counsel for the defendant in error. The primary evidence of the contents of the writing was the instrument itself, and the court erred in forcing the plaintiff in error to become a party to an effort to prove the contents of such writing by the preponderance of parol proof as to the statement which appeared in the writing.

The judgment of the Appellate Court and that of the circuit court are each reversed, and the cause will be remanded to the circuit court for such other and further proceedings as to law and justice shall appertain.

Reversed and remanded.

SWING v. CLOQUET LUMBER CO.

(Supreme Court of Minnesota, 1913. 121 Minn. 221, 141 N. W. 117, L. R. A. 1918C, 660.)

Action in the district court for St. Louis county by the trustee for the creditors of the Union Mutual Fire Insurance Company of Cincinnati to recover $1,106.88, the amount of a certain assessment levied against defendant as a policy holder in said company. * * *

The case was tried before Ensign, J., who made findings and ordered judgment in favor of plaintiff for $591.25. From the judgment entered pursuant to the order for judgment, defendant appealed.

HALLAM, J.[27] * * * 1. Defendant contends that there is no competent proof as to the contents of the premium note given by it or of the policy issued by plaintiff. It is true neither document was offered in evidence. It does appear that a premium note was given and that a policy was issued. It was necessary for plaintiff to further prove, by competent evidence, the amount of the note and the amount and duration of the policy.

Plaintiff offered for this purpose the policy register of the company. This contains entries showing the issuance of policy No. 2652, the date thereof, the original amount thereof, the amount of the premium note, the amount that it was reduced by fire, and the amount of insurance remaining in force. Plaintiff contends that the policy register is competent evidence of these facts. He invokes the rule applied to stock corporations that, where the name of an individual appears on the stockbook of a corporation as a stockholder, that fact establishes prima facie his relation as a stockholder in an action against him to enforce a stockholder's liability. Holland v. Duluth Iron Mining & Development Co., 65 Minn. 324, 68 N. W. 50, 60 Am. St. Rep. 480; Turnbull v. Payson, 95 U. S. 418, 24 L. Ed. 437. It is unnecessary to determine whether this rule is to be so extended as to make a policy register of a company such as this evidence in an action of this sort to establish the relation of policy holder, the amount of the policy, and the existence and amount of the premium note. It does appear in this case, from competent evidence, that the two assessments above mentioned were paid on a policy bearing the number 2652. It appears that defendant sustained a loss by fire; that there was paid by the insurance company to defendant, by reason thereof and on account of this policy, the sum of $33.26; that defendant receipted therefor, and, in said receipt, recited that this policy No. 2652 was reduced in the amount of this loss, leaving the sum of $4,966.74 still in force. It further appears that on December 30, 1890, defendant returned to the company this policy with a letter containing the following:

"Herewith return as requested,

			Prem.	Expires.
2652	Gen'l Form.	$5,000.00	$137.50	July 1, 1894.

"Kindly give us proper credit for return premium and forward note to us and oblige."

This testimony constitutes an admission in writing of the essential parts of the policy and of the premium note. Some controversy has existed in the past as to whether the contents of a written instrument may be proved against a party by his own admissions, and the question has not heretofore been decided in this state. Webster v. Ferguson, 94 Minn. 86, 91, 102 N. W. 213. The weight of authority is to the effect that such proof is competent. Slatterie v. Pooley, 6 M.

[27] Statement condensed and part of opinion omitted.

& W. (Eng.) 664; 2 Wigmore, Evidence, § 1255 et seq. This rule is sound in principle, at least when the admissions are in writing, as they are in this case. We hold that a written admission of the contents of a written document may be established against the party making the admission, without production of the document or accounting for its nonproduction. This evidence is in this case ample and conclusive, without resort to the policy register at all. * * *

Judgment modified.

SECTION 2.—OTHER FACTS

BERRYMAN v. WISE.

(Court of King's Bench, 1791. 4 Term R. 366.)

This was an action of slander by an attorney. The declaration stated that the plaintiff was an attorney of this Court, and having been employed in a particular cause had received a certain sum of money, which the defendant charged him with swindling, adding a threat that he would move the Court to have him struck off the roll of attornies. At the trial at the last York assizes before Thompson, B. the plaintiff proved the words, and his having been employed as an attorney in that and other suits. The defendant's counsel objected that the plaintiff had not proved the first allegation in the declaration, namely, that he was an attorney of this Court, which could only be proved, by his admission, or by a copy of the roll of attornies: but the objection was overruled, and the plaintiff obtained a verdict, the learned judge reserving the point, with liberty to move to enter a non-suit.

The Court were of opinion that this was sufficient proof, for the defendant's threat imported that the plaintiff was an attorney. And

BULLER, J., said that in the case of all peace officers, justices of the peace, constables &c, it was sufficient to prove that they acted in those characters, without producing their appointments, and that even in the case of murder. The excise and custom-house officers indeed fall under a different consideration: but even in those cases evidence was admitted both in criminal and civil suits to shew that the party was a reputed officer prior to the 11 Geo. I, c. 30, s. 32. In actions brought by attornies for their fees, the proof now insisted on has never been required. Neither in actions for tithes is it necessary for the incumbent to prove presentation, institution, and induction; proof that he received the tithes, and acted as the incumbent, is sufficient.

Rule discharged.

THE KING v. INHABITANTS OF COPPULL.

(Court of King's Bench, 1801. 2 East, 25.)

Two justices by an order removed Henry Bentham, his wife, and three children by name, from the township of Standish with Langtree to the township of Coppull, both in the county of Lancaster. The Sessions on appeal confirmed the order, subject to the opinion of this Court on a case, stating, That the respondents proved by the evidence of the pauper, that his father many years ago purchased a small estate for less than £30. in the township of Coppull, and occupied it himself for about five years, during which time the pauper was part of his father's family; and that the pauper's father during his occupation of the estate actually paid the parish rates or assessments in respect of his estate: but the respondents did not produce any rates or assessments, and had not given any notice for the production of the assessments or rates. The appellants objected, that without the production of them, or having given notice to produce them, there was no legal or proper evidence that the pauper's father was charged for the same.

LORD KENYON, C. J. It is impossible to argue that parol evidence may be given of rates which are not produced, nor any notice proved to produce them, nor any reasonable account given for their non-production. The best evidence was not given which the nature of the thing would admit of.

GROSE, J. It is in every day's experience to reject parol evidence of a writing which may and ought to be produced.

PER CURIAM. Orders quashed.

COTTERILL v. HOBBY.

(Court of King's Bench, 1825. 4 Barn. & C. 465.)

The declaration stated, that at the time of the grievances complained of, a certain close, situate, &c., was in the possession and occupation of one H. C. Morgan, as tenant thereof to the plaintiff, the reversion then and still belonging to the plaintiff, and that the defendant cut down a quantity of branches off and from certain trees then standing and growing in and upon the said close; second count trover for timber. Plea, the general issue. At the trial before Garrow, B., at the last Lent assizes for Hereford, Morgan was called as a witness for the plaintiff, and proved that he was tenant to the plaintiff of the close in question, under a written agreement, that defendant lopped some branches off the trees growing there, and carried them away. No evidence of the value was given. For the defendant, it was objected that the agreement under which Morgan held should have been produced, for that it could not otherwise appear that the plaintiff was reversioner of the

trees. The learned Judge refused to nonsuit the plaintiff, and the jury returned a general verdict with £5. damages. In Easter term, Campbell obtained a rule nisi for entering a nonsuit against which,

Taunton, and Oldnall Russell, now showed cause.

BAYLEY, J. It having been shown that Morgan held under a written agreement, I am of opinion that the terms of the holding could only be proved by that instrument, and, consequently, that the verdict on the first count cannot be sustained. But the objection does not apply to the count in trover. The trees were equally the property of the plaintiff, whether they were or were not excepted out of the demise; and it having been proved that the defendant carried away some of the branches, I think that the plaintiff is entitled to nominal damages, although no proof of the value was given.

HORLOYD and LITTLEDALE, JJ., concurred.

Verdict reduced to 1s.[28]

DOE ex dem. BINGHAM et al. v. CARTWRIGHT.

(Court of King's Bench, 1820. 3 Barn. & Ald. 326.)

This was an ejectment tried before Richardson, J., at the last assizes for the county of Worcester. The bailiff proved, that on Lady-day, 1818, he agreed that the land in question should be let to the defendant, and that he should sign an agreement with a surety. A memorandum of agreement was drawn up: the terms were read over to the defendant, and he assented to them. However, he never signed the agreement, or brought any surety. A notice to quit was served before Midsummer-day, 1818, to quit at the Lady-day following. It was objected, that the terms of the tenancy, the time at which it was to commence and end, ought to be proved by the written memorandum, drawn up by the witness, and assented to by the defendant. The learned Judge was of that opinion, and nonsuited the plaintiff; but reserved liberty to move to enter a verdict. A rule nisi having been obtained for that purpose in last Michaelmas term,

ABBOTT, C. J. I think, that in this case, there never existed any written agreement between the parties. The paper referred to at the trial would not become an agreement, till the defendant had brought a surety and executed it. It contained a mere proposal; and, upon the evidence, it appears to have been an unaccepted proposal. The defendant might have been turned out of the premises without any notice to quit; and there could, therefore, be no necessity for producing this memorandum.

Rule absolute.[29]

[28] For an elaborate review of the English cases on this point, see Strother v. Barr, 5 Bing. 136 (1828).

[29] And so in Rex. v. Wrangle, 2 Adol. & El. 514 (1835), where an unsigned written memorandum of an oral agreement had been prepared at the dictation of both parties.

KEENE v. MEADE.

(Supreme Court of the United States, 1830. 3 Pet. 1, 7 L. Ed. 581.)

In the circuit court, the testator of the defendant in error, Richard W. Meade, instituted an action against Richard R. Keene, the plaintiff in error, for money lent and advanced to him, in Spain, where Mr. Meade, at the time of the loan resided, and carried on business as a merchant. In order to establish the claims of the plaintiff below, a commission was issued to Cadiz; and under the same, certain depositions were taken, which were returned with the commission. * * *

The defendant's counsel also objected to the deposition of F. Rudolph, so far as the same went to prove the item of $250 in the plaintiff's account; alleging as the ground of the objection, that as there was a written acknowledgment made by the defendant, the writing should be produced, and the same could not be proved by parol. The plaintiff, by his counsel, offered to withdraw, and stated, that he withdrew and waived that part of the deposition which went to prove the existence of a written acknowledgment of receipt, and he relied only on the proof of the actual payment of the amount paid by the witness. The court overruled the objection, and permitted the evidence to be read.

THOMPSON, J.[80] This case comes up on a writ of error to the circuit court of the District of Columbia, and the questions for decision grow out of bills of exception taken by the defendant at the trial, and relate to the admission of evidence offered on the part of the plaintiff, and objected to by the defendant. * * *

The general objection to the testimony taken under the commission on account of the alleged variance having been overruled, the plaintiff's counsel read the deposition of F. Rudolph, which, in that part which went to prove the first item of $250 in the plaintiff's account, states that the defendant made the entry on the plaintiff's rough cash-book, himself; writing his name at full length, at his request, not so much for the sake of the receipt, as in order for him to become acquainted with his signature, and the way of spelling his name. The witness fully proved the actual payment of the money. But the defendant objected to such parol proof, as written evidence of the payment existed and should be produced. This objection we think not well founded. The entry of the advance made by the defendant himself under the circumstances stated, cannot be considered better evidence, within the sense and meaning of the rule on that subject, than proof of the actual payment. The entry in the cash-book did not change the nature of the contract arising from the loan, or operate as an extinguishment of it, as a bond or other sealed instrument would have done. If the original entry had been produced, the handwriting of the defendant must have been proved, a much more uncertain in-

[80] Statement condensed and part of opinion omitted.

quiry than the fact of actual payment. It cannot be laid down as a universal rule, that where written evidence of a fact exists, all parol evidence of the same fact must be excluded. Suppose the defendant had written a letter to the plaintiff acknowledging the receipt of the money, it certainly could not be pretended that the production of this letter would be indispensable, and exclude all parol evidence of the advance. And yet it would be written evidence. The entry made by the defendant in the cash-book was not intended, or understood to be a receipt for the money, but made for a different purpose; and even if a promissory note had been given as written evidence of the loan, the action might have been brought for money lent, and this proved by parol. The note must have been produced on the trial; not, however, as the only competent evidence of the loan, but to be cancelled, so as to prevent its being put into circulation; a reason which does not in any manner apply to the present case. This objection has been argued at the bar, as if the court permitted the plaintiff to withdraw or expunge that part of the deposition which related to the written acknowledgment, in order to let in the parol evidence. But this view of it is not warranted by the bill of exceptions. This was offered to be done by the plaintiff's counsel, but no such permission was given by the court. The parol evidence was deemed admissible, notwithstanding the written entry of the advance. The parol evidence did not in any manner vary or contradict the written entry, and no objection could be made to it on that ground. Nor does the non-production of the written entry afford any inference, that, if produced, it would have operated to the prejudice of the plaintiff. Nor can it in any manner injure the defendant. The production of the written entry in evidence would not protect the defendant from another action for the same cause, as seemed to be supposed on the argument. The charge would not be cancelled on the book, but remains the same as before trial; and the defendant's protection against another action depends on entirely different grounds. * * *

Judgment affirmed.[31]

GILBERT v. DUNCAN.

(Supreme Court of New Jersey, 1861. 29 N. J. Law, 133.)

WHELPLEY, C. J.[32] The action in the court below was upon two promissory notes, made by Gilbert, payable to David Rowland, and by him endorsed to the plaintiffs—the first, dated December 1st, 1856, for $918; the second, for $1,464.28, dated 9th March, 1857. They were dated at New York, and there transferred to the plaintiffs below. Both

[31] And so the payment of money may be proved without the production of the receipt. Brannan v. Henry, 175 Ala. 454, 57 South. 967 (1912).

[32] Part of opinion of Whelpley, C. J., and dissenting opinion of Van Dyke, J., omitted.

notes were made by Gilbert, for the accommodation of Rowland: such was the evidence at the trial, and that was not controverted.

There was no evidence that Duncan, Sherman & Co. knew, at the time of their transfer to them, that the notes were not business paper.

At the trial, the defendant, Gilbert, set up, among other defences, that, at the time the last note was transferred to Duncan, Sherman & Co., they agreed to give up to Rowland the first note. On this point the evidence was conflicting, and the court charged the jury that, if such was the agreement, the plaintiffs could not recover upon the first note. The verdict was for the amount of both notes. For the purposes of this case, we must assume, such having been the finding of the jury, that no such agreement was made, unless that finding may have been produced by some erroneous ruling of the court bearing upon that issue.

The evidence on the part of Gilbert tended to prove that, at the time the second note was transferred, Duncan, Sherman & Co. agreed to give up the first note. The evidence on the part of the plaintiffs, upon which the jury must have rested their verdict as to this point was, that they never agreed to give up the note for $918; that the note for $1,464.28 was not passed to them to take up the note for $918, but another note of Gilbert's passed by Rowland to them for $1,140.20. To the admission of parol evidence of the existence and amount of this note the defendant's counsel objected, unless proof of its loss or destruction was first made, assigning as the ground of the objection, that it contravened the rule excluding parol evidence of the contents of written instruments.

This is one of the errors assigned.

The note was not an agreement between the parties. The plaintiffs in no wise rested their claim upon it; it was entirely collateral to the issue; indeed the evidence was immaterial to the issue, in this sense, that the plaintiff's proof was complete, for all the purposes of the case, without proof of the existence or the amount of the note. The defendant had proved by one witness an agreement with the plaintiff's clerk to give up the note for $918; the plaintiffs' clerk denied the agreement to give up that note; and further said, the note which he did agree to give up, was for a different amount, for $1,140.20.

It is difficult to lay down any rule which will accurately define in what cases it is not necessary to produce a writing as the best evidence. There is much conflict in the cases upon this subject, arising more, perhaps, out of the application of the rule to differing cases than as to the rule itself. All the cases recognize the principle that, where the contents of the instrument are required, it must be produced, or its absence excused.

Savage, C. J., in McFadden v. Kingsbury, 11 Wend. (N. Y.) 667, said: "I have always understood the rule to be, that parol evidence of the contents of papers may be given when they do not form the foundation of the cause, but merely relate to some collateral fact."

The judgment of Parker, C. J., in Tucker v. Welsh, 17 Mass. 165, 9 Am. Dec. 137, proceeds also on the ground that the contents of a paper collateral to the issue may be proved by parol.

Mr. Greenleaf, also, in his work upon Evidence, paragraph 89, adopts the rule as enunciated by Chief Justices Savage and Parsons, citing as authority the cases just referred to. The author of the note in Phillips' Ev. Cow. & Hill's Notes, 2 vol. 398, after an elaborate examination of these cases, and others cited by him as maintaining the opposite doctrine, says: "We know of no ground, either upon principle or authority, upon which the doctrine can be maintained. Where, however, the contents are immaterial, and the question is one of mere identity, as in the present case, no reason is perceived why the production of the instrument should be required before the witness is permitted to allege its existence."

To enforce such a rule in every case would only serve to embarrass the administration of justice. If the statement of plaintiff's clerk was true, how could the plaintiff be aware that the production of the note for $1,140.20 would be of any avail?

In general, the principle adopted seems to be, that the existence of the paper may be shown by parol evidence for many purposes, when the existence of the paper is not shown for the purpose of maintaining or destroying any right involved in the action, but as a fact or circumstance collateral to the questions at issue. Lamb v. Moberly, 3 T. B. Mon. (Ky.) 179; Boone v. Dykes' Legatees, Ibid. 531; United States v. Porter, 3 Day (Conn.) 284, Fed. Cas. No. 16,074.

The rule of evidence, the infringement of which is assigned for error, is that requiring the best evidence to be given the nature of the case admits. It is said the existence of such a note can be best proved by its production. That may be the case—it would so seem. But the cases already cited show that it is impossible to adhere to this rule. For instance, a party proceeds, upon a trial, to give parol evidence of an agreement; the adversary objects that this cannot be done, and by cross-examination shows that the agreement was reduced to writing, that there was such an agreement in writing; it was never doubted that this may be done, and yet, if this rule is of universal application this could be done only by the writing itself. The rule must therefore have some limitation. No other rule can be adopted in practice than to permit the existence of a paper to be proved by parol as a fact in all cases where its contents are not material to the rights of the parties in the action, or the party proving it does not seek to avail himself of its contents as proof of any fact stated in it, or of any obligation created or discharged by it.

A fact stated in a writing may be proved aliunde, if it had existence independent of the paper as a payment of money, although a receipt of release has been given.

I entirely agree with the doctrine stated in the notes to Phillips' Evidence, that where the statements of a writing are desired as evidence

that such statements were made in writing, the writing, as the best evidence, must be produced, even if these statements are not pertinent to the main issue between the parties.

The evidence was properly received by the judge.[33] * * *

TAYLOR v. PECK.

(Court of Appeals of Virginia, 1871. 21 Grat. 11.)

MONCURE, P.[34] * * * The question presented by this assignment of error arises on the 4th bill of exceptions; from which it appears, that on the trial of the cause, the plaintiff proved herself to be the owner in fee of the lands in question, and that defendant was in possession on the 5th day of November, 1869, the date of the writ, and was still in possession at the time of the trial, and the plaintiff lived two miles from the main dwelling which was occupied by the defendant on said premises; and closed her evidence. The defendant, to sustain the issue on his part, then introduced two receipts signed by the plaintiff in the words and figures following, to wit:

"Received of C. L. Peck, three hundred dollars, amount in full for the rent of my property for the year 1868. M. B. Taylor."

[U. S. revenue stamp, 2 cents; cancelled.]

"Received of C. L. Peck, January 1, 1870, three hundred dollars in full, for the rent of my property for the year 1869, according to contract. M. B. Taylor."

[U. S. revenue stamp, 2 cents; cancelled.]

And proved that the sum of money mentioned in the receipt which is not dated, was paid partly in 1868, and the balance in September, 1869; that the payment in September, 1869, was not made by the defendant in person, but by an agent, and that the receipt was given on the 1st day of January, 1870. And he further proved that the sum of money mentioned in the receipt bearing date January 1st, 1870, was actually paid on the said 1st day of January, 1870, and was for the use and occupation of said premises for the year 1869; and he further proved that he had been in possession of said land since the 1st of January, 1868. And thereupon the defendant announced that he was through with his evidence. * * *

The defendant's evidence was excluded by the County Court upon the ground that parol evidence is inadmissible to prove the contents

[33] The same rule has been applied in an action to recover the price to be paid for a note sold to defendant, Lamb v. Moberly, 3 T. B. Mon. (Ky.) 179 (1826); and in an action to recover the amount agreed to be paid for the plaintiff's signature to an instrument, Shoenberger's Ex'rs v. Hackman, 37 Pa. 87 (1860).

[34] Statement of facts and part of opinion omitted.

of a written contract, unless the non-production of such contract is first duly accounted for; and that to admit the said evidence of the defendant in this case, would be to violate that rule.

There is no doubt about the existence of the rule or its wisdom. The only question is, does this case fall within it? Or does not this case come within some exception to the rule?

First. We think this case does not fall within the rule. In other words, that the rule does not apply to it. The evidence was not offered, and does not tend, to prove the contents of a written contract. It was offered, and tends only, to prove that at the time of the institution of the action, the defendant occupied the land in controversy as the plaintiff's tenant. The terms of the tenancy, or of the lease under which the defendant then held the premises, was perfectly immaterial. If he held them at that time as tenant, no matter on what terms and conditions, he held them lawfully, and the plaintiff had no right to recover in the action. That he held them as tenant of the plaintiff, and not adversely, was a fact which could be proved by parol evidence, and need not of necessity be proved by the production of the lease, though there may have been no reason for its non-production. It is well settled in England that the existence of a tenancy between the parties may be shown by parol, though the demise be in writing. Rex v. Holy Trinity, Kingston upon Hull, 7 Barn. & Cres. 611, 14 Eng. C. L. R. 101. If the fact of the occupation of land is alone in issue, without respect to the terms of the tenancy, this fact may be proved by any competent oral testimony, such as payment of rent, or declarations of the tenant, notwithstanding it appears that the occupancy was under an agreement in writing; for here the writing is only collateral to the fact in question. Thus the law is laid down by Professor Greenleaf, 1 Greenl. on Ev. § 87; and he cites the following cases to sustain him: Rex v. Holy Trinity, &c., supra; Doe v. Harvey, 8 Bing. 239, 241; Spiers v. Willison, 4 Cranch, 398, 2 L. Ed. 659; Dennett v. Crocker, 8 Greenl. (Me.) 239, 244. The case of Rex v. The Holy Trinity, &c., which was decided by the whole court of King's Bench in 1827, was questioned in the case of Strother, &c., v. Barr, &c., decided by the common pleas in 1828; 5 Bing. R. 136, 15 Eng. C. L. R. 391; and the opinion of Best, C. J., in that case, was much relied upon in the argument of the counsel for the plaintiff in this case. But in that case there was an equal division of the court, and the decision was against the opinion of the Chief Justice. He was the only judge in the case who questioned the correctness of the decision of Rex v. The Holy Trinity, &c., while two of the three other judges strongly relied upon it as a binding authority.

Secondly. But even if the rule in question were applicable to such a case as this, it comes within the exception to the rule which was declared in the case of Slatterie v. Pooley, 6 Mees. & Welsb. R. 664, decided by the Court of Exchequer in 1840, and cited by the Attorney-

General in this case. That exception is, that "a parol admission by a party to a suit is always receivable in evidence against him, although it relate to the contents of a deed or other written instrument; and even though its contents be directly in issue in the cause." * * *

The case of Slatterie v. Pooley has since been confirmed by a unanimous decision of the Court of Common Pleas in the case of Howard v. Smith, 3 Man. & Gran. 254, 42 Eng. C. L. R. 139, decided in 1841, and also cited by the Attorney-General.

According to these cases, which we think correctly expound the law, the receipts of the plaintiff for rent for the years 1868 and 1869, which were excluded as aforesaid, were clearly admissible.

And we think that all the evidence of the defendant which was excluded by the County Court was admissible evidence, and ought not to have been so excluded. * * *

Judgment reversed.[85]

HATCH v. FOWLER et al.

(Supreme Court of Michigan, 1873. 28 Mich. 205.)

COOLEY, J.[86] Fowler and Kelsey replevied from Hatch a quantity of lumber which he, as sheriff of Lapeer county, had levied upon by virtue of a writ of attachment against one Doyle. The levy was made at Imlay City, but the lumber was not removed, nor was any one left by the sheriff in charge of it. The sheriff duly endorsed the levy on his writ, and claimed afterwards to hold the property by virtue of it, and refused to give it up on demand by plaintiff's agent. It was conceded that the lumber belonged originally to Doyle, and had been manufactured by him at Burlington, some eighteen miles from the place where the attachment was served. Plaintiffs claimed to have bought the lumber of Doyle, and the defense was that if any such purchase was ever negotiated it had never been perfected, so as to pass the title, and even if it had been, so as to be valid and complete as between the parties, it was presumptively fraudulent as to the creditors of Doyle, and therefore prima facie void as against the writ in the hands of Hatch as sheriff.

To prove their title, Fowler, one of the plaintiffs, took the stand as a witness, and testified that in August, 1870, he was acquainted with Doyle, and went from Bay City with Kelsey to see him on the 16th of that month. Doyle had some lumber sawed, and a stock of logs in his mill to saw at that time. Plaintiffs made with him a written con-

[85] And so in Minnesota Debenture Co. v. Johnson, 96 Minn. 91, 104 N. W. 1149, 107 N. W. 740 (1906), testimony by the defendant that he held as tenant of X.

[86] Part of opinion omitted.

tract for the purchase of a certain amount of lumber. The written contract was then produced and identified, but it being attested by a subscribing witness who was not produced, it was not received in evidence. Fowler then proceeded to say that plaintiffs paid Doyle five hundred dollars at that time. He was then asked whether they subsequently made any payment to Doyle on the lumber. The question was objected to, but allowed, and subject to objection the witness proceeded to say that afterwards in September, they paid upon the contract five hundred dollars more, and in December seven hundred and seventy-five dollars more. * * *

The first question we shall consider is, whether plaintiffs were at liberty to make oral proof of the purchase they claimed to have made, when it was conceded that the contract was in writing. The plaintiffs, in the discussion of this question, have made the following points:

First. That the action is purely a possessory action.

Second. That as the plaintiffs claim title from Doyle, the specific terms whereby they acquire title are material only to the parties to the contract, to wit: Doyle, Fowler and Kelsey.

Third. That Hatch is a stranger to the contract, and has no right to inquire into its terms, except so far as they affect the rights of creditors whom he represents.

Fourth. That until Hatch had entered upon his defense, and shown that he represented creditors, proof of a sale which could only be avoided by creditors would be immaterial and collateral to the then issue.

The third of these positions we have no occasion to discuss; the other three appear to us to assume all that is in dispute between the parties.

It is very true that replevin is a possessory action; and as a general rule a party in the actual and undisputed possession of property cannot be required, as against a mere intruder, to show how he came possessed of the title, or even that he has any title at all. But in this case the plaintiffs did not plant themselves upon their possession, and, from the very equivocal nature of their possession, it is not very clear that they could have done so with safety, even as against a stranger. They began their case by showing title to the lumber in Doyle, and endeavoring to show that they had acquired that title by purchase. They endeavored to prove title, instead of possession; and though, as an important step in establishing title, they gave evidence to show possession had been taken by them, this was incidental only to the main fact sought to be made out, and not the main fact itself.

Starting thus, with the title in Doyle, how were the plaintiffs to deduce it to themselves? Clearly by showing their purchase. But how

were they to show their purchase except by proving the terms of the agreement, and a compliance therewith on their own part? This very case illustrates, in a very striking manner, the importance of the rule which requires the written contract to be produced in evidence. The plaintiffs insist upon a completed sale to themselves. How much did they buy? What were the conditions, if any, to be performed before title was to pass? What was the understanding by the contract regarding prices, inspection and delivery? Not one of these questions is satisfactorily answered by the parol evidence which was received, and different inferences are admissible. Some of the undisputed facts, though not absolutely inconsistent with a completed sale, are facts which are always held to require satisfactory explanation, in the absence of which the law presumes the title was not to pass. Such are the facts that the sum to be paid was not determined, and the inspection necessary for that purpose had not been had. If it were the clear intent of the parties that the title should pass notwithstanding, it might doubtless pass; but that intent is to be ascertained from their contract, and not from what they may say of it afterwards in a controversy with third parties. Nor can it be said that a third party proceeded against as a trespasser has no interest in knowing whether the conditions of the sale have been complied with. He has a vital interest in knowing whether the party who prosecutes him has a right to prosecute; for even though such party recover judgment, if he have no right in fact, his recovery will be no bar to a subsequent suit by the real party entitled.

Presumptively, on the plaintiff's own showing in this case, the title had not passed from Doyle. The mere delivery of a symbolical possession would not be conclusive. That of itself would not be so significant in its bearing upon the question whether the sale was completed, as the fact that the quantity and amount to be paid were not determined. This subject was so fully discussed in Lingham v. Eggleston, 27 Mich. 324, that we may content ourselves with a reference to that case, only remarking that parties who claim the title in opposition to such significant circumstances cannot complain that secondary evidence is objected to when that of the highest nature alone could give satisfactory explanation if any is possible.

This case has no analogy to Rayner v. Lee, 20 Mich. 384, and the other cases referred to by counsel. In the case named, a party was allowed to prove an occupation of land by one person under another without producing the lease; but there the fact of tenancy was all that was sought to be proved, and the terms of the lease, or whether any written lease existed, was unimportant. The other cases cited in the same connection are similar. But here the terms of the contract are of vital importance, because a compliance with them, or something accepted as equivalent, is essential to establish the title. And we cannot say that any thing has been accepted for some

thing else, or any thing waived, until we know what there was in the contract in respect to which there might be substitution or waiver. * * *

Judgment reversed.[87]

PACIFIC EXPRESS CO. v. DUNN.

(Supreme Court of Texas, 1891. 81 Tex. 85, 16 S. W. 792.)

STAYTON, C. J. Appellee brought this action to recover damages for the destruction of a house and property therein by fire, which he alleges resulted from the negligence of an employé of appellant while engaged in the course of his employment in its business. In the course of the trial, appellee was permitted to prove his ownership of the house by his own testimony, and it is urged that such evidence was not admissible for that purpose. This evidence was to the effect that he owned the house and lot on which it stood, and was in possession of it at the time and before it was destroyed; that he built the house some four years before it was burned, on another lot, from which he removed it to the lot on which it stood, about three years before it was destroyed; that two rooms in the house were occupied by his tenants, two vacant, and another occupied by himself as an office.

It was contended that appellee could not thus show his ownership, and that it was incumbent on him to show title by written muniment; or to show that he held the exclusive possession. The possession shown was certainly exclusive, within the meaning of the law, for the possession of his tenants was his possession, and no part of the premises was occupied by any person other than himself and his tenants. We do not understand that, in actions of this character, it is incumbent on a plaintiff to deraign title through writings from the sovereignty of the soil, or in some of the other methods in which title is acquired, but understand that an exclusive and peaceable possession of land furnishes prima facie evidence of ownership, which, if not rebutted, is sufficient to maintain such an action as this, or even ejectment or trespass to try title against a trespasser or mere intruder. Linard v. Crossland, 10 Tex. 462, 60 Am. Dec. 213; Lea v. Hernandez, 10 Tex. 137; Wilson v. Palmer, 18 Tex. 595; Yates v. Yates, 76 N. C. 142; Smith v. Lorillard, 10 Johns. (N. Y.) 339; Bledsoe v. Simms, 53 Mo. 305; Keith v. Keith, 104 Ill. 397; Barger v. Hobbs, 67 Ill. 592; Sedg. & W. Tr. Title Land, 717, and cases cited.

The question which brought out the evidence as to possession may have been leading, and the broad assertion of ownership may have been but the assertion of an opinion, but these matters furnish no rea-

[87] Compare Johnson v. Carlin, 121 Minn. 176, 141 N. W. 4, Ann. Cas. 1914C, 705 (1913), to the effect that, in an action against a tenant whose lease might be terminated in case of a sale of the premises, the fact of a sale might be proved without producing the contract of sale.

son for reversal, in view of the evidence of right furnished by the possession proved. There is no other question in the case, and the judgment must be affirmed.[88]

SECTION 3.—DEGREES OF SECONDARY EVIDENCE

HILTS v. CALVIN.

(Supreme Court of New York, 1817. 14 Johns. 182.)

SPENCER, J.,[89] delivered the opinion of the court. The plaintiff below offered one John G. Hilts as a witness. He was objected to on the ground of his incompetency, arising from his alleged conviction of the crime of grand larceny.

It was proved that there were no papers or records in the clerk's office of Herkimer, prior to May, 1804, and that in April, of that year, the clerk's office had been burnt down, and most or all of the papers had been consumed. It was offered to be proved that the witness, Hilts, had been convicted, previous to 1804, for harbouring stolen goods, and sentenced to the state prison: which proof was objected to, but admitted by the court, and made out by parol; and the witness being excluded, the plaintiff was nonsuited for want of proof to sustain his action.

It is insisted, that there was higher and better proof of Hilts' conviction, and that he ought not to have been excluded: 1. The copy of the sentence required to be given by the clerk of the court to the sheriff, who is required to deliver the same to the keeper of the state prison, with the prisoner. 1 R. L. 415. K. & R. sess. 24, ch. 121, s. 5.

2. The certificate required by the second section of the act relative to district attorneys to be sent to the court of exchequer, there to remain of record, containing the tenor and effect of every conviction, the name of the person and addition, the offence, the day and place of the conviction, and before whom it was had, and the judgment given thereon; a copy of which, under the hand of the clerk and the seal of the exchequer, is declared to be good evidence of such former conviction. 1 R. L. 462. K. & R. sess. 24, ch. 146, s. 2.

Whatever may be thought of the first objection, the second is decisive. It is always to be presumed that a public officer has done his duty, and this presumption stands until it is disproved. We must then intend that there was, in the court of exchequer, the transcript pointed out by the statute; and it follows that there was higher proof in the power of the party than that given at the trial below. This court,

[88] See same rule in Mathews v. Livingston, 86 Conn. 263, 85 Atl. 529, Ann. Cas. 1914A, 195 (1912).

[89] Statement omitted.

in the case of the People v. Herrick, 13 Johns. 82, 7 Am. Dec. 364, decided, that a party who would take exception to a witness on the ground of his conviction of the crimen falsi, must have a copy of the record of conviction ready to produce in court. The judgment below must be reversed.

Judgment reversed.

WINN et al. v. PATTERSON.

(Supreme Court of the United States, 1835. 9 Pet. 663, 9 L. Ed. 266.)

STORY, J.[40] This is a writ of error to the circuit court of the district of Georgia. The cause, which is an ejectment, has been twice before this court, and the decisions then had, will be found reported in 11 Wheat. 380, 6 L. Ed. 500, and 5 Pet. 233, 8 L. Ed. 108, to which we may therefore refer, as containing a statement of many of the material facts.

At the new trial had in November term, 1833, in pursuance of the mandate of this court, the plaintiff, to maintain the issue on his part, gave in evidence a copy of a grant from the State of Georgia to Basil Jones, for 7,300 acres, including the lands in controversy, dated the 24th of May, 1787, with a plat of survey thereto annexed. He then offered a copy of a power of attorney from Basil Jones to Thomas Smyth, Jr., purporting to be dated the 6th of August, 1793, and to authorize Smyth, among other things, to sell and convey the tract of 7,300 acres, so granted, which power purported to be signed and sealed in the presence of "Abram Jones, J. P., and Thomas Harwood, Jr.;" and the copy was certified to be a true copy from the records of Richmond county, Georgia, and recorded therein, on the 11th day of July, 1795. And to account for the loss of the original power of attorney, of which the copy was offered, and of the use of due diligence and search to find the same, the plaintiff read the affidavit of William Patterson, the lessor of the plaintiff, which in substance stated that he had not in his possession, power, or custody, the original grant, and that he verily believed the original power of attorney and grant have been lost or destroyed. * * *

The remaining question then, is, whether the copy now produced was proper secondary proof, entitled by law to be admitted in evidence. The argument is, that it is a copy of a copy, and so not admissible; and that the original record might have been produced in evidence. By the laws of Georgia, act of 1785, deeds of bargain and sale of lands are required to be recorded in the county where the lands lie; Prince's Dig. 112. Powers of attorney to convey lands, are not required by law to be recorded in the same county, though there seems to be a

[40] Part of opinion omitted.

common practice so to do. The act of 1785 provides that all bonds, specialties, letters of attorney, and powers in writing, the execution whereof shall be proved by one or more of the witnesses thereto, before certain magistrates of either of the United States, where the same were executed, and duly certified in the manner stated in the act, shall be sufficient evidence to the court and jury of the due execution thereof; Prince's Dig. 113. The present power was not recorded in the county of Franklin, where the lands lie, but in Richmond county; and, therefore, a copy from the record is not strictly admissible in evidence, as it would have been if powers of attorney were by law to be recorded in the county where the lands lie, and the present power had been so duly recorded. It is certainly a common practice to produce, in the custody of the clerk, under a subpœna duces tecum, the original records of deeds duly recorded. But in point of law a copy from such record is admissible in evidence, upon the ground stated in Lynch v. Clark, 3 Salk. 154; that where an original document of a public nature would be evidence if produced, an immediate sworn copy thereof is admissible in evidence; for as all persons have a right to the evidence which documents of a public nature afford, they might otherwise be required to be exhibited at different places at the same time. See Mr. Leach's note to 11 Mod. Rep. 134; Birt v. Barlow, 1 Doug. 171; 1 Starkie on Evidence, §§ 36, 37. If, therefore, the record itself would be evidence of a recorded deed, a duly attested copy thereof would also be evidence. The present copy does not, however, (as is admitted,) fall within the reach of this rule. But the question does arise, whether the defendant can insist upon the production of the record books of the county of Richmond, in court, in this case; as higher and more authentic evidence of the power of attorney not properly recorded there, to the exclusion of any other copy duly established in proof. We think he cannot. It is not required by any rule of evidence with which we are acquainted.

We admit that the rule, that a copy of a copy is not admissible evidence, is correct in itself, when properly understood and limited to its true sense. The rule properly applies to cases where the copy is taken from a copy, the original being still in existence and capable of being compared with it; for then it is a second remove from the original; or where it is a copy of a copy of a record, the record being in existence by law deemed as high evidence as the original; for then it is also a second remove from the record. But it is quite a different question whether it applies to cases of secondary evidence where the original is lost, or the record of it is not in law deemed as high evidence as the original; or; where the copy of a copy is the highest proof in existence. On these points we give no opinion, because this is not, in our judgment, the case of a mere copy of a copy verified as such; but it is the case of a second copy verified as a true copy of the original. Mr. Robertson expressly asserts that the record

was a copy of the original power made by himself, and that the present copy is a true copy which has been compared by himself with the record. In effect, therefore, he swears that both are true copies of the original power. In point of evidence, then, the case stands precisely in the same predicament as if the witness had made two copies at the same time of the original, and had then compared one of them with the original, and the other with the first copy, which he had found correct. The mode by which he had arrived at the result, that the second is a true copy of the original, may be more circuitous than that by which he has ascertained the first to be correct; but that only furnishes matter of observation as to the strength of the proof, and not as to its dignity or degree. In each case his testimony amounts to the same result, as a matter of personal knowledge, that each is a true copy of the original. We are, therefore, of opinion, that there was no error in the court in admitting the copy in evidence under these circumstances. * * *

Judgment affirmed.

HARVEY et ux. v. THORPE.

(Supreme Court of Alabama, 1856. 28 Ala. 250, 65 Am. Dec. 344.)

This was an action to recover a tract of land. A deed material to the defense had been lost. Defendant was permitted to introduce parol evidence to the effect that a mistake had been made in recording the deed so that the number of feet appearing in the deed register differed from the original.[41]

GOLDTHWAITE, C. J. * * * As to the principal question in the case—the admission of parol evidence to contradict the transcript of the deed certified by the clerk: The English cases certainly lay down the rule very broadly, that there are no degrees in secondary evidence (Rowlandson v. Wainright, 1 Nev. & Per. 8; Coyle v. Cole, 6 Car. & P. 81; Rex v. Hunt, 3 B. & Ald. 506; Brown v. Woodman, 6 Car. & P. 206); while, on the contrary, the current of American authorities goes very strongly to show that, although the facts may warrant the admission of secondary evidence, the best kind of that character of evidence which appears to be in the power of the party to produce, must be offered. United States v. Britton, 2 Mason, 464 [Fed. Cas. No. 14,650]; Kello v. Maget, 18 N. C. 414; Renner v. Bank of Columbia, 9 Wheat. 582-597 [6 L. Ed. 166]; Popino v. McAllister, 7 N. J. Law, 46-53; Blade v. Noland, 12 Wend. 173 [27 Am. Dec. 126]. We confess that the American rule appears to us more reasonable than the English; and we see great propriety, if there was

[41] The statement has been condensed and part of opinion omitted.

an examined copy of an instrument in the possession of a party, in refusing to allow him to prove it by the uncertain memory of witnesses. A copy of a letter, taken by a copying press, would unquestionably be better evidence of the original that the recollection of its contents by a witness; and the same reasons which would require the production of the original, if in the control of the party, would operate in favor of the production of the fac-simile, or of the examined copy. But, in all these cases, the strength of the proposition consists in the fact, that there is secondary evidence, in its nature and character better than that which the party offers, and that it is in his power to produce it. He certainly must be allowed to show, that what appears to be secondary evidence of a higher degree is not so in fact. In other words, he would be allowed to show that the paper, which purported to be a copy, was not in fact and in truth one.

To apply these principles to the case under consideration, the question is, whether the defendants below were concluded by the record of the conveyance in the office of the clerk of the county court. We should think it very unreasonable, that because the law authorized the conveyance to be recorded, that record should, in case of the loss or destruction of the original, be conclusive even on the parties to the deed. It would be more unreasonable still to give this effect to it against a stranger. That the legislature has the power to do so, is not denied; but we should require the use of the clearest and most unequivocal words to force us to such a conclusion.

The act of 1803 requires the clerk of the county court to record all conveyances of land lying in his county, duly certified and acknowledged, which are delivered to him for that purpose (Clay's Digest, 154–155); and the thirteenth section provides, that, in case of the loss or destruction of the original deed, the record, or a duly certified transcript, shall be received in evidence, "and be as good and effectual and available in law as if the original deed or conveyance had been produced and proved." In giving to the record the same degree of force that the original deed would have had, it was doubtless presumed that the clerk would make a true copy, "word for word," as another section of the act requires him to do; and we think it was only the record when thus made that it was intended to invest with unimpeachable verity. In other words, to make it a record, it must be a copy. Even judicial records, made under the sanction of judicial officers, and in themselves originals, have not always been held conclusive as to jurisdictional facts. Here the act contemplates nothing but a copy: and it is to this copy, when made by the clerk, that it was the intention of the law to accord unimpeachable verity. It is prima facie evidence, on the ground that all officers must be presumed to have discharged the duties which the law requires of them; and the statute also dispenses with any further proof of the execution than the production of the record or the transcript. But we are satisfied that it could never have

been intended to make the record as effectual as the original, unless it was a true copy; and we must, therefore, hold that it is not conclusive. * * *

Judgment affirmed.[42]

ESLOW et al. v. MITCHELL.

(Supreme Court of Michigan, 1873. 26 Mich. 500.)

CAMPBELL, J.[43] The plaintiffs in error, who were defendants below, held a chattel mortgage on certain articles used in a billiard saloon, given by one George W. Closson, in January, 1870, and falling due March 15, 1870. They were in possession of the chattels from a time not long after the date of the mortgage. There was evidence tending to show a sale and conveyance of the goods by the mortgagees, to one Teachout, in February, 1870, before the mortgage matured. Some time before its maturity, Closson empowered one Lane as his agent, to pay the mortgage and get the property back, and dispose of it. Lane tendered the amount, on the day it became due, and the mortgagees did not accept the money, nor return the goods. Lane then sold the property to Mitchell, who made demand, and on refusal brought trover.

The principal questions arise upon the effect of the tender, and of the sale to Teachout, and upon the validity of the transfer to Mitchell. Some further questions also arose on the trial, upon rulings on evidence.

To prove the power of attorney to Lane, evidence of its loss was given, and it was then made out by secondary evidence. Lane was allowed to show its contents from memory, and this was objected to on two grounds: first, because there was better evidence in the form of a copy, in the hands of Mitchell's counsel; and, second, because there was a subscribing witness who should have been sworn.

The supposed copy did not appear to have been compared by Lane, so that he could have identified it, and there is no rule of law that requires secondary evidence to be of one kind rather than another, where the writing is a private writing, and no counterpart is legally presumed or required to exist. If the evidence produced does not clearly show the tenor of the document, of course it fails; and if parties willfully keep back evidence in their possession, which might clear up a doubtful point, their conduct will have a tendency to injure their case. But there is no doubt private papers may be made out by

[42] And so in Wetmore State Bank v. Courter, 97 Kan. 178, 155 Pac. 27 (1916).

Compare Ming v. Olster, 195 Mo. 460, 92 S. W. 898 (1906), where a copy from the deed record was used to prove an alteration in the original.

[43] Statement and part of opinion omitted.

parol secondary evidence, and the objection to it, if there be any, is one of weight and not of competency. And in this case, for anything appearing, it may have been the best attainable, and the most satisfactory. * * *

Judgment affirmed.[44]

[44] And so in People v. Christian, 144 Mich. 247, 107 N. W. 919 (1906), where it was held that the defendant should have been permitted to testify to the contents of a lost letter from a public officer, though it was admitted that an office copy was in existence from which a certified copy could have been obtained.

See, also, Rosenbaum v. Podolsky, 97 Misc. Rep. 614, 162 N. Y. Supp. 227 (1916), where it was held that since the original contract was unavailable, because on file in a foreign court, the party was entitled to prove the contents by parol, though he could have obtained a copy from his own office in another state, the court observing: "* * * Although the argument is plausible, it is apparent on a moment's reflection that proof of an instrument by proving a copy is merely one form of parol testimony as to its contents; and I am not aware of any rule of law that makes a distinction of grade in secondary evidence. Its probative force will of course vary according to the quality of the proof, but if parol testimony is permissible it is competent; its character may be such as the party elects or finds possible, assuming of course always that it meets the other requirements relating to evidence generally. The same rule applies to primary evidence. Seidenspinner v. Metropolitan Life Ins. Co., 175 N. Y. 95, 98 [67 N. E. 123 (1903)]; People v. Gonzalez, 35 N. Y. 49, 61 [1866]."

Where a copy is preferred, it must appear that one is in existence and available in order to exclude oral testimony. Universal Oil & Fertilizer Co. v. Burney, 174 N. C. 382, 93 S. E. 912 (1917).

CHAPTER VII

THE "PAROL EVIDENCE" RULE [1]

SECTION 1.—EVIDENCE TO VARY, CONTRADICT, OR AVOID CERTAIN WRITTEN INSTRUMENTS

KAINES v. KNIGHTLY.

(Court of King's Bench, 1683. Skin. 54.)

The case upon evidence was, a policy of assurance was drawn from Archangel to Legorn, and assumpsit being brought upon it, the defendant said, that the agreement before the subscription was, that the adventure should begin, but from the Downs; but this agreement was not put into writing. This policy is but a mere parol agreement, and so may be altered or discharged by agreement by parol; but without it be put in writing, it shall be taken that the policy speaks the minds of the parties; for policies are things well known, and go as far as trade goes; and to suffer them to be defeated by agreements not appearing, is to lessen their credit, and to make them of no value, which yet are countenanced by two several Acts of Parliament. That the party may as well say, he is to have ten guineas premium, though the policy says but three; as to say he assured but from such a place, scil. The Downs, when the policy says it was from Archangel. The custom of merchants ought to be proved by those that have had frequent experience, and have known cases so ruled. 'Twas allowed, that if a ship was laden at Aleppo, and come to Messina, that she may be insured; the adventure is to begin from Messina; but then it must be so express'd, nay it need not be express'd that she was laden at Aleppo, (though the opinion of some merchants was so) as Pemberton, Chief Justice, said; but if the insurance was of goods laden at Aleppo, and they were indeed laden at Messina, it might make a difference. Pemberton said, that policies were sacred things, and that a merchant should no more be allowed to go from what he had subscribed in them, than he that subscribes a bill of exchange, payable at such a day, shall be allowed to go from it, and say it was agreed to be upon a condition &c. when it may be that the bill had been negotiated; for though neither of them are specialties, yet they are of great

[1] The cases under this topic have been selected primarily for the purpose of bringing out the real nature of the rule or rules involved, and it is hoped that this will also show why the subject could be dealt with more satisfactorily, if distributed to more appropriate courses.—*Ed.*

credit, and much for the support, conveniency, and advantage of trade; and the jury found contrary to the direction of the Court: and afterwards in Mich. term, there was another trial at Bar, and a verdict according to direction for the plaintiff. Afterwards an action upon the case was brought, for telling him that the ship was in the Downs, when in truth she was not, &c.

PRESTON v. MERCEAU.

(Court of Common Pleas, 1779. 2 Wm. Bl. 1249.)

Action on the case for the use and occupation of a house, of which, on the 21st of July, 1775, it was agreed in writing "that a lease should be let by Christiana Preston to Abraham Gamage for twenty-one years at £26. per annum, to commence from Michaelmas then next." Gamage died and made Merceau his executor, who paid £26. into Court for one year's rent. On the trial the plaintiff offered to shew, by parol evidence, that besides the £26. per annum, the defendant had agreed to pay £2. 12 s. 6d. a year, being the ground rent of the premises, to the ground landlord; but no evidence was offered of the actual payment of such ground rent during the testator's life, without which, DE GREY, C. J., thought such parol evidence inadmissible, and nonsuited the plaintiff. And now Davy and Grose moved to set aside this nonsuit, alleging that this was evidence not to alter, or vary, but to explain the [agreement]. That this was not a solemn deed or will, but a mere executory act; and had a bill in Chancery been brought to carry this into execution, parol evidence would have been admitted to prove the agreement to pay the ground rent. For in Joynes and Statham, the 29th of October, 1746, 3 Atk. 388, parol evidence was admitted to shew, that an agreement for a lease at £9. a year was to be clear of taxes.

But by BLACKSTONE, J., (absente GOULD, J.) I am clearly of opinion that Lord Chief Justice did right in rejecting this evidence. Courts should be very cautious in admitting any evidence to supply or explain written agreements. Else the Statute of Frauds would be eluded, and the same uncertainty introduced by suppletory or explanatory evidence, which that statute has suppressed in respect to the principal object. It never ought to be suffered, so as to contradict or explain away an explicit agreement, for that is in effect to vary it. Here is a positive agreement that the tenant shall pay £26. Shall we admit proof that this means £28. 12s. 6d.? What is it to the tenant by whom the rent is to be paid, so as he is obliged to pay more than his contract expresses? We can neither alter the rent nor the term, the two things expressed in this agreement. With respect to collateral matters it might be otherwise. He might shew who is to put the house in repair, or the like, concerning which nothing is said; but he cannot by parol evidence shorten the term to fourteen or extend it to

twenty-five years, or make the rent other than £26. per annum. The case in Atkins is of a mere executory act, in which the master was to settle the proper covenants, and therefore had a right to inquire who was to pay the taxes. Besides, there were strong suggestions of fraud in making the written agreement, as one party could neither read nor write.

NARES, J., of the same opinion. Great caution should be used in admitting explanatory evidence, especially in a case of a specific rent. This is an instrument in writing, and would have nonsuited the plaintiff before the statute of 11 Geo. 2, c. 19, sect. 14.

Rule discharged.

RICH v. JACKSON.

(Court of Chancery, 1794. 4 Brown, Ch. Rep. 514.)

The bill stated, that William Stiles, since deceased, being possessed of certain premises in Fleet Street, in 1791, William Jackson, the defendant's late husband, entered into a treaty with him for the lease thereof, and, in a conversation between them on the subject, offered him eighty guineas a year for the same, and that he, William Jackson, would pay all the taxes thereon, which Stiles agreed to accept.

That Stiles being then in a bad state of health at Tooting, Jackson, in September, in that year, went thither, and it having been mentioned by Stiles and Jackson, in the presence of witnesses, that Stiles was to receive eighty guineas a year for the premises, clear of all taxes, Jackson drew up a memorandum in his own handwriting, in which (after the usual introductory words) were the following: "Mr. William Stiles doth agree to let and grant a lease for twenty-one years, to be reckoned from Michaelmas, 1791, of (the premises) on the aforesaid William Jackson's paying to the aforesaid William Stiles £84. per annum, as follows (that is to say), £21. for every quarter; and the said William Jackson doth agree to pay the said William Stiles, his heirs, executors, and administrators, the aforesaid sum of £84. per annum, to be paid quarterly as aforesaid;" which agreement was signed by Stiles and Jackson, and attested by Nathaniel Seager, who was a witness in the cause. That before any rent became due, Jackson wrote to Stile's attorney, in order that a proper lease might be prepared of the premises, but the same was omitted to be done, and upon the 21st of November following, and before any lease was prepared, Stiles died, having made his will, whereby he gave the premises (int. al.) to Mr. Thomas Whitehead, who in February, 1792, agreed with the plaintiff for the purchase thereof, and the same were properly conveyed to the plaintiff.

That the plaintiff was, at the time of the conveyance to him, acquainted with the verbal and written agreement between Stiles and Jackson.

That Whitehead having given notice to Jackson, that the future rents would be payable to the plaintiffs, he obtained from Jackson a copy of the written agreement, from whence the plaintiff's attorney prepared a lease, containing the usual covenants, with a reservation of rent, at £84. a year, clear of all taxes whatever, which was sent to Jackson.

It appeared by the answer, that Jackson refused this lease, and caused a lease to be drawn on the terms of paying £84. per annum, without the words "clear of taxes," which was also refused by the plaintiffs.

It was stated in the bill, and admitted by the answer, that, about the 29th May, Jackson died intestate, and that the defendants had administered to him.

The plaintiff stated by his bill, but it was neither admitted nor denied by the answer, that the plaintiff had tendered to the defendant the lease, with the reservation of a clear rent, which she had refused; on which account the bill prayed a specific performance of the verbal agreement, and that a lease might be prepared and executed, reserving a rent of £84. clear of all taxes, and an injunction to restrain the under mentioned articles.

The defendant by her answer said, she was not present at any of the conversations, but that she had frequently heard William Jackson in his lifetime say, that it never was understood that he should pay the land tax, that it was not an hasty transaction, but that the agreement was left with Stiles for a day of two for his perusal, and that he had returned it with a note, with an immaterial addition, which was made to it. And that she did not believe that Stiles would have raised such dispute had Jackson survived.

The answer then stated (which had also been mentioned in the bill), that the defendant having paid £16. 8d. for land tax, brought an action in the Court of Common Pleas for the recovery thereof, the plaintiff having refused to deduct the same in the payment of the rent; and the cause being tried at Guildhall, before the present Lord Chancellor, then Lord Chief Justice of the Common Pleas, the defendant offered parol evidence in his defence, in contradiction to the written agreement, but his Lordship was pleased to reject such evidence, and directed a verdict to be given for the defendant (then plaintiff) for £16. 8d. with costs, with liberty to the plaintiff (defendant at law) to move the Court to impeach the same, if he should be so advised; and that, upon an application of the plaintiff to the Court of Common Pleas, the Court approved the verdict, and refused a rule to show cause why the same should not be set aside.

The common injunction had been granted in this cause, and, upon a motion to discharge the same, Lord Chancellor refused so to do, and said he would permit the cause to go on to another hearing.

And the cause now coming on to be heard,

Mr. Mansfield, and Mr. Abbot, for the plaintiff, contended that the

plaintiffs had a right to be relieved, upon proving the parol agreement, unless there was any rule in this Court to prevent the reading parol evidence, to show what was the intention of the parties.

This day, February 26th, LORD CHANCELLOR [2] gave judgment to the following effect:

From the evidence, believing the witnesses to speak truth, it is impossible to mistake the meaning of the parties to be exactly what Mr. Mansfield has stated, that the rent to be paid was meant to be a clear rent; but the parties had concluded the matter by a written agreement, which was, that a lease should be granted for twenty-one years, at a rent of eighty guineas a year, and the tenant paying his twenty guineas a quarter, including in it his land-tax receipt. It can only be according to the sense the law puts upon it.

The party died before the payment of any rent, so that the whole matter remains upon the agreement.

The Court of Common Pleas rejected the parol evidence very properly.

I am satisfied that there is no difference in the case in equity, where the party only comes for a more formal execution of the agreement.

I looked into all the cases: I cannot find that the Court has ever taken upon itself, to add to the form of the agreement; that in repeated instances the Court has refused to do so, though it has been insisted, that the parol evidence of the adverse party has shown the written agreement to be against conscience.

Joynes v. Statham (6 Ves. 335, note) was a case of that sort; the parol evidence, on the part of the defendant, showed the plaintiff had taken an unfair advantage, and it was his (defendant's) understanding that he was to receive a clear rent. Lord Hardwicke admitted the evidence to be read, to rebut the equity. Mr. Atkyns's note is very long; I looked at Lord Hardwicke's own note, which is very short. He mentions Walker v. Walker, as cited, and very little of the argument or evidence. It then says, "Decree a specific performance on the terms of the answer, the plaintiff submitting to this rather than to have his bill dismissed." His intention was therefore to dismiss the bill, but he gave the plaintiff this option. Walker v. Walker (6 Ves. 335, note) proceeded exactly on the same ground, where the second surrender was to be the consideration of the first. The cases cited were those in Vernon, where the act promised to be done on one part, raises the consideration, without which the party would not have done that which he did. The objection was taken, that it was to add to an agreement; Lord Hardwicke said no, it was to rebut an equity. Legal v. Miller is a little different in circumstances from this, but proceeds on the same ground: Pitcairne v. Ogbourne is not like this; the objection there ought to have been to the relevancy, not the competency, of the evidence. It was evidence of a private and fraudulent

[2] Lord Loughborough.

agreement, and the bill dismissed on that ground. In Baker v. Payne, the evidence was very properly admitted, and the agreement was corrected by original minutes, through the medium of parol evidence, of the custom of the trade. In Filmer v. Gott, the evidence was not to contradict the deed, but to show the deed was obtained by fraud. The King v. Scammonden was properly determined. Brodie v. St. Paul is but slightly mentioned in the report. These are the cases. The hardness of the case, under special circumstances, may induce the Court to refuse decreeing a performance, or to leave it to the plaintiff's remedy at law; but it is quite impossible to admit the rule of law to be broke in upon; and that requires, that nothing should be added to the written agreement, unless in cases where there is a clear subsequent and independent agreement, varying the former, but not where it is of matter passing at the same time with the written agreement.[3] The evidence offered here, which I permitted to be read, but which I ought not to have admitted, is all of matter passing at the same time with the written agreement, therefore I must dismiss the bill, but I will do so without costs.[4]

KEATING v. PRICE.

(Supreme Court of New York, 1799. 1 Johns. Cas. 22, 1 Am. Dec. 92.)

This was an action on the case founded on a special agreement. The plea was the general issue, with a notice from the defendant, that he would insist on some special matters in his defence, which, with reference to the point decided by the court, it will be unnecessary to state.

On the trial before Lansing, chief justice, at the last Rensselaer circuit, the plaintiff proved a written agreement, as set forth in the declaration, by which the defendant promised to deliver to the plaintiff, at the city of Albany, fifty thousand pipe staves, at a stipulated price, on or before the 1st day of May, 1796.

On the part of the defendant, it was, among other things, proved, by one R. Wait, that in the month of January, 1797, he had a con-

[3] Compare Lord Hardwicke in Henkle v. Royal Assurance Co., 1 Ves. Sr. 317 (1749): "No doubt, but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts: so that if reduced into writing contrary to intent of the parties, on proper proof that would be rectified. But the plaintiff comes to do this in the harshest case that can happen: of a policy, after the event and loss happened, to vary the contract so as to turn the loss on the insurer, who otherwise, it is admitted, cannot be charged: however, if the case is so strong as to require it, the court ought to do it."

[4] The student is referred to the proper course in equity for the various rules governing the reformation of contracts and conveyances.

A large number of the English cases has been collected in a note by the reporter to the principal case.

versation with the plaintiff, who informed him, that he, the plaintiff, had made the contract with the defendant for the delivery of the staves, as above mentioned, but that he had agreed to extend the time for delivering them until the next spring.

A verdict was taken for the plaintiff by consent, subject to the opinion of this court on several points, and among others, whether the time for performing the contract could be extended, by a subsequent agreement between the parties, and whether Wait's testimony could be received, to prove the declaration of the plaintiff to that effect. If so, it was agreed that a nonsuit should be entered.

PER CURIAM. This being, originally, a simple contract, we are of opinion, that it was competent for the parties, by parol agreement, to enlarge the time of performing it, and that Wait's testimony, to prove the plaintiff's declaration to that effect, was properly received. An extension of the time may often be essential to the performance of executory contracts, and there can be no reason why a subsequent agreement for that purpose, should not be valid. Let a nonsuit be accordingly entered.

Judgment of nonsuit.[5]

KAIN v. OLD et al.

(Court of King's Bench, 1824. 2 Barn. & C. 627.)

Assumpsit for a breach of warranty in the sale of a ship. The jury returned a verdict for plaintiff, subject to the opinion of the Court on a case stated which sufficiently appears in the opinion.[6]

ABBOTT, C. J., now delivered the judgment of the Court.

This is an action of assumpsit, brought for the recovery of damages for the breach of an alleged contract. The declaration alleges that, in

[5] Accord: Goss v. Lord Nugent, 5 B. & Ad. 58 (1833); Emerson v. Slater, 22 How. 41, 16 L. Ed. 360 (1859); Harris v. Murphy, Jenkins & Co., 119 N. C. 34, 25 S. E. 708, 56 Am. St. Rep. 656 (1896).

Just how far this rule may be affected by the statute of frauds is not entirely free from doubt. In case of contracts within the statute of frauds it seems to be agreed that, if a modified performance is agreed on and carried out, this may be shown as a defense to an action on the original contract, or as an excuse for failure to perform strictly, and also that, if the plaintiff refrains from strict performance at the request of defendant, e. g., delivery delayed to accommodate the defendant, he may still recover upon making a tender within a reasonable time. Cuff v. Penn, 1 M. & S. 21 (1813); Hickman v. Haynes, L. R. 10 C. P. 598 (1875).

But it also appears that an executory oral agreement, attempting to modify a written contract within the statute of frauds, will not enable the plaintiff to recover on the modified contract. Goss v. Lord Nugent, 5 B. & Ad. 58 (1833); Warren v. A. B. Mayer Mfg. Co., 161 Mo. 112, 61 S. W. 644 (1901).

Such problems, however, do not appear to involve any problem peculiar to the law of evidence, but depend rather on the proper construction of the statute of frauds.—*Ed.*

[6] Statement condensed.

consideration that the plaintiff would buy of the defendant's testator a certain ship at a price mentioned, the testator promised that the ship was copper bolted; that relying on that promise, the plaintiff bought the ship and paid the price; that he afterwards sold the ship to one Shepherd, and on that sale warranted the ship to be copper fastened; that the ship was not copper bolted; that Shepherd brought an action against him on his warranty, and recovered damages and costs. At the trial before me it was found, that the defendant's testator being sole owner of the ship, signed and delivered to the plaintiff an instrument describing the ship as copper bolted, and containing an inventory of stores; at the foot of which was written, "Sold the within mentioned ship to Messrs. Kain and Son, W. Dodds." And it was further found that the testator received the sum of £1650, and executed a bill of sale of the ship to Kain. That bill of sale was in the usual form, and contained a recital of the certificate of registry, but it did not describe the vessel as copper bolted. It was further found that Kain resold the ship to Shepherd, according to printed particulars similar to those before mentioned, and executed to him a bill of sale similar to that which was executed by the testator; that Shepherd brought an action on the case against him on his warranty, that the ship was copper fastened, and recovered.

Upon this case the question is, whether the plaintiff has proved a promise according to his declaration. We think he has not. The first instrument which contains a description of the ship as copper bolted, and an inventory of her furniture, and concludes with the words, "Sold the within-mentioned ship to Messrs. Kain and Son, W. Dodds" cannot in our opinion be regarded as an instrument of contract. It is invalid either as a conveyance or as an agreement to convey the ship, by the register acts, because it does not contain a recital of the certificate of registry, Biddell v. Leader, 1 B. & C. 327. And it is imperfect as an instrument of contract, because it does not mention the price, and this defect is not supplied by any fact appearing in the case; for there is no mention of any price as agreed between the parties before or at the time when Dodds the testator delivered the paper to the plaintiff: and the bill of sale mentions the sum of £1650. as the consideration of the sale, but does not mention any prior contract or agreement. We do not, however, rely on this imperfection, the objection arising out of the register act being decisive as to the invalidity of the paper. The bill of sale then is the only instrument of contract, and this does not describe the ship as copper bolted; though it contains covenants for the title and for further assurance. The description of copper bolted in the paper can therefore be considered as a representation only, and not as any part of the contract. The contract is in writing, as every contract for the sale of a ship must be.

Where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract, though not

always, because matter talked of at the commencement of a bargain may be excluded by the language used at its termination. But if the contract be in the end reduced into writing, nothing which is not found in the writing can be considered as a part of the contract. A matter antecedent to and dehors the writing, may in some cases be received in evidence, as showing the inducements to the contract; such as a representation of some particular quality or incident to the thing sold. But the buyer is not at liberty to show such a representation, unless he can also show that the seller by some fraud prevented him from discovering a fault which he, the seller, knew to exist. All this is very clearly laid down in the judgment delivered by the late Lord Chief Justice Gibbs in Pickering v. Dowson, and it is decisive of the present case wherein the plaintiff has neither declared upon, nor proved fraud on the part of the defendant's testator, but has declared upon a promise or contract. The postea therefore, is to be delivered to the defendant.

Judgment for defendant.

MILLER v. TRAVERS et al.

(Court of Chancery, 1832. 8 Bing. 244.)

TINDAL, C. J.[7] In this case the plaintiff, John Riggs Miller, filed his bill against the defendants for the purpose of establishing the will of the late Sir John Edward Riggs Miller, Bart., and for carrying into execution the trusts thereof. One of the defendants, Elizabeth Wheatley, was the sister and heiress at law of the testator. And upon the hearing of the cause before His Honour the Vice-Chancellor, after the answers of the several defendants, and amongst others, the answer of the defendant, Elizabeth Wheatley, had been put in, and witnesses examined, His Honour ordered, amongst other things, "That the parties should proceed to a trial at law on the following issue; viz. Whether Sir John Edward Riggs Miller, Bart., did devise his estates in the county of Clare, and in the county of Limerick, and in the city and county of the city of Limerick, or either and which of them, to the trustees mentioned in his will, and their heirs;" in which issue the plaintiff in the cause was to be the plaintiff, and the heiress at law and her husband defendants.

Against this part of the decree the defendant, Elizabeth Wheatley, has appealed, and prays a rehearing of the cause so far as respects that part.

Upon the hearing of this question on appeal, the Lord Chancellor has been pleased to request the assistance of the Lord Chief Baron and myself; probably foreseeing, as the case has appeared in the result, that the propriety of directing an issue, at least as to the devise of the

[7] Part of opinion omitted.

estates in the county of Clare, which was the main point in contention between these parties, would depend upon the nature of the evidence to be brought forward by the plaintiff, upon whom the affirmative in such issue would rest.

For if the evidence, and the only evidence which can possibly be brought forward by the plaintiff in support of his proposition, is of such a nature and description as to be inadmissible at the trial of the cause, it would be the duty of this Court to refuse the issue; it being manifestly to the advantage of both parties that such question should be decided in the first instance by the Judge sitting in equity, rather than that the very same question should be decided upon the very same principles of evidence by the Judge at Nisi Prius, after an expense and delay that must be worse than useless to all concerned in the suit.

Now the main question between the parties, and which has formed the principal subject of argument before us, is this, Whether parol evidence is admissible to show the testator's intention that his real estates in the county of Clare should pass by his will? There is a subordinate question as to the due execution of one sheet of the will, to which we shall afterwards advert, and upon which question an issue of a different and more limited form than that which has been at present directed, may perhaps properly be granted, if the plaintiff thinks fit to insist upon it; but the great contention between the parties is upon the question above proposed, as to the admissibility of parol evidence with respect to the estates in Clare.

This question arises upon facts, either admitted or proved in the cause, which are few and simple.

The testator by his will, duly executed, devised "all his freehold and real estate whatsoever, situate in the county of Limerick, and in the city of Limerick," to certain trustees therein named and their heirs. At the time of making his will he had no real estate in the county of Limerick, but he had a small real estate in the city of Limerick, and considerable real estates situate in the county of Clare.

The real estate in the city of Limerick is admitted to have passed under the devise; but the plaintiff contends that he is at liberty to show by parol evidence that the testator intended his estates in Clare also to pass under the same devise.

The general character of the parol evidence which the plaintiff contends he is at liberty to produce, in order to establish such intention in the devisor, is this; first, that the estate in the city of Limerick is so small, and so disproportioned to the nature of the charges laid upon it, and the trusts which are declared, as to make it manifest there must have been some mistake; and in order to show what that mistake was, the plaintiff proposes to prove that in the copy of the will which had been submitted to the testator for his inspection, and had been approved and returned by him, the devise in question stood thus: "All my freehold and real estate whatsoever situate in the counties of

Clare, Limerick, and in the city of Limerick;" that the testator directed some alterations to be made in other parts of his will, and that the same copy of the will, accompanied with a statement of the proposed alterations, was sent by the testator's attorney to his conveyancer, in order that such alterations might be reduced into proper form; and that upon such occasion the conveyancer, besides making the alterations directed, did by mistake, and without any authority, strike out the words "counties of Clare," and substitute the words "county of" in lieu thereof, so as to leave the devise in question in the same precise form as it now stands in the executed will. The plaintiff further proposes to prove, that a fair copy of the will so altered was sent to the testator, who, after having kept it by him for some time, executed the same in the manner required by law, without adverting to the alteration above pointed out. Indeed, without entering more minutely into the detail of the evidence, it may be taken, for the purpose of the argument, that if parol evidence was admissible by law, the evidence tendered in this case would be sufficient to establish, beyond contradiction, the intention of the testator to have been to include his estates in Clare in the devise to the trustees. Upon the fullest consideration, however, it appears to the Lord Chief Baron and myself, that admitting it may be shown from the description of the property in the city of Limerick, that some mistake may have arisen, yet, still, as the devise in question has a certain operation and effect, namely, the effect of passing the estate in the city of Limerick, and as the intention of the testator to devise any estate in the county of Clare cannot be collected from the will itself, nor without altering or adding to the words used in the will, such intention cannot be supplied by the evidence proposed to be given. * * *

The plaintiff, however, contends, that he has a right to prove, that the testator intended to pass not only the estate in the city of Limerick, but an estate in a county not named in the will, namely, the county of Clare, and that the will is to be read and construed as if the word Clare stood in the place of or in addition to that of Limerick.

But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it is to be collected from the will itself, to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention not apparent upon the face of the will. It is not simply removing a difficulty, arising from a defective or mistaken description; it is making the will speak upon a subject on which it is altogether silent, and is the same in effect, as the filling up a blank which the testator might have left in his will. It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator, which he is supposed to have omitted.

Now, the first objection to the introduction of such evidence is, that it is inconsistent with the rule, which reason and sense lay down, and

which has been universally established for the construction of wills, namely, that the testator's intention is to be collected from the words used in the will, and that words which he has not used cannot be added. Denn v. Page, 3 T. R. 87.

But it is an objection no less strong, that the only mode of proving the alleged intention of the testator is, by setting up the draft of the will against the executed will itself. As, however, the copy of the will which omitted the name of the county of Clare was for some time in the custody of the testator, and, therefore, open for his inspection, which copy was afterwards executed by him with all the formalities required by the statute of frauds, the presumption is, that he must have seen and approved of the alteration, rather than that he overlooked it by mistake. It is unnecessary to advert to the danger of allowing the draft of the will to be set up as of greater authority to evince the intention of the testator than the will itself, after the will has been solemnly executed, and after the death of the testator. If such evidence is admissible to introduce a new subject-matter of devise, why not also to introduce the name of a devisee, altogether omitted in the will? If it is admissible to introduce new matter of devise, or a new devisee, why not to strike out such as are contained in the executed will? The effect of such evidence in either case would be, that the will, though made in form by the testator in his lifetime, would really be made by the attorney after his death; that all the guards intended to be introduced by the statute of frauds would be entirely destroyed, and the statute itself virtually repealed.

And upon examination of the decided cases [8] on which the plaintiff has relied in argument, no one will be found to go the length of supporting the proposition which he contends for; on the contrary, they will all be found consistent with the distinction above adverted to,—that an uncertainty, which arises from applying the description contained in the will either to the thing devised, or to the person of the devisee, may be helped by parol evidence; but that a new subject-matter of devise, or a new devisee, where the will is entirely silent upon either, cannot be imported by parol evidence into the will itself.

On the contrary, the cases against the plaintiff's construction appear to bear more closely on that point. In the first place, it is well established, that where a complete blank is left for the name of a legatee or devisee, no parol evidence, however strong, will be allowed to fill it up as intended by the testator. Hunt v. Hort, 3 Bro. C. C. 311, and in many other cases.

[8] In the omitted passage the opinion reviewed the following cases dealing with the construction or application of various provisions in wills: Lowe v. Huntingtower, 4 Russ. 532, note; Standen v. Standen, 2 Ves. Jr. 589 (1795); Mosley v. Massey, 8 East, 149 (1806); Selwood v. Mildmay, 3 Ves. Jr. 306 (1797); Goodtitle v. Southern, 1 M. & S. 299 (1813); Day v. Trig, 1 P. Williams, 286 (1715).

Now the principle must be precisely the same, whether it is the person of the devisee, or the estate or thing devised, which is left altogether in blank. And it requires a very nice discrimination to distinguish between the case of a will, where the description of the estate is left altogether in blank, and the present case, where there is a total omission of the estates in Clare.

In the case of Doe d. Oxenden v. Chichester, 4 Dow. P. C. 65, it was held by the House of Lords, in affirmance of the judgment below, that in the case of a devise of "my estate of Ashton," no parol evidence was admissible to show that the testator intended to pass not only his lands in Ashton, but in the adjoining parishes, which he had been accustomed to call by the general name of his Ashton estate.

The Chief Justice of the Common Pleas, in giving the judgment of all the Judges, says, "If a testator should devise his lands, of or in Devonshire or Somersetshire, it would be impossible to say that you ought to receive evidence that his intention was to devise lands out of those counties." Lord Eldon, then Lord Chancellor, in page 90 of the Report, had stated in substance the same opinion. The case so put by Lord Eldon and the Chief Justice, is the very case now under discussion.

But the case of Newburgh v. Newburgh, decided in the House of Lords on the 16th of June, 1825, appears to be in point with the present. In that case the appellant contended, that the omission of the word "Gloucester," in the will of the late Lord Newburgh, proceeded upon a mere mistake, and was contrary to the intention of the testator, at the time of making his will, and insisted that she ought to be allowed to prove, as well from the context of the will itself as from other extrinsic evidence, that the testator intended to devise to her an estate for life as well in the estates in Gloucester, which was not inserted in the will, as in the county of Sussex, which was mentioned therein.

The question, "whether parol evidence was admissible to prove such mistake, for the purpose of correcting the will and entitling the appellant to the Gloucester estate, as if the word 'Gloucester' had been inserted in the will," was submitted to the Judges, and Lord Chief Justice Abbott declared it to be the unanimous opinion of those who had heard the argument, that it could not.

As well, therefore, upon the authority of the cases, and more particularly of that which is last referred to, as upon reason and principle, we think the evidence offered by the plaintiff would be inadmissible upon the trial of the issue, and that it would therefore be useless to grant the issue in the terms directed by the Vice-Chancellor. * * *

Order reversed.

GUARDHOUSE et al. v. BLACKBURN et al.

(Court of Probate, 1866. L. R. 1 Prob. & Div. 109.)

The defendants in this case were the executors under the will and codicil of Mrs. Hannah Jameson, late of Netherton, in Cumberland, who died on the 29th of August, 1863. The plaintiffs were the residuary legatees named in her will. The will was dated the 30th of May, 1851, and the codicil the 13th of April, 1852, and both were proved in common form by the defendants, in October, 1863. The probate had since been called in by the plaintiffs, and the will and codicil were propounded by the defendants in the ordinary declaration.

By the will the testatrix disposed of three different estates, called Folds, Scales, and Stainton; the estate of Scales she charged with legacies to the amount of £500., and that of Stainton with eight legacies of the amount of £100. each. She duly executed a codicil to her will in the following terms.

"This is a codicil to the will of me Hannah Jameson, of, &c., which will bears date the 30th day of May, 1851. I revoke the bequest of £100. therein made to my nephew, Edward Blackburn, and in lieu thereof I give him £200. I give and bequeath the legacy or sum of six hundred pounds, equally, unto, between, and amongst the therein named Samuel Jameson, John Jameson, Dorothy Smith, Margaret Armstrong, Jane Jameson, and Mary Ann Jameson; the said Jane Jameson and Mary Ann Jameson taking one-fifth share only, upon the same conditions, and under the same limitations in all respects as I have in my said will devised my estate of Folds in their favour. I release and discharge my said estate from the payment of the legacies therein given to my executors, and I direct all the legacies therein and herein given (and not revoked) to be paid out of my personal estate. In all other respects I ratify my said will. In witness whereof, I have hereunto set my hand this 13th day of April, 1852. Hannah Jameson."

The plaintiffs admitted the due execution of the will and codicil and the only question raised by them was as to whether the words "therein and," at the end of the codicil, were entitled to probate. By their plea they denied that the codicil, as executed, expressed the wishes and intentions of the deceased; and alleged that she, having a mind to alter her will, sent for William Carrick, her solicitor, and gave him instructions for a codicil, which he reduced into writing, and which instructions were pleaded; which, after giving and revoking the legacies mentioned in the codicil as executed, concluded, "And I charge all the said legacies on my personal estate." That the said William Carrick, intending to prepare the said codicil for execution, and to make a few verbal alterations only, wrote out the paper propounded, but that he inadvertently, or by mistake, and without any instructions whatever to that effect from the deceased, wrote the words, "And I direct all the legacies therein and herein given (and not revoked) to be

paid out of my personal estate in lieu of; and I charge all the said legacies on my personal estate." That the effect of the said words, "therein and," which had the effect of discharging the estate of Scales of legacies to the amount of £500., and of the estate of Stainton of the payment of legacies to the amount of £800., was not observed by the said William Carrick, nor by the deceased, when she executed the codicil, and that the said paper writing, containing the words "therein and," was not the codicil of the said deceased.

William Carrick said in examination: he took the instructions from the testatrix by word of mouth, at her residence, and wrote them down in her presence on the draft. The draft was intended to be copied for execution. From the draft he prepared in her presence a copy for execution for her, varying in a few particulars from the draft, but not in substance, until he came to the words in dispute. He read over the draft to her, and asked if it was as she intended it. She expressed herself satisfied with it. He read the copy over to her, so that she could understand it. She said nothing, but proceeded to execute it. He retained the codicil in his custody until the deceased's death. She gave him no instructions to discharge the real estates of Scales and Stainton from the legacies of £1300.; and he had no instructions from her to insert the words "therein and." He inserted them by inadvertence. Her attention was not particularly directed to them, and his attention was first directed to them after her death.

Sir J. P. WILDE.[9] * * * Supposing, then, parol evidence to be admissible in such a case as the present, the question recurs to what extent is it still open to the Court since the statute, to act upon such evidence, for the purpose of rejecting the whole or expunging any portion of the written testament to which the testator has duly affixed his name? A more important inquiry could hardly arise. For you may as effectually incline the balance by taking out of one scale as by adding to the other, and it is quite as easy to vary the effect of a will in any given direction by leaving words out as by putting them in. After much consideration, the following propositions commend themselves to the Court as rules which, since the statute, ought to govern its action in respect of a duly executed paper: First, that before a paper so executed is entitled to probate, the Court must be satisfied that the testator knew and approved of the contents at the time he signed it. Secondly, that except in certain cases, where suspicion attaches to the document, the fact of the testator's execution is sufficient proof that he knew and approved the contents. Thirdly, that although the testator knew and approved the contents, the paper may still be rejected, on proof establishing, beyond all possibility of mistake, that he did not intend the paper to operate as a will. Fourthly, that although the testator did know and approve the contents, the paper may be refused probate, if it be proved that any fraud has been purposely practised

[9] Part of opinion omitted.

on the testator in obtaining his execution thereof. Fifthly, that subject to this last preceding proposition, the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof. Sixthly, that the above rules apply equally to a portion of the will as to the whole. The first and second of these propositions are amply established by the case of Barry v. Butlin, 2 Moo. P. C. 480, and others of that class in the Privy Council. The third was also well approved law in the Ecclesiastical Courts, for there must be an "animus testandi" to constitute a paper testamentary. The fourth requires no comment, and the last is justified by the case of Allen v. McPherson, 1 H. of L. Cas. 191. It remains to say a few words on the fifth. It is here that the right to derogate from the force of an executed paper approaches and receives its limit. And it is obvious enough, that if the Court should allow itself to pass beyond proof that the contents of any such paper were read or otherwise made known to the testator, and suffer an inquiry by the oath of the attorney or others as to what the testator really wished or intended, the authenticity of a will would no longer repose on the ceremony of execution exacted by the statute, but would be set at large in the wide field of parol conflict, and confided to the mercies of memory. The security intended by the statute would thus perish at the hands of the Court. I have thus endeavoured to place the use of parol evidence in these matters on its true ground. The general rule for excluding it in our courts is based upon the proposition that written testimony is of a higher grade—more certain, more reliable—than parol, and that resort should be had to the highest evidence of which a subject is capable, to the exclusion of the inferior class. But it is one thing to admit evidence, and another to give effect to it. If a statute require that a thing should be in writing and signed, in order to its validity, it precludes the Court from giving effect to parol testimony of that which is required to be so written and signed. And if it be said, why, then, admit parol evidence on the subject at all? The answer is, that if the scope of such evidence can be clearly known before it is heard, it should be excluded; but then only on the ground of immateriality, not because it is secondary. In actual practice a large number of cases are so presented that it is impracticable to reject evidence as immaterial before the details of it are known. Little need be added as to the operation of these principles upon the present case. The codicil was proved to have been read over to the testator before the execution thereof, she duly executed the same, and the Court conceives it to be beyond its functions or powers to substitute the oath of the attorney who prepared it, fortified by his notes of the testator's instructions, for the written provisions contained in a paper so executed. The probate will, therefore, be delivered out to the plaintiffs in its present form.

FOSTER v. JOLLY.

(Court of Exchequer, 1835. 1 Cromp., M. & R. 703.)

ASSUMPSIT by the payee against the maker of a promissory note for £12., payable fourteen days after date. Plea, the general issue. At the trial before Gurney, B., at the last assizes for the county of Lancaster, it appeared that Samuel Milnes, the brother-in-law of the defendant, being agent for a co-operative society, and having ordered goods for the society from a person named Walker, which had not been paid for, the plaintiff, as the attorney of Walker, sued Milnes for the amount. Milnes then gave the names of certain members of the society, who were also sued for the debt and a verdict obtained. Milnes also gave a cognovit, and, judgment being entered up, he was taken on a ca. sa., and while in prison, the defendant gave the note in question for the amount of the demand against Milnes. The defendant now proposed to show, that the note was given under an agreement that it should not be enforced, in case Walker should obtain a verdict in the action against the members of the co-operative society. On the part of the plaintiff, it was objected that parol evidence of the agreement was inadmissible to vary the terms of the written instrument, and also that the agreement was that the note should not be put in suit, only in case Walker obtained the fruits of his verdict. The learned Judge, however, admitted the evidence, giving the plaintiff leave to move to enter a verdict for £12., if the Court should be of opinion that the evidence was inadmissible. In the course of last term, Wightman accordingly obtained a rule, and—

Alexander now showed cause. It is not a universal rule that parol evidence may not be given to contradict the terms, express or implied, of a bill or note. Where a bill purports to be "for value received," it is competent to the party sued upon it to show, that, in fact, no value has been received; so, it is every day's practice to contradict, by oral evidence, the implied consideration which every bill or note carries with it.

LORD ABINGER, C. B. At the commencement of the argument, I felt some doubt, whether this might not be regarded as a question of consideration; but the reasoning of Mr. Wightman has placed it in another light, and I am of opinion that the evidence tendered by the defendant went to vary the contract appearing on the face of the note. It is not a question of consideration, or collateral security. The consideration of the instrument was not impeached, nor was it given as a collateral security, but the defence attempted to be established was in direct contradiction of the terms of the note. The maker of a note payable on a day certain cannot be allowed to say, "I only meant to pay you upon a contingency," that is at variance with his own written contract. The case must be governed by that of Rawson v. Walker.

PARKE, B. At first I had some doubts upon the point, but I am now satisfied that this evidence ought to have been rejected. Every bill or note contains two things—value either expressed or implied, and a contract to pay at a specified time. The general rule is, that the maker is at liberty to contradict the value as between himself and the party to whom he gave the note; but he is not at liberty to contradict the express contract to pay at a specified time. Here the event upon which the defendant contends that the note was payable was contingent, and might never happen, which is a clear contradiction of the contract contained in the note. Rawson v. Walker is in point; Pike v. Street falls within the other class of cases in which the consideration has been contradicted. There the agreement was, that the plaintiff should sue the acceptor of the bill only, and should not sue the endorser (the defendant). That, as between the plaintiff and the defendant, negatived any consideration, and so was admissible.

ALDERSON, B. Parol evidence is admissible to contradict the consideration or value of a bill or note, but not the terms of the instrument itself. Here the note contains an engagement to pay at a specified time, namely, in fourteen days, and evidence is offered to show, that this means that the note should be paid upon the occurrence of an event which may happen either before or after the expiration of fourteen days. Such evidence falls within the general rule, that matters in writing shall not be contradicted by parol.

GURNEY, B., concurred.

Rule absolute.

PEUGH v. DAVIS.

(Supreme Court of the United States, 1877. 96 U. S. 332, 24 L. Ed. 775.)

Mr. Justice FIELD [10] delivered the opinion of the court:

This is a suit in equity to redeem certain property, consisting of two squares of land in the City of Washington, from an alleged mortgage of the complainant. The facts, out of which it arises, are briefly these: in March, 1857, the complainant, Samuel A. Peugh, borrowed from the defendant, Henry S. Davis, the sum of $2,000 payable in sixty days with interest at the rate of three and three-fourths per cent. a month, and executed as security for its payment a deed of the two squares. This deed was absolute in form, purporting to be made upon a sale of the property for the consideration of the $2,000, and contained a special covenant against the acts of the grantor and parties claiming under him. This loan was paid at its maturity, and the deed returned to the grantor.

In May following, the complainant borrowed another sum from the defendant, amounting to $1,500, payable in sixty days, with the

[10] Statement omitted.

same rate of interest, and as security for its payment redelivered to him the same deed. Upon this sum the interest was paid up to the sixth of September following. The principal not being paid, the defendant placed the deed on record on the 7th of that month. In January, 1858, a party claiming the squares under a tax title brought two suits in ejectment for their recovery. The defendant thereupon demanded payment of his loan, as he had previously done, but without success.

On the 9th of February following, the complainant obtained from the defendant the further sum of $500, and thereupon executed to him an instrument under seal, which recited that he had previously sold and conveyed to the defendant the squares in question; that the sale and conveyance were made with the assurance and promise of a good and indefeasible title in fee simple; and that the title was now disputed. It contained a general covenant warranting the title against all parties, and a special covenant to pay and refund to the defendant the costs and expenses, including the consideration of the deed, to which he might be subjected by reason of any claim or litigation on account of the premises. Accompanying this instrument, and bearing the same date, the complainant gave the defendant a receipt for $2,000, purporting to be in full for the purchase of the land.

The question presented for determination is whether these instruments taken in connection with the testimony of the parties, had the effect of releasing the complainant's equity of redemption. It is insisted by him that the $500 advanced at the time was an additional loan, and that the redelivered deed was security for the $2,000, as it had previously been for the $1,500. It is claimed by the defendant that this money was paid for a release of the equity of redemption which the complainant offered to sell for that sum, and at the same time to warrant the title of the property and indemnify the defendant against loss from the then pending litigation.

It is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security and not of sale, it will give effect to the actual contract of the parties. As the equity, upon which the court acts in such cases, arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument. Thus, it may be shown that a deed was made to defraud creditors, or to give a preference, or to secure a loan, or for any other object not apparent on its face. The object of parties in such cases will be considered by a court of equity; it

constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent fraud or oppression, and to promote justice. Hughes v. Edwards, 9 Wheat. 489, 6 L. Ed. 142; Russell v. Southard, 12 How. 139, 13 L. Ed. 927; Taylor v. Luther, 2 Sumn., 228, Fed. Cas. No. 13,796; Pierce v. Robinson, 13 Cal. 116.

It is also an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has in a court of equity a right to redeem the property upon payment of the loan. This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates. Its maintenance is deemed essential to the protection of the debtor, who, under pressing necessities, will often submit to ruinous conditions, expecting or hoping to be able to repay the loan at its maturity, and thus prevent the conditions from being enforced and the property sacrificed.

A subsequent release of the equity of redemption may, undoubtedly, be made to the mortgagee. There is nothing in the policy of the law which forbids the transfer to him of the debtor's interest. The transaction will, however, be closely scrutinized, so as to prevent any oppression of the debtor. Especially is this necessary, as was said on one occasion by this court, when the creditor has shown himself ready and skillful to take advantage of the necessities of the borrower. Russell v. Southard, supra. Without citing the authorities, it may be stated as conclusions from them, that a release to the mortgagee will not be inferred from equivocal circumstances and loose expressions. It must appear by a writing importing in terms a transfer of the mortgagor's interest, or such facts must be shown as will operate to estop him from asserting any interest in the premises. The release must also be for an adequate consideration; that is to say, it must be for a consideration which would be deemed reasonable if the transaction were between other parties dealing in similar property in its vicinity. Any marked undervaluation of the property in the price paid will vitiate the proceeding.

If, now, we apply these views to the question before us, it will not be difficult of solution. It is admitted that the deed of the complainant was executed as security for the loan obtained by him from the defendant. It is, therefore, to be treated as a mortgage, as much so as if it contained a condition that the estate should revert to the grantor upon payment of the loan. There is no satisfactory evidence that the equity of redemption was ever released. The testimony of the parties is directly in conflict, both being equally positive—the one, that the advance of $500 in February, 1858, was an additional loan; and the other, that it was made in purchase of the mortgagor's interest in the property. The testimony of the defendant with reference to other matters connected with the loan is, in several essential particulars, successfully contradicted. His denial of having received the

installments of interest prior to September, 1857, and his hesitation when paid checks for the amounts with his indorsement were produced, show that his recollection cannot always be trusted.

Aside from the defective recollection of the creditor, there are several circumstances tending to support the statement of the mortgagor. One of them is, that the value of the property at the time of the alleged release was greatly in excess of the amount previously secured with the additional $500. Several witnesses resident at the time in Washington, dealers in real property, and familiar with that in controversy and similar property in its vicinity, place its value at treble that amount. Some of them place a still higher estimate upon it. It is not, in accordance with the usual course of parties, when no fraud is practiced upon them, and they are free in their action, to surrender their interest in property at a price so manifestly inadequate. The tax title existed when the deed was executed, and it was not then considered of any validity. The experienced searcher who examined the records pronounced it worthless, and so it subsequently proved.

Another circumstance corroborative of the statement of the mortgagor, is, that he retained possession of the property after the time of the alleged release, inclosed it, and either cultivated it or let it for cultivation, until the inclosure was destroyed by soldiers at the commencement of the war in 1861. Subsequently he leased one of the squares, and the tenant erected a building upon it. The defendant did not enter into possession until 1865. These acts of the mortgagor justify the conclusion that he never supposed that his interest in the property was gone, whatever the mortgagee may have thought. Parties do not usually inclose and cultivate property in which they have no interest.

The instrument executed on the 9th of February, 1858, and the accompanying receipt, upon which the defendant chiefly relies, do not change the original character of the transaction. That instrument contains only a general warranty of the title conveyed by the original deed, with a special covenant to indemnify the grantee against loss from the then pending litigation. It recites that the deed was executed upon a contract of sale contrary to the admitted facts that it was given as security for a loan. The receipt of the $2,000, purporting to be the purchase money for the premises, is to be construed with the instrument, and taken as having reference to the consideration upon which the deed had been executed. That being absolute in terms, purporting on its face to be made upon a sale of the property, the other papers referring to it were drawn so as to conform with those terms. They are no more conclusive of any actual sale of the mortgagor's interest than the original deed. The absence in the instrument of a formal transfer of that interest leads to the conclusion that no such transfer was intended.

We are of opinion that the plaintiff never conveyed his interest in the property in controversy except as security for the loan, and that

his deed is a subsisting security, He has, therefore, a right to redeem the property from the mortgage. In estimating the amount due upon the loan, interest only at the rate of six per cent. per annum will be allowed. The extortionate interest stipulated was forbidden by statute, and would, in a short period, have devoured the whole estate. The defendant should be charged with a reasonable sum for the use and occupation of the premises from the time he took possession in 1865, and allowed for the taxes paid and other necessary expenses incurred by him.

The decree of the Supreme Court of the District must be reversed and the cause remanded for further proceedings, in accordance with this opinion; and it is so ordered.

KENT v. AGARD.

(Supreme Court of Wisconsin, 1869. 24 Wis. 378.)

Ejectment. Plaintiff showed title in one Cown in 1848; mortgage from Cown to him in 1859; foreclosure of the mortgage, and referee's deed to him, in 1865. He then introduced a deed of the premises, absolute on its face, executed by Cown to one Lasley, June 12, 1849, recorded as a deed on the day of its date; and offered to show, by the testimony of said Cown, that said deed was given as a security for an indorsement by Lasley of Cown's note; that said note had been paid in full by Cown before June, 1854; that in the month last mentioned Lasley died; and that in June, 1856, the administrators of Lasley's estate, by an instrument under seal and duly recorded in said county, made by order of the proper probate court, after proof taken of the facts, acknowledged full satisfaction of said mortgage, and released and reconveyed the premises to said Cown; but the evidence was rejected; and, it being admitted that defendants were in possession under the heirs of Lasley, the plaintiff was nonsuited. From this judgment he appealed.

PAINE, J. The plaintiff should have been allowed to show by parol that the absolute deed given by Cown to Lasley was intended as a mere security, and was consequently only a mortgage. That this may be done in some form of action, is not contested. And I can see no reason why it may not be done in an action to recover the possession of real estate. When the facts are proved, such a deed is a mortgage only, both at law and in equity. The rights of the mortgagor and mortgagee are precisely the same as though the defeasance were contained in the deed itself. The only difference is in the manner of proving the defeasance.

It may well be that where the grantee in such an absolute deed dies, his executors or administrators could not conclude his heirs by admitting the deed to be a mere mortgage, and by releasing it as such. The

heirs may be entitled to a trial upon the fact, if they choose to contest it. But that trial may as well be in an action of ejectment as in any other. If the deed was in fact only a mortgage, then the indebtedness secured by it was properly paid to the administrators; and, on proof of the fact by parol, their release takes effect, and shows that the mortgage was extinguished, and constituted no obstacle to the plaintiff's recovery upon his legal title.

Indeed, it seems difficult to imagine any other action by which the plaintiff could bring the question to trial. If he should bring an equitable action, and ask to have the deed declared a mortgage, it would seem to be a sufficient answer to tell him that if it was a mortgage in fact, he could prove it in an action at law, and it would then have only the effect of a mortgage. The authorities cited by the appellant show that such evidence is admissible in both classes of actions.

BY THE COURT. The judgment is reversed, and the cause remanded for a new trial.[11]

PRENTISS v. RUSS.

(Supreme Judicial Court of Maine, 1839. 16 Me. 30.)

Replevin for a chaise. The defendant claimed the chaise under a contract dated April 4, 1837, wherein the plaintiff sells to the defendant the chaise in question, and Russ sells to Prentiss a note given by one Pinkham to him, and indorsed, and promises, that if Prentiss cannot collect the note of Pinkham on execution, he will pay him the amount, and guaranties to Prentiss, that execution can be obtained on the note for principal and interest. On the trial, the plaintiff contended, that the contract of sale had been rescinded; and to establish this fact, offered evidence to prove that the note was void through an entire failure of consideration; that the defendant well knew the fact, but when the contract was made fraudulently represented to the plaintiff, that the note was collectable, and that Pinkham had no defence to it; that an action had previously been brought upon it in the name of one Butler, which was defended by Pinkham, and discontinued because the defence would have been successful, and the costs paid by Russ; and that these facts, though well known to the defendant, were by him concealed from the plaintiff. The defendant objected to this evidence, because that the contract was in writing, and parol evidence could not be admitted to vary, control, or explain it; and because the plaintiff could have upon that contract all the

[11] And so in Lamson v. Moffat, 61 Wis. 153, 21 N. W. 62 (1884), where the security took the form of a lease.
Contra: Reilly v. Cullen, 159 Mo. 322, 60 S. W. 126 (1900).

remedies, if any, to which he was entitled. The judge overruled the objections, and the testimony was admitted. The plaintiff, on finding the truth, tendered back the note, notified the defendant that the bargain was rescinded, and demanded the chaise.

The judge instructed the jury, that if at the time of making the contract, Pinkham had a valid defence to the note, and if the defendant, knowing that fact, did nevertheless fraudulently represent to the plaintiff, that the note was due and collectable and that Pinkham had no defence to it; or if there had been a previous action brought upon said note, with the knowledge and for the benefit of Russ, which had been discontinued on account of the defence set up by Pinkham; and if the knowledge of that fact would probably have dissuaded the plaintiff from parting with his chaise on the terms set forth in the written contract; and if said Russ artfully and purposely concealed that fact from the plaintiff; then it would be competent for the plaintiff to rescind the contract and sale. On the return of a verdict for the plaintiff, the defendant's counsel filed exceptions.

SHEPLEY, J. As the contract between the parties was reduced to writing, it is contended, that parol evidence should not have been admitted to prove, that other allegations were made, than those contained in it; and the case of Richards v. Killam (10 Mass. 239) is relied upon as in point. In that case the assignment of the bond was made under seal, and the action was assumpsit complaining indeed of deceit and fraud but the declaration was drawn in such a manner, that the court say, that the allegations "are insufficient to enable us to give to this action or the evidence to support it, the effect of an action for a deceit and fraud, considered as a tort, and not as a breach of contract." And it appears to have been upon that ground, that the evidence was held to be inadmissible. In the case of Boyce v. Grundy (3 Pet. 219, 7 L. Ed. 655), it was decided, that a party was not precluded from introducing testimony of other allegations made at the time than those contained in the written contract for the purpose of proving fraud.

Nor is one who has in a contract of sale taken a warranty, precluded from rescinding it, if he can prove, that it was obtained from him by fraud; because the whole contract whatever may be its character is avoided by the fraud, and the parties are left to assert their rights as they would, if no contract had been made.

Fraud may be committed by the suppressio veri as well as by the allegatio falsi, if the means of information are not equally accessible to both, but exclusively within the knowledge of one of the parties, and known to be material to a correct understanding of the subject; and especially when one of the parties relies upon the other to communicate to him the true state of facts to enable him to judge of the expediency of the bargain. The instructions given required the jury to find, that the former action was discontinued on account of the defence set up, and that this was artfully and purposely concealed, and that it would have had a material influence, had it been known, upon

the contract. The case of Hill v. Grey, 1 Stark. Rep. 352, fully justifies this part of the charge.

The jury having found the contract fraudulent, the plaintiff had a right to rescind it, and having elected to do so, and performed what was necessary on his part, is entitled to recover.

Exceptions overruled.[12]

HOUGHTON v. BURDEN.

(Supreme Court of the United States, 1913. 228 U. S. 161, 33 Sup. Ct. 491, 57 L. Ed. 780.)

Mr. Justice LURTON [13] delivered the opinion of the court:

This is an appeal from a decree determining a controversy arising in a bankruptcy proceeding. The origin of the matter was this: Canfield, the bankrupt, was a merchant in New York. He borrowed from Burden the sum of $10,000, and as security assigned to him certain book accounts, aggregating the sum of $14,000, and agreed to act as agent for Burden in their collection. Shortly afterwards he was adjudicated a bankrupt. The receiver obtained possession of the bankrupt's books and held onto the assigned accounts, and proceeded to collect them upon the claim that the contract was usurious and void under the law of New York.

In this situation Burden intervened in the Bankruptcy case and filed a petition, in which he asserted his title to the assigned accounts and to any proceeds collected by the receiver. The district court, upon a final hearing, upheld the contention of the bankrupt's receiver, now the trustee, and dismissed the intervening petition. This decree was reversed by the circuit court of appeals, that court holding that the defense of usury [14] had not been satisfactorily made out. * * *

The contract is elaborate and too lengthy to be set out in full. In substance it provided for a loan of $10,000 at 6 per cent upon assigned accounts against reputable merchants, the loan not to exceed 75 per cent of the face value of the accounts. Canfield agreed to act as Burden's agent in collecting, and to guarantee the payment of each account so assigned. The contract also provided that after the pay-

[12] That the rule may be otherwise in the case of specialties, see George v. Tate, 102 U. S. 564, 26 L. Ed. 232 (1880).

For a discussion of the fraud cases, see Adams v. Gillig, 199 N. Y. 314, 92 N. E. 670, 32 L. R. A. (N. S.) 127, 20 Ann. Cas. 910 (1910).

Generally it may be shown that the signing of what purports to be a written contract was induced by misrepresentation as to its contents. Whipple v. Brown Bros. Co., 225 N. Y. 237, 121 N. E. 748 (1919).

[13] Part of opinion omitted.

[14] The lawful rate of interest in New York is 6 per cent. By section 373 of the General Business Law of New York it is provided:

"All * * * contracts whatsoever * * * whereupon or whereby there shall be reserved or taken or secured, or agreed to be reserved or taken, any greater sum, or greater value, for the loan or forbearance of any money, goods or other things in action, than as above prescribed, shall be void."

ment of the money borrowed and interest, and costs and expense of collection, and the compensation to Burden for his services as required by the bond, the remaining accounts should be reassigned to Canfield. The clause in regard to this compensation gives rise to the claim of usury. It was in these words:

"The party of the second part shall be entitled to compensation for the labor and services to be performed, and time to be expended, by him in making the examinations required by the terms of the bond executed by the Fidelity & Casualty Company of New York, and delivered simultaneously herewith, which compensation is to be measured by computing 1 per cent per month upon whatever part of the advance shall remain uncollected on the said accounts, and for the period that the same shall remain uncollected."

The indemnity bond, styled an "assigned-accounts bond," is in the usual form, and is undoubtedly a device resorted to, to enable merchants to use book accounts as collateral for money advanced or loaned. * * *

The contention is that this provision for compensating Burden for the service required by the indemnity bond was a mere cover for unlawful interest, and that it was never intended or expected that any such service would be given. This is sought to be shown by alleged oral declarations of Canfield. Thus, Canfield says that when he was about to sign the contract, he asked Burden what the clause about services to be rendered meant, and that he replied, "that that was simply to get around the usury law; there were no services to be rendered at all." * * *

All of this evidence was excepted to as contradicting the written agreement and was admitted over objection. Where the inquiry is whether the contract is one forbidden by law, it is open to evidence dehors the agreement to show that, though legal upon its face,[15] it was in fact an illegal agreement. Otherwise the very purpose of the law in forbidding the taking of usury under any cover or pretext would be defeated. The defense is one which the debtor may make even though it contradicts the agreement. Scott v. Lloyd, 9 Pet. 418, 9 L. Ed. 178.

[15] Marshall, C. J., in Scott v. Lloyd, 9 Pet. 418, 9 L. Ed. 178 (1835): "It has been settled, that to constitute the offence, there must be a loan, upon which more than six per cent interest is to be received; and it is also settled, that where the contract is in truth for the borrowing and lending of money, no form which can be given to it will free it from the taint of usury, if more than legal interest be secured. The ingenuity of lenders has devised many contrivances, by which, under forms sanctioned by law, the statute may be evaded. Among the earliest and most common of these is the purchase of annuities, secured upon real estate or otherwise. * * * Yet it is apparent, that if giving this form to the contract will afford a cover which conceals it from judicial investigation, the statute would become a dead letter. Courts, therefore, perceived the necessity of disregarding the form, and examining into the real nature of the transaction. If that be in fact a loan, no shift or device will protect it."

It has been suggested that there is a distinction between the admissibility of evidence dehors the contract which is intended to show the whole and true nature of the transaction, and mere declarations made by the lender in the nature of a confession that the agreement for services required to maintain the obligation of the indemnity bond was a mere scheme to cover usury, and that no service was to be rendered. We notice the distinction and pass it by, for the reason that, assuming the evidence to be competent, it is not so convincing as to justify a disagreement with the view of the circuit court of appeals that the defense of usury has not been satisfactorily made out. * * *

Decree affirmed.

Mr. Justice PITNEY dissents.

THE KING v. INHABITANTS OF CHEADLE.

(Court of King's Bench, 1832. 3 Barn. & Adol. 833.)

On appeal against an order of two justices, whereby William Smith and his wife and children, were removed from the parish of Cheadle, in the county of Stafford, to the township of Scropton and Foston, in the county of Derby, the sessions quashed the order, subject to the opinion of this Court on the following case:

The settlement of the pauper, W. Smith, at the time of his marriage in 1808, was in the appellant township of Scropton and Foston. The appellants, in order to establish a subsequent settlement by estate in Cheadle, [proved a conveyance to him of certain property in which the purchase price was stated to be £2. 2s.].

The evidence of the pauper, and also of one Jeremiah Robinson (who was not a party to the deed), was then tendered on the part of the appellants, and objected to on the other side, but received by the Court, to show that the consideration stated in the deed was not paid, nor intended by the parties to be paid; and that the deed was only made for the purpose of confirming the pauper's title to the plot of land which had been allotted to him shortly after his marriage, under the parol arrangement between John James and his children. The sessions found that the consideration mentioned in the deed was not paid, nor intended to be paid. The questions for the opinion of this Court, were, 1st, whether the last-mentioned evidence was properly admitted? and if it was, then, 2dly, whether, on all the facts of the case, the pauper acquired a settlement in the respondent parish?

LORD TENTERDEN, C. J. I think a settlement was gained in Cheadle. The appellants proved that John James, the father of the pauper's wife, being seised in fee of a house and land in Cheadle, and having several children, it was agreed among them in his lifetime that a part of the land should be allotted to each of them. One of the children

married the pauper in 1808, and, soon after in pursuance of the agreement, a portion of the land was staked out, upon which the pauper built a house, and after residing there seventeen years, he sold the house for £60. There having been twenty years' possession, the case thus far showed such an estate as gave the pauper a settlement. To avoid this settlement by estate, the parish officers of Cheadle proposed to show, by the deed of 1815, that the pauper's title to it accrued by a purchase for a money consideration not amounting to £30. That deed recited, that Smith had agreed to purchase the land for the consideration of two guineas. The other parish alleged in answer that the recital was not true, and that the real consideration was not a money consideration; and they gave evidence that the two guineas were not paid, or intended to be paid, and that the only object of the parties in executing this deed was to confirm the pauper's title. The objection is, that evidence to contradict the statement of the consideration in the deed ought not to have been admitted. Now, the parties to the deed might be estopped by it from saying that this was not a purchase for a money consideration; but the parish officers, who are strangers to it, are not. If that were otherwise, the greatest inconvenience and injustice might arise, because a settlement might be acquired or not according to the language used by parties in an instrument of this nature. The evidence was, in my opinion, properly received, as showing, not that the deed was void, but that this was not a purchase for a money consideration.

LITTLEDALE, J., concurred.

PARKE, J. It is quite clear, that although the parties to this deed were estopped by it, strangers were not, and consequently the parish officers might show the real nature of the transaction. If this were not so, parishes might be burthened with settlements for which there was no colour. It is clear that a settlement was gained in this case by an estate voluntarily conveyed to the pauper.

TAUNTON, J., concurred.

Order confirmed.[16]

BOWES v. FOSTER.

(Court of Exchequer, 1858. 2 Hurl. & N. 779.)

Trover. Pleas: Not guilty, and not possessed. Issues thereon.

At the trial before the Assessor of the Court of Passage at Liverpool, the facts, according to the plaintiff's evidence, were, that in June last, being in difficulties, he was desirous of disposing of his stock in

[16] See same thing allowed in Rex v. Inhabitants of Scammonden, 3 D. & E. 474 (1789), on the broad ground that a party might prove other considerations than those expressed in the deed.

trade and business of a chemist; but fearing that some of his creditors would issue execution against his goods, he agreed with the defendant, who was also a chemist, and a creditor of the plaintiff for £40., that there should be a pretended sale of them to him. For this purpose an invoice of the goods was made out to the defendant, and a receipt was given to him by the plaintiff for the sum of £40., which was therein stated to be the purchase-money of the goods. The plaintiff then delivered possession to the defendant and left the neighbourhood, and an assistant of the defendant took charge of the shop and carried on the business. The defendant afterwards sent the goods to an auctioneer for sale, and the plaintiff, having heard of it, gave notice to the auctioneer that they were his property. The goods were sold, and the plaintiff brought an action against the auctioneer, who obtained an interpleader order, under which he paid the proceeds into Court, and the defendant was admitted to defend the action. At the conclusion of the plaintiff's case, it was submitted by the defendant's counsel that he ought to be nonsuited, inasmuch as it was not competent for him to allege that the agreement under which he had given the invoice and receipt, and had delivered possession of the goods, was intended as between him and the defendant as a fraud on other creditors. The Assessor overruled the objection, and the defendant's counsel then adduced evidence to prove that the goods were delivered to the defendant in satisfaction of the £40. which the plaintiff owed him. The Assessor left it to the jury to say whether the transaction was a bona fide sale, or a mere colourable one for the purpose of protecting the goods against any creditor who might issue execution: that in the former case they should find for the defendant, and in the latter for the plaintiff. The jury found a verdict for the plaintiff, and leave was reserved to the defendant to move to enter a nonsuit.

Brett, in the present term, obtained a rule nisi accordingly.

POLLOCK, C. B.[17] I am of opinion that the rule ought to be discharged. A large portion of the argument in support of it appears to me to arise from not distinguishing between a fact and the evidence of a fact. Where goods are professed to be transferred by deed, the deed actually transfers the property; and, the moment the deed is executed, by law the property ceases to be the property of the person who has executed the deed, and becomes the property of the person in whose favor it has been executed. That is not so with a fictitious invoice, or a receipt for money which has never been paid. The documents, no doubt, are evidence of a fact, but the question is whether they may not be rebutted by evidence that there was no sale and no payment. I consider that so much of the argument for the defendant

[17] Part of opinions of Pollock, C. B., and Channell, B., and opinions of Martin and Watson, BB., omitted.

as is founded on any supposed analogy to deeds, altogether fails. Then is there any established rule of evidence or practice in the administration of justice, that, where parol documents are produced leading to one result, it is not competent to contradict them and show that the real truth is not that which the documents import? I think that there is no such rule. With respect to a receipt not under seal, there is no doubt that evidence is admissible to contradict it, and show that no money passed. In the course of the argument, Mr. Brett suggested the case of a person who gives a receipt to another, to enable him to show that no claim can be made upon him by the person giving the receipt, and in that way obtains money. Such a receipt would no doubt have all the effect it was intended to have: as between the person to whom it was given and the person to whom it was shown it would be conclusive evidence of payment though no money was paid; but as between the former and the person giving the receipt, it might be shown that no money passed. What fell from Lord Ellenborough in the case of Alner v. George, 1 Camp. 392, viz., that a receipt in full, where the person who gave it was under no misapprehension and can complain of no fraud or imposition, is binding upon him," means, where the receipt in full is given as and for a real receipt and discharge. I can well understand that there may be cases where the transaction is of such a fraudulent character that a Court of Justice will not inquire about it; for instance, if two persons have committed a robbery and proceed to divide the stolen goods, neither a Court of law or equity would interfere or recognise any agreement as to what share each was to have in such a transaction. And I can well understand that there may be cases falling short of felony where a similar doctrine would hold on the ground that the Court will not entertain a transaction which makes it necessary for them to recognise a crime. It may be, that the entire doctrine which Mr. Brett contends for would be applicable where it is necessary for a Court of law to tolerate, and as it were encourage, a matter which in itself constitutes a criminal offence. But I am by no means prepared to carry that doctrine to every possible transaction where imposition is practised by the parties. * * *

CHANNELL, B. * * * In order to divest the property from the plaintiff, it was necessary for the defendant to show either a transfer by gift or by sale. A mere delivery of the goods would not prevent the person delivering them from explaining in what sense that took place, so as to show that there was no intention of vesting the property. The invoice, receipt, and delivery of possession were only evidence of a sale, though no doubt they were matters from which a sale might be inferred, and which, unexplained, would call upon the jury to find a sale. Then it is said that when a party is setting up, not an act done and complete as in the case of a deed, but evidence of a fact, a part of the transaction only can be looked at and not the whole, and

that all that part must be excluded which shows that the parties may have been guilty of fraud. In my opinion that is not a correct view. * * *

Rule discharged.[18]

GRIERSON v. MASON.

(Court of Appeals of New York, 1875. 60 N. Y. 394.)

MILLER, J. Upon the trial of this case there was evidence to show that on the 1st of May, 1870, the defendant entered into the employment of John S. Cropper & Co., and upon their sale and assignment of the business, continued in the plaintiff's employment by virtue of a verbal agreement that he was to receive a certain commission upon the sale of goods, which should amount to at least the sum of $1,500 a year.

To contradict this evidence a written agreement [19] was introduced by the plaintiff, bearing date April 30, 1870, signed by the firm of J. S. Cropper & Co., to the effect that the defendant was to receive a commission of five per cent. upon the sales made. It also appeared that the defendant drew the instrument, that it was executed by the firm within three or four months after the commencement of his employment, and as he testifies, it was made, and the referee so finds, with sufficient evidence to sustain the finding, to induce one Woods to advance money upon the goods, and that it was given to Woods and kept by him. The question is, under the foregoing facts, whether parol proof of the purpose for which the instrument was executed was competent, and the referee erred in giving effect to it as he did in his report.

The object of the testimony was to show that the instrument was executed for a specific purpose, and that purpose being accomplished, was of no effect in changing the contract previously made with the defendant. I think that it was competent evidence for this purpose. The defendant had made out a contract. The plaintiff proved an instrument which altered the contract, and the defendant had a right to prove that the instrument introduced was not intended as an alteration of the contract, but with a view of accomplishing a particular purpose. Such evidence was not given to change the written contract by parol, but to establish that such contract had no force, efficacy or effect. That it was

[18] See Filkins v. Whyland, 24 N. Y. 338 (1862).

[19] The agreement in question was as follows:

"This agreement, made this the 30th day of April, 1870, between John S. Cropper & Co., of Newark, New Jersey, and Thomas F. Mason, of Brooklyn, New York, the said John S. Cropper & Co. agree to give the said Thomas F. Mason the sole and exclusive right to sell all the goods manufactured by them at such prices and on such terms as they may from time to time determine, and the said Thomas F. Mason is to receive as commission five (5) per cent commission on such, and make returns on the first of each month of all sales.

"John S. Cropper & Co."

not intended to be a contract, but merely a writing to be used in inducing Woods to make advancements upon the goods. This is in avoidance of the instrument and not to change it, and I do not see why the testimony was not as competent in this case as it would be to show that a written instrument was obtained fraudulently, by duress, or in an improper manner. Such evidence does not come within the ordinary rule of introducing parol evidence to contradict written testimony, but tends to explain the circumstances under which such an instrument was executed and delivered, or to show that it was canceled or surrendered. It would, I think, have been proper to show that the instrument was given up, and equally so that it did not constitute the entire contract, as it was only for a special purpose. There are numerous cases in the books where the design and object of an instrument embodying the main portion of an oral agreement may be shown, and it is held that a receipt for goods changes the obligation of a preceding parol agreement. Blossom v. Griffin, 13 N. Y. 569, 67 Am. Dec. 75. It is also held that the purpose for which a writing was executed may be proved by parol when not inconsistent with its terms. See Seymour v. Cowing, *40 N. Y. 532. This case is far stronger than any cited, because the evidence was a perfect answer to the writing, and showed it had no application to the agreement.

There was no error on the trial, and the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.[20]

WILLIAMS v. JONES.

(Court of King's Bench, 1826. 5 Barn. & C. 108.)

Assumpsit upon an agreement, dated the 11th of November, 1822, whereby plaintiff, "in consideration of £250. paid by the defendant, and of £100. to be paid by defendant within two years from the date thereof, agreed to take T. Jones, the defendant's son, into partnership with him, as attornies and solicitors, and to give him a moiety of the profits of the partnership, and of the profits arising from the hundred court of Werrall, of which the plaintiff was lord, and a moiety of the royalties." The partnership to continue for ten years. Breach, non-payment of the £100. Plea, non-assumpsit. At the trial before Warren, C. J., of Chester, at the Spring assizes, 1825, for that city, the plaintiff proved the agreement as set out in the declaration, but it appeared by the cross examination of his witnesses that the defendant's son was not admitted an attorney until April, 1823. For the defendant it was contended, that the agreement was illegal, as constituting a partnership

[20] And so in Coffman v. Malone, 98 Neb. 819, 154 N. W. 726, L. R. A. 1917B, 258 (1915), annotated.

between an attorney and a person who had not at that time been admitted. For the plaintiff evidence was offered that the agreement was not put in force before the admission of the defendant's son. The learned Judge thought the evidence inadmissible, and directed a nonsuit. In Easter term a rule nisi for a new trial was granted, and now

Cross, Serjt., was called upon to support it. No time being fixed for the commencement of the partnership, it was open to the plaintiff to give parol evidence upon that point.

BAYLEY, J. Where a written contract has been entered into, the court must look to that in order to ascertain the meaning of the parties; and we are not at liberty to admit the introduction of parol evidence to show that the agreement was in reality different from that which it purports to be. The declaration in this case describes the contract as forming a partnership to commence in præsenti, and as made between parties, then attornies, and the agreement corresponds with the description given in the declaration. It is described as an absolute contract, but it is now contended that it was conditional, to commence in futuro, if T. Jones should be admitted an attorney. But it is impossible to put such a construction upon it. Here, then, there was a bargain giving a present share of the profits of an attorney's business to a person not admitted; that was illegal, according to the 22 G. 2, c. 46, s. 11.; and even if the evidence had been admissible, to show that the agreement was to take effect in futuro, the agreement as proved would not correspond with the description of it in the declaration, and on that ground the nonsuit would be right. This rule must, therefore, be discharged.

HOLROYD, J. I am of opinion that the nonsuit in this case was right. Whatever may have been the intent of the parties, which I collect to have been that the instrument should take effect immediately, at all events the law gives it that effect, no time for its commencement being mentioned in the instrument. Parol evidence was properly admitted to show that the agreement was illegal, but not for the purpose of varying the contract, by adding to or diminishing from it. It is contended for the plaintiff that evidence should have been admitted, which certainly would have shown the contract not to be illegal, but would at the same time have shown it to be different from the legal import of the instrument declared upon. If the evidence had merely gone to rebut the illegality, I should have thought it admissible; but it went further, and then two objections arose to it; first, it went to show that an agreement apparently absolute was really conditional; secondly, its effect was to add by parol to an agreement, which according to Boydell v. Drummond, 11 East, 142, could not be valid, unless in writing, inasmuch as it was not to be performed within a year from the making of it.

LITTLEDALE, J., concurred.

Rule discharged.

WILSON v. POWERS et al.

(Supreme Judicial Court of Massachusetts, 1881. 131 Mass. 539.)

Contract upon a joint and several promissory note for $5,000, dated February 2, 1874, payable to the plaintiff or order, "with interest at the rate of twelve per cent. per annum, payable semiannually in advance," and signed by Philip S. Walsh as principal and by the defendants as sureties. The defence relied upon was that the defendants had been discharged from their liability as sureties by an instrument, dated July 5, 1877, and signed by the plaintiff, the material part of which was as follows: "And I hereby agree to continue or extend the time of final payment for three additional years, or until February in the year of our Lord 1880. The conditions as expressed in said mortgage deed to be complied with. That is also required that the said Walsh shall pay when requested all interest now due and continue to pay at the rate of seven and three tenths per cent. interest semiannual after February, 1877, and an addition to be applied to the principal of 4.7 per cent as aforesaid."

After the former decision, reported 130 Mass. 127, the case was tried in the Superior Court before Allen, J. There was evidence tending to show that the instrument was under seal when delivered. The plaintiff contended that the instrument was delivered to Walsh as a proposal merely, and that it was not to take effect as a contract until assented to by the sureties. The jury returned a verdict for the plaintiff, and found specially that the instrument was not delivered as a completed agreement; and the defendants alleged exceptions to the admission of certain evidence, bearing upon this issue, which appears in the opinion.

DEVENS, J. At the trial, the defendants relied upon a certain instrument as discharging them from their obligation as sureties, by which Wilson, the promisee of the note, as it was contended, agreed to extend the time of payment of the note to the principal defendant without the assent of the sureties. It was contended by the plaintiff, that the instrument signed by Wilson was delivered by him as a proposition merely, and upon the agreement that it should become binding only upon the assent of the sureties thereto. The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled in order to avoid its effect. This is not to show any modification or alteration of the written agreement, but that it never became operative, and that its obligation never commenced. Whitaker v. Salisbury, 15 Pick. 534; Davis v. Jones, 17 C. B. 625; Murray v. Earl of Stair, 2 B. & C. 82; Pym v. Campbell, 6 El. & Bl. 370; Wallis v. Littell, 11 C. B. (N. S.) 369.

Evidence was admitted of the conversation which took place at the time of the actual delivery of the instrument to Walsh by Wilson, and

also of a previous conversation, before the date of the instrument and before it was written, to the effect that it should become binding only upon the assent of the sureties. The defendants contend that, even if all that took place at the time of the delivery was admissible as an explanation thereof, and as a part of the res gestæ, yet that the evidence of the previous conversation was erroneously admitted. But a previous conversation might, and in this case apparently did, have a direct bearing upon the question whether the delivery was conditional. Wilson at the time of delivery stated that "this was his proposition, and it was in writing;" and the previous conversation clearly related to such an instrument as a proposal only. Whether the delivery of a paper is absolute or conditional is a question of fact. If it were shown that two parties had agreed that an instrument should be thereafter prepared to take effect only upon compliance with a certain condition or the occurrence of a certain event, and thereafter such an instrument were prepared and delivered, even if nothing was said at the time of the actual delivery, it would be for the jury to say whether such delivery did not take place under and in pursuance of the previous agreement. That a delivery should be conditional, it is not necessary that express words to that effect should be used at the time. That conclusion may be drawn from all the circumstances which properly form a part of the entire transaction, whether in point of time they precede or accompany the delivery. In Murray v. Earl of Stair, 2 B. & C. 82, a subscribing witness to a bond stated that it was delivered by the obligor as his deed, but that before and at the time of the execution it was agreed that it should remain in his (the subscribing witness's) hands until the death of A. B. and until certain securities were given up, and that the bond was given to him on that condition. It was held that it was then a question of fact for the jury, upon the whole evidence, whether the bond was delivered as a deed to take effect from the moment of delivery, or whether it was delivered upon the express condition that it was not to operate as a deed until the death of A. B., and until the securities were given up.

The defendants have no just ground of complaint on account of the evidence admitted.

Exceptions overruled.[21]

[21] Accord: Gilman v. Gross, 97 Wis. 224, 72 N. W. 885 (1897), that a subscription paper for corporate stock should not be binding until a certain number of shares were sold; Trumbull v. O'Hara, 71 Conn. 172, 41 Atl. 546 (1898), that a promissory note should not be binding until a certain event; Ware v. Allen, 128 U. S. 590, 9 Sup. Ct. 174, 32 L. Ed. 563 (1888), that a contract should not be binding until approved by an attorney; Pym v. Campbell, 6 E. & B. 370 (1856), same as above; Stiebel v. Grosberg, 202 N. Y. 266, 95 N. E. 692, 36 L. R. A. (N. S.) 1147, Ann. Cas. 1912D, 1305 (1911), that a release under seal was not to take effect until a condition happened.

See, also, Wallis v. Littell, 11 C. B. (N. S.) 369 (1861), to the effect that the fact that a payment contemplated by the instrument had been made was not conclusive, but simply evidence tending to show that the writing did take effect.

BEARD v. BOYLAN.

(Supreme Court of Errors of Connecticut, 1890. 59 Conn. 181, 22 Atl. 152.)

ANDREWS, C. J.[22] The plaintiff, being a creditor of the defendant, signed a composition agreement with sundry other creditors, as follows: "Whereas, Henry Boylan, of Derby, is in embarrassed financial circumstances, and is unable to pay his debts in full, and desires to effect a compromise with his creditors without the expense and delay of settling in the probate court as an insolvent estate, and proposes to pay twenty per cent. on all unsecured and unpreferred claims on or before December 1st, 1888; and whereas we, the undersigned, creditors of said Boylan, are willing to accept said twenty per cent. in full of our respective claims: Now, therefore, we, the undersigned, being creditors of said Boylan to the amounts set opposite our names respectively, hereby, each in consideration of the like agreements of the others, signers of this contract, agree with each other, and with said Boylan, that we will accept twenty per cent. of our respective unsecured claims against said Boylan, if paid on or before December 1st, 1888, in full settlement and discharge of said claims. Derby, Sept. 22d, 1888." After signing this agreement the plaintiff received and accepted the 20 per cent. therein stipulated. Subsequently he brought the present suit, in which he claims to recover the whole amount of his original debt, less the twenty per cent. for which he gives credit.

The defendant's answer sets up the composition agreement, the payment of the 20 per cent., and the receiving thereof by the plaintiff, in bar of the action. The plaintiff's reply admits the execution and delivery of the agreement, and the receipt of the per cent. therein named. The remaining part of the reply, so far as it is necessary to be noticed, is as follows: "Par. 6. The plaintiff signed said composition agreement in consideration that it should be signed and agreed to by all the creditors who held unsecured claims against the defendant at the time the plaintiff signed said agreement, and that it should be void unless so signed by said creditors." "Par. 9. Long after the 7th day of December, 1888, and before the bringing of this suit, the plaintiff learned for the first time that said composition agreement was not signed by all the creditors of the defendant who held unsecured claims against the defendant when the plaintiff signed said agreement."

The defendant demurred to paragraph 6, "because the same, and the matters therein contained, are inconsistent with and contradictory of the said composition agreement;" and to paragraph 9, "because the same, and the matters therein contained, are immaterial, and irrelevant to the issues in this case." * * *

The question presented by the demurrer is whether or not it would be competent to prove the facts alleged in these paragraphs of the

[22] Part of opinion omitted.

reply for the purpose of varying the effect of the composition agreement. If so, then the demurrer was properly overruled; otherwise, there was error in so doing. While the law undoubtedly requires the utmost good faith in the making and in the performance of a composition agreement between a debtor and his creditors, and any advantage by one creditor over any other, any concealment by the debtor, or any preference will vitiate the entire agreement, yet the agreement itself, if in writing, must be construed by the same rules as any other written contract. "Where a written document is resorted to by the parties for the expression of their conclusions after a series of conferences, such document will be regarded as expressing their final views, and as absorbing all other parol understandings, prior or contemporaneous. To permit evidence of prior, or even of contemporaneous, parol conditions to qualify the written document would be to not only substitute media peculiarly fallible—recollections of witnesses as to words—for a medium whose accuracy the parties affirm, but often to substitute an abandoned for an adopted contract. Hence all prior conferences are regarded, unless there be fraud, as merged in such case in the final document." Whart. Ev. § 1014; 1 Greenl. Ev. § 275; Dean v. Mason, 4 Conn. 428, 10 Am. Dec. 162; Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 37, 54 Am. Dec. 309; Fitch v. Iron Works, 29 Conn. 82; Galpin v. Atwater, Id. 97.

The argument of the plaintiff is that proof of the allegations in the sixth paragraph of his reply would not contradict the composition agreement, because, he says, the matters by him there alleged are already in that agreement by fair implication. He says, and says truly, that "contracts are to be taken and construed according to the intent of the parties, and this intent should be ascertained from the whole instrument; and that it is a general principle, applicable to all instruments and agreements, that whatever may be fairly implied from the terms and language of the instrument is, in judgment of law, contained in it." These are well-recognized principles. But does this case fall within them? The admissions of the reply—namely, the execution of the composition agreement, and the receipt by him of the agreed per cent.—show that the agreement was at one time a valid and binding one. The sixth paragraph alleges a condition upon which it was to be void,—that is, a condition subsequent,—and the plaintiff asks the court to supply this condition by implication. It seems to us that it cannot be done. Implication supplies words in a written contract for the purpose of making complete something which the words used leave incomplete. It extends only so far as may be necessary to ascertain what the parties intended by the language they have used. It can never put an additional term or condition into the contract. The question is never what the parties may have secretly and in fact intended, but what meaning did they intend to convey by the language they have used in the written instrument? When a contract is reduced to writing and is complete in itself, the law presumes the writing to contain

the whole agreement. There is nothing left for implication. This rule is very compactly stated by the court in Stone v. Rockefeller, 29 Ohio St. 625, a case upon the guaranty of a note, as follows: "The law will not supply any condition which is not incorporated into the agreement, or fairly implied from the language used; and, in the absence of fraud, accident, or mistake, it is presumed conclusively that the terms of the contract, as agreed between the parties at the time, are fully expressed in the written guaranty." Now, it seems to us that this is a case for the application of the presumption that the whole of the agreement was committed to writing. No fraud, accident, or mistake is suggested. The writing is apparently complete. If a condition upon which the instrument was to be void was in fact agreed on, it is incredible that the parties should not have inserted it in the writing.

There is error in the judgment [23] of the court of common pleas, and it is reversed.[24]

LOOMIS, SEYMOUR, and TORRANCE, JJ., concur. CARPENTER, J., dissents.

WIGGLESWORTH v. DALLISON et al.

(Court of King's Bench, 1779. 1 Doug. 201.)

This was an action of trespass for mowing, carrying away, and converting to the defendant's own use, the corn of the plaintiff, growing in a field called Hibaldstow Leys, in the parish of Hibaldstow, in the county of Lincoln. The defendant Dallison pleaded liberum tenementum, and the other defendant justified as his servant. The plaintiff replied, that true it was that the locus in quo was the close, soil and freehold of Dallison; but,—after stating that one Isabella Dallison deceased, (being tenant for life,) and Dallison, the reversioner in fee, made a lease on the 2d of March, 1753, by which the said Isabella demised, and the said Dallison confirmed, the said close to the plaintiff, his executors, administrators, and assigns, for 21 years, to be computed from the 1st of May, 1755, and that the plaintiff, by virtue thereof entered and continued in possession, till the end of the said term of 21 years,—he pleaded a custom, in the following words, viz. "That, within the parish of Hibaldstow, there now is, and from time whereof the memory of man is not to the contrary, there hath been a certain ancient and laudable custom, there used and approved of, that is to say, that every tenant and farmer of any lands within the same parish, for any term of years which hath expired on the first day of May in

[23] The trial court had sustained the demurrer to the reply, but this ruling was reversed by the court of common pleas.—*Ed.*

[24] See, also, Smith v. Mathis, 174 Mich. 262, 140 N. W. 548 (1913).

any year, hath been used and accustomed, and of right ought to have, take, and enjoy, to his own use, and to reap, cut and carry away, when ripe and fit to be reaped and taken away, his way-going crop, that is to say, all the corn growing upon the said lands which hath before the expiration of such term been sown by such tenant, upon any part of such lands, not exceeding a reasonable quantity thereof in proportion to the residue of such lands, according to the course and usage of husbandry in the same parish, and which hath been left standing and growing upon such lands at the expiration of such term of years." He then stated that, in the year 1775, he sowed with corn part of the said close, being a reasonable part in proportion to the residue thereof according to the course and usage of husbandry in the said parish, and that the corn produced and raised by such sowing of the corn so sown as aforesaid, being the corn in the declaration mentioned, at the end of the term, and at the time of the trespass committed, was standing and growing in the said close, the said time not exceeding a reasonable time for the same to stand, in order to ripen and become fit to be reaped, and that he was during all that time, lawfully possessed of the said corn, as his absolute property, by virtue of the custom. The defendant, in his rejoinder, denied the existence of any such custom, and concluded to the country. The cause was tried before Eyre, Baron, at the last Assizes for Lincolnshire, when the jury found the custom, in the words of the replication.

Baldwin moved in arrest of judgment, that such a custom was repugnant to the terms of the deed, and, therefore, though it might be good in respect to parol leases, could not have a legal existence in the case of leases by deed.

A rule to shew cause was granted.

The case was argued on Tuesday the 8th of June, by Hill, Serjeant, Chambre, and Dayrell, for the plaintiff, and Cust, Baldwin, Balguy, and Gough, for the defendants; when three objections were made on the part of the defendant, viz. 1. That the custom was unreasonable. 2. That it was uncertain. 3. That, (as had been contended on moving for the rule,) it was repugnant to the deed under which the plaintiff had held.

LORD MANSFIELD. We have thought of this case, and we are all of opinion, that the custom is good. It is just, for he who sows, ought to reap, and it is for the benefit and encouragement of agriculture. It is, indeed, against the general rule of law concerning emblements, which are not allowed to tenants who know when their term is to cease, because it is held to be their fault or folly to have sown, when they knew their interest would expire before they could reap. But the custom of a particular place may rectify what otherwise would be imprudence or folly. The lease being by deed does not vary the case. The custom does not alter or contradict the agreement in the lease; it

only superadds a right which is consequential to the taking, as a heriot may be due by custom, although not mentioned in the grant or lease.[25]

The rule discharged.[26]

HUTTON v. WARREN.

(Court of Exchequer, 1836. 1 Mees. & W. 466.)

Assumpsit to recover the customary allowances for work done by the plaintiff on the leased premises shortly before the expiration of his term. After verdict for plaintiff a rule nisi was obtained to enter a non-suit on the ground that the lease excluded the custom.[27]

PARKE, B. It appeared on the trial that the plaintiff took the farm of the late incumbent, the father of the defendant, on the 2d of January, 1811, by a lease under seal, comprising the tithes of the parish also, at the rent of £150. for the farm, and £200. for the tithes, payable at Michaelmas and Lady Day, for the term of six years from Lady Day, 1811, if the lessor should so long continue incumbent. The plaintiff occupied until October, 1832, when the incumbent resigned, and the defendant, his son, succeeded him in the living. The plaintiff continued to occupy the farm and tithes, paying the same rent, at the same times, until Lady Day, 1834, when he quitted, in pursuance of a notice given to him by the defendant; and he claimed in this action the allowances for seed and labour due to the off-going tenant by the custom of the country.

The defendant resisted the claim, on the ground that he held under the terms of the written lease, and that by those he was not entitled to any such allowances.

It was proved, that, by the custom of the country, a tenant was bound to farm according to a certain course of husbandry for the whole of his tenancy, and at quitting was entitled to a fair allowance for seed and labour on the arable land; and was obliged to leave the manure, if the landlord would purchase it. * * *

We are of opinion that this custom was, by implication, imported into the lease.[28]

It has long been settled, that in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent.

[25] Vide Doe v. Snowden, C. B. M. 19 Geo. III, 2 Blackst. 1225 (1779), where it is said by the court that if there is a taking from old Lady Day (April 5th) the custom of most counties would entitle the lessee to enter upon the arable at Candlemas (February 2d) to prepare for the Lent corn, without any special words for that purpose; i. e., in a written agreement for seven years, for the court were speaking of such an agreement.

[26] It appears from the reporter's note that the judgment for the plaintiff was affirmed in the Exchequer Chamber, in 1781.

[27] Statement condensed and part of opinion omitted.

[28] In the omitted passage the court held that the tenant continued to hold on the same terms as provided in the lease.

The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages. Whether such a relaxation of the strictness of the common law was wisely applied, where formal instruments have been entered into, and particularly leases under seal, may well be doubted; but the contrary has been established by such authority, and the relations between landlord and tenant have been so long regulated upon the supposition that all customary obligations, not altered by the contract, are to remain in force, that it is too late to pursue a contrary course; and it would be productive of much inconvenience if this practice were now to be disturbed.

The common law, indeed, does so little to prescribe the relative duties of landlord and tenant, since it leaves the latter at liberty to pursue any course of management he pleases, provided he is not guilty of waste, that it is by no means surprising that the Courts should have been favourably inclined to the introduction of those regulations in the mode of cultivation which custom and usage have established in each district to be the most beneficial to all parties.

Accordingly, in Wigglesworth v. Dallison (1 Doug. 201), afterwards affirmed in a writ of error, the tenant was allowed an away-going crop, though there was a formal lease under seal. There the lease was entirely silent on the subject of such a right, and Lord Mansfield said that the custom did not alter [29] or contradict the lease, but only superadded something to it. * * *

The next reported case on this subject is that of Webb v. Plummer (2 B. & Ald. 750), in which there was a lease of down land, with a covenant to spend all the produce on the premises, and to fold a flock of sheep upon the usual part of the farm; and also, in the last year of the term, to carry out the manure on parts of the fallowed farm pointed out by the lessor, the lessor paying for the fallowing land

[29] Lord Campbell, in Humphrey v. Dale, 7 E. & B. 266 (1857): "In a certain sense every material incident which is added to a written contract varies it, makes it different from what it appeared to be, and so far is inconsistent with it. If, by the side of the written contract without, you write the same contract with the added incident, the two would seem to import different obligations, and be different contracts. To take a familiar instance by way of illustration: On the face of a bill of exchange at three months after date the acceptor would be taken to bind himself to the payment precisely at the end of the three months; but, by the custom, he is only bound to do so at the end of the days of grace, which vary, according to the country in which the bill is made payable, from three up to fifteen. The truth is that the principle on which the evidence is admissible is that the parties have not set down on paper the whole of their contract in all its terms, but those only which were necessary to be determined in the particular case by specific agreement, and which of course might vary infinitely, leaving to implication and tacit understanding all those general and unvarying incidents which a uniform usage would annex, and according to which they must in reason be understood to contract unless they expressly exclude them."

and carrying out the dung, but nothing for the dung itself, and paying for grass on the ground, and threshing the corn. The claim was for a customary allowance for foldage, (a mode of manuring the ground,) but the Court held, that, as there was an express provision for some payment on quitting for the things covenanted to be done, and an omission of foldage, the customary obligation to pay for the latter was excluded. No doubt could exist in that case but that the language of the lease was equivalent to a stipulation that the lessor should pay for the things mentioned and no more.

The question then is, whether, from the terms of the lease now under consideration, it can be collected that the parties intended to exclude the customary obligation to make allowances for seed and labour.

The only clause relating to the management of the farm (except the covenant to repair) is one which stipulated that the plaintiff shall spend and consume on the farm three-fourths of the hay and straw arising not only from the farm itself, but from the demised tithes of the whole parish, and spread the manure, leaving such as should not be spread at the end of the term for the use of the landlord, on paying a reasonable price for the same. This provision introduces and has a principal reference to a subject to which the custom of the country does not apply at all, namely, the tithes, and imposes a new obligation on the tenant dehors that custom, and then qualifies that obligation by an engagement on the landlord's part to give a remuneration, by re-purchasing a part of the produce in a particular event. It is by no means to be inferred from this provision that this is the only compensation which the tenant is to receive on quitting. If, indeed, there had been a covenant by the tenant to plough and sow a certain portion of the demised land in the last year, being such as the custom of the country required, he being paid on quitting for the ploughing, or to plough, sow, and manure, he being paid for the manuring, the principle of expressum facit cessare tacitum, which governed the decision in Webb v. Plummer, would have applied; but that is not the case here. The custom of the country as to the obligation of the tenant to plough and sow, and the corresponding obligation of the landlord to pay for such ploughing and sowing in the last year of the term, is in no way varied. The only alteration made in the custom is, that the tenant is obliged to spend more than the produce of the farm on the premises, being paid for it in the same way as he would have been for that which the custom required him to spend.

We are therefore of opinion that the plaintiff is entitled to recover, and the rule must be discharged.

Rule discharged.[80]

[80] For a collection of cases where the custom was thought to be excluded by the provisions of the writing, see City of Covington v. Kanawha Coal & Coke Co., 121 Ky. 681, 89 S. W. 1126, 3 L. R. A. (N. S.) 248, 123 Am. St. Rep. 219 (1906).

It is obvious that the problem is one of construction, and that in a doubtful case little help is afforded by the view that may have been taken of a differ-

KNAPP v. HARDEN.

(Court of Exchequer, 1835. 1 Gale, 47.)

Assumpsit for goods sold and delivered, and for work and labour.

Pleas. 1st. Non assumpsit. 2dly. That the goods were sold on a contract, in which the times of payment were stipulated; viz. "£100. in the month of November, 1834; £100. other part thereof, on the 10th day of May, 1835; and the remainder in the course of the year. Replication, denying the contract, and similiter. The action was commenced on the 22d November. At the trial, before Gurney, B., at the sittings in Middlesex, in Michaelmas Term, it was proved that the work and labour had been done; that the plaintiff, before he undertook the work, had written a letter to the defendant, specifying the prices to be charged. The letter was sent to the defendant's surveyor, Gardiner, a witness at the trial, which he communicated to the defendant, who thereupon wrote a letter to the witness, stating that he consented to the terms, if the money were to be payable at the periods stated in the plea. At a conversation between Gardiner and the plaintiff, this letter was produced to, and read by, the plaintiff, witness observing, that plaintiff might consider the month of November to be the 1st of November. To this the plaintiff consented. The original letter, containing the prices, was afterwards signed by the defendant. Gurney, B., giving leave to the plaintiff to move to enter a verdict, on the ground that the evidence was inadmissible, left it to the jury whether the times of payment were part of the agreement between the parties.—Verdict for the defendant.

Chandless now moved to enter a verdict for the plaintiff. The letter containing the prices, signed by the plaintiff and the defendant, was a complete contract in writing, and the effect of it could not be varied by parol evidence of a contemporaneous agreement. Boydell v. Drummond (11 East, 142)—[PARKE, B.—The two letters are to be taken together.]—The second letter was signed by the defendant only, and could not be connected with the other except by parol, therefore it came within the degree of oral evidence.

PARKE, B. It is quite clear the letter did not in itself constitute an agreement: it was not meant to be so by the parties.

ALDERSON, B. The signature to the letter was only to authenticate the amount.

Rule refused.

ent contract. The difficulty cannot be solved by the easy assumption that the custom is inconsistent, and therefore excluded, where the contract apparently calls for something different, because in many instances it is undeniably true that the custom is actually applied to just such contracts.—*Ed.*

WILSON v. SHERBURNE.

(Supreme Judicial Court of Massachusetts, 1850. 6 Cush. 68.)

This was an action on a promissory note dated February 14th, 1849, by which the defendant promised the plaintiff to pay him or his order one hundred and fifty dollars on the first day of May then next. There was an indorsement on the note, under date of February 21st, 1849, of fifty dollars and thirty-six cents.

The defendant pleaded the general issue, and specified in his defence that the consideration of the note was the sale of a fish-stand in Springfield, with an express agreement, on the part of the plaintiff, not to be engaged in the fish business in Springfield, in competition with the defendant, for one year thereafter; and that the plaintiff had broken this agreement, by engaging in the fish business, within the year, greatly to the damage of the defendant.

It was in evidence, for the defendant, that the consideration of the note, as to the sum of fifty dollars, and thirty-six cents, which had been indorsed thereon, before the commencement of the action, was the sale of the stand and personal property belonging to it; and as to the residue, the plaintiff's agreement not to be engaged in the fish business in Springfield for one year; that the contract of sale and the agreement not to be engaged in the fish business were made at the same time; and that there was a contract in writing entered into between the parties. The defendant, having proved the loss of the written contract, called a witness to testify to its contents, who stated that the plaintiff sold to the defendant on the same terms and conditions, on which a sale of the same property had previously been made between other parties, and evidenced by a written contract, which was produced; but the witness could not say, that there was anything in the written contract between the parties about the good-will of the business.

The defendant then offered parol evidence to prove, that at the time of the sale, there was also a verbal contract made between the parties, that the plaintiff would not engage in the fish business in Springfield for one year; that this agreement formed a part of the consideration of the note sued for, and that the plaintiff had violated it.

The plaintiff objected, that the written contract between the parties having referred to, and made a part of their agreement, the terms and conditions of a written contract previously made between other parties, parol evidence was not admissible to show other terms and conditions. The defendant contended, that the agreement, which he offered to prove, was independent of the written contract.

The presiding judge (Byington, J.) of the court of common pleas, before whom the case was tried, rejected the evidence; and a verdict being thereupon rendered for the plaintiff, the defendant excepted.

By the Court. The cases cited by the counsel of the respective parties show how very difficult it is to mark with precision any satisfactory and definite boundary line, between the classes of cases in which parol evidence is or is not admissible, where the parties have made a written contract in reference to the general subject of agreement between them.

We are of opinion, that the evidence here offered was properly excluded, inasmuch as the defendant must take the position, that the sale of the fish-stand and the personal property attached to it, and the stipulation that the defendant would not engage in the business, within the limits of Springfield, for the term of one year, were part of or formed the original consideration. But the written contract signed by the parties does not show any such contract not to sell fish in Springfield for one year. The parties having stipulated in writing, it is not competent, by parol evidence, to add to or enlarge it. The testimony was properly excluded.

Exceptions overruled.[81]

HARRIS et al. v. RICKETT.

(Court of Exchequer, 1859. 4 Hurl. & N. 1.)

Trover by the plaintiffs, as assignees of a bankrupt, to recover the value of certain property transferred by him to the defendant. After verdict for defendant, a rule nisi was obtained to enter the verdict for plaintiffs.[82]

The judgment of the court was now delivered by

Pollock, C. B. In this case the plaintiffs sued as assignees of Forman, a bankrupt, and claimed certain goods and chattels as such assignees. The facts were, that the bankrupt had executed a bill of sale to the defendant of the property in question, which, however, being for an antecedent debt, and being a conveyance of all the bankrupt's property, was primâ facie an act of bankruptcy, and therefore void. But the defendant contended, and the jury found, that at the time of the loan which constituted the debt, it had been agreed between the bankrupt and the defendant that this security should be given.[83] If so, the case of Hutton v. Cruttwell is an authority to show that the assignment was valid. But the plaintiffs contended that it was not open to the defendant to prove this, or that the proof, when made, was unimportant. The facts that gave rise to the contention were as follows. The loan was agreed on, and the jury found that, at the time of the agreement for the loan and as part of it, it was

[81] For a contrary view, see Locke v. Murdoch, 20 N. M. 522, 151 Pac. 298, L. R. A. 1917B, 267 (1915), where a number of the cases accord and contra are collected.

[82] Statement condensed.

[83] This agreement was proved by the testimony of the bankrupt.

agreed that this bill of sale should be given. The giving of the bill of sale, however, was postponed, from the bankrupt's unwillingness to have it registered; and when the money was actually lent, three documents were signed by the bankrupt: first, a promissory note; secondly, an agreement to pay 10*l.* per annum as bonus; thirdly, an undertaking to give an assignment of a policy of insurance and some other security, not mentioning this bill of sale. It was therefore urged that this last writing was all that bound the parties; that it could neither be added to nor varied, and consequently there was, in point of law, no antecedent agreement to give the bill of sale.

To this argument we do not assent. It is not necessary to say whether an agreement is conclusive between any but the parties to it and those who claim under them, nor whether the assignees in this case claimed under the bankrupt, nor whether the rule applies when fraud or illegality is to be avoided; but we are of opinion this rule should be discharged, on the ground that the writing does not contain, and was not intended to contain, the entire obligation of the bankrupt.

The jury have found that it was agreed to give the bill of sale; they have not found, nor does it appear to us, that the writing was intended to contain the whole agreement, and we are of opinion that the rule relied on by the plaintiffs only applies where the parties to an agreement reduce it to writing, and agree or intend that that writing shall be their agreement. The rule must therefore be discharged.

Rule discharged.

STANGE v. WILSON.

(Supreme Court of Michigan, 1868. 17 Mich. 342.)

CAMPBELL, J.[84] Wilson sued Stange for the value of certain iron work, which turned out, on the trial, to have been furnished under a written contract, containing only an agreement that Wilson should make "all the iron work, consisting of wrought and cast iron, according to plans furnished by G. W. Lloyd, architect, for Detroit & Milwaukee railway depot, for and in consideration of the sum of $5,000. The time for furnishing the iron was not referred to, and the time of payment was also left in blank. The only question properly presented by the record is, whether certain testimony was properly excluded, the defense resting on the claim that the work had not been furnished as soon as it ought to have been.

On the trial, the question was asked, on cross-examination of one of the plaintiff's witnesses, "When the plaintiff had agreed to have said work done?" Another witness was asked, on cross-examination, "Within what time it was that the plaintiff was to have the work in

[84] Part of opinion omitted.

question done for the defendant?" Both of these questions were excluded, on the ground that parol proof could not be received, because the contract must speak for itself concerning the agreed time of performance.

The defendant below, in his defense, "offered to show by evidence that, at the time of making said written contract, it was agreed, by parol, that the work in question should be furnished by the plaintiff as fast as it might be required by the masons and carpenters, who should do the work on the building for which such work to be furnished by the plaintiff was intended, the defendant proposing, in making such offer, to follow up such evidence by testimony that the plaintiff had failed to furnish such work and materials as so agreed, and failed to furnish them as fast as required by said masons and carpenters," and to show consequent damage. This was also rejected.

It was claimed, on the argument, that this testimony was admissible, on two grounds: First, To remedy a defect in the written agreement by parol; and, second, To show what was reasonable time.

There is no ground for maintaining that such proof is proper to complete or supplement the written agreement. It is very plain that an agreement to do a thing within a definite time can never be identical in spirit or substance with an agreement to do it within a time not fixed, and which, in law, is to be merely a reasonable time. And where the written contract is left in that indefinite shape, an agreement to make it definite is an agreement to alter it; and this can not be done by any contemporaneous parol understanding. The elementary rule, excluding parol evidence offered for any such purpose, is so plainly applicable as to need no explanation.

There is much more plausibility in the second ground, which maintains the admissibility of the evidence as bearing on the question of reasonable time. But it seems to me that it has no real tendency to show what time was reasonable, either alone, or as a step in natural connection with any other proof, proposed or relevant.

The supplemental proof, which the defendant below proposed to introduce, was simply proof of a breach of this parol agreement, in not furnishing articles within the time as promised. That proof was undoubtedly competent to prove damages in case the court should find that it was unreasonable not to furnish the iron as fast as required by the workmen, but it could have no possible bearing on the reasonableness of their requisitions. Unless the proof of the parol agreement being made tended to prove of itself that the time thus fixed was reasonable, independent of any binding force in the agreement, it was rightly ruled out.

It was argued that it had this tendency, because the fact that the parties were willing to agree upon such terms shows they must have thought them reasonable. This is in fact claiming for the parol communications the full force of an agreement; and it would be a fair

answer to such a claim to say, that, inasmuch as when they made their written agreement, by which only they were to be bound, they omitted this clause from it, it must follow that they were not willing to agree that it would be reasonable. And this is really the defect in the claim, that it confounds causes with consequences. If time is reasonable, it is because circumstances make it so, and not because it is so agreed, and if parties agree that it is reasonable, it must be presumed that they are so persuaded by the circumstances, which can not derive any force or bearing from their opinions, whether one way or the other.

When a contract is to be performed within a reasonable time, the law implies that the parties contract in view of all the pertinent facts that may be mutually known to them, and it requires them to exercise such reasonable diligence as under all then and subsequently existing circumstances might be fairly expected. When a court or jury is called upon to decide whether they have complied with what might have been reasonably expected, there must be proof of such facts as will show what ought to have been done. Where there has been an agreement, it must be complied with, whether reasonable or not, simply because the parties for a lawful consideration have seen fit to make it. But where the promise made is no promise in law, it must be regarded as a nullity. To accept it in any shape as a basis or proof of obligation is to enforce it. * * *

Judgment affirmed.[85]

DREW v. WISWALL et al.

(Supreme Judicial Court of Massachusetts, 1903. 183 Mass. 554, 67 N. E. 666.)

Contract for breach of an alleged agreement of the defendants to construct certain streets upon land in Woburn adjacent to certain lots purchased by the plaintiff from the defendants. Writ dated July 1, 1898.

The answer contained a general denial and also set up the statute of frauds.

At the trial in the Superior Court, Richardson, J., on motion of the defendants, ruled that upon all the evidence the plaintiff was not entitled to recover, and ordered a verdict for the defendants. The plaintiff alleged exceptions.

BRALEY, J.[86] The exceptions do not disclose the reasons, if any, that were given by the defendants at the trial to support their request for the ruling made; but at the argument they relied on two propositions, only, which we consider in the order presented.

Under the declaration as finally amended, the plaintiff, in order to

[85] Accord: Cameron Coal & Mercantile Co. v. Universal Metal Co., 26 Okl. 615, 110 Pac. 720, 31 L. R. A. (N. S.) 618 (1910), annotated.

[86] Part of opinion omitted.

recover damages, must prove the purchase of and payment for the land, as well as the agreement by the defendants to construct the streets, and that, while he had built a house on the estate conveyed, the defendants had failed to perform their contract. An examination of the evidence fully recited in the exceptions fails to show any substantial variance, as matter of law, between these allegations and the proof offered to sustain them. * * *

It is true that the plaintiff's title to the land comes by deed from the defendants, which is silent as to such an agreement. But the rule that a contract in writing cannot be added to or varied by the introduction of oral stipulations or agreements made before or contemporaneous with its execution is not violated by holding that the contract proved by the plaintiff was not merged in the deed, and was independent and separate, though the sale of the land and building the house furnished the consideration by which it is supported. Durkin v. Cobleigh, 156 Mass. 108, 30 N. E. 474, 17 L. R. A. 270, 32 Am. St. Rep. 436; Cole v. Hadley, 162 Mass. 579, 39 N. E. 279; Rackemann v. Riverbank Improvement Co., 167 Mass. 1, 44 N. E. 990, 57 Am. St. Rep. 427; Radigan v. Johnson, 174 Mass. 68, 54 N. E. 358.

No sufficient legal reason appears why the plaintiff was not entitled to submit his case to a jury for its determination under proper instructions, and the ruling that he could not maintain his action was wrong.

Exceptions sustained.[37]

WHEATON ROLLER MILL CO. v. JOHN T. NOYE MFG. CO.

(Supreme Court of Minnesota, 1896. 66 Minn. 156, 68 N. W. 854.)

MITCHELL, J.[38] This action was brought to recover damages for the breach of a warranty of a steam engine, boiler, etc., furnished and set up by defendant for the plaintiff in its mill. The alleged warranty was that the machinery was well made, of good material, and *capable of operating plaintiff's mill at full capacity;* the part italicized being all that is material on this appeal. It appeared on the trial that the machinery was furnished under the written contract found in full in the paper book, at folios 52 to 57, which is so long that we shall leave it to speak for itself, without attempting here to state its provisions. The plaintiff then offered certain parol evidence, the exclusion of which by the court forms the subject of the assignments of error.

We do not find in the part of the record cited any such ruling as

[37] And so in Anderson v. American Suburban Corp., 155 N. C. 131, 71 S. E. 221, 36 L. R. A. (N. S.) 896 (1911), annotated.

[38] Part of opinion omitted.

that referred to in the first assignment of error, which may therefore be passed without further notice.

The second assignment of error is that "the court erred in sustaining defendant's objection to plaintiff's offer to prove that there was an express oral warranty." This refers to the complex and somewhat obscure and indefinite offer found at the bottom of page 12 of the record. * * *

Assuming that such a warranty as suggested could be spelled out of the offer, and that it was made in proper form, still the evidence was properly excluded under the familiar rule that parol evidence is inadmissible to vary the terms of a written contract. Plaintiff's contention is that it does not fall within that rule; that the offer was merely to prove a separate oral agreement as to a matter on which the writing was silent, and which was not inconsistent with its terms. The rule thus sought to be invoked is one which both courts and text writers have found some difficulty in formulating so as to be at once complete as well as accurate. Mr. Stephens states the rule thus: "There may be proved by parol the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them." Steph. Ev. c. 12. This seems an accurate statement of the rule, except that it is indefinite as to what are "the circumstances of the case" which the court may consider in determining the completeness or incompleteness of the document. Mr. Freeman, in his note to Green v. Batson, 5 Am. St. Rep. 194, 36 N. W. 849, says, "Where the contract as expressed in the writing is manifestly incomplete, parol evidence is admissible to show a contemporaneous agreement that the property should be of a particular quality, quantity, or kind." This statement of the rule is perhaps subject to the criticism that it seems to imply that the incompleteness of the writing must be manifest on its face from a mere inspection of the document. All the authorities are substantially agreed that where, in the absence of fraud, accident, or mistake, the parties have deliberately put their contract into a writing which is complete in itself, and couched in such language as imports a complete legal obligation, it is conclusively presumed that they have introduced into the written instrument all material terms and circumstances relating thereto.

But the point upon which the courts have sometimes differed is as to how the incompleteness of the written contract may be made to appear. Some cases seem to go to the length of holding that this may be done by going outside of the writing, and proving that there was a stipulation entered into but not contained in it, and hence that only part of the contract was put in writing. If any such doctrine is to obtain, there would be very little left of the rule against varying writ-

ten contracts by parol. Such is not the law. Other cases seem to almost go to the other extreme, by holding that the incompleteness of the writing must appear on the face of the document from mere inspection. But to furnish a basis for the admission of parol evidence the incompleteness need not be apparent on the face of the instrument. If the written contract, construed in view of the circumstances in which, and the purpose for which, it was executed,—which evidence is always admissible to put the court in the position of the parties,—shows that it was not meant to contain the whole bargain between the parties, then parol evidence is admissible to prove a term upon which the writing is silent, and which is not inconsistent with what is written; but, if it shows that the writing was meant to contain the whole bargain between the parties, no parol evidence can be admitted to introduce a term which does not appear there. In short, the true rule is that the only criterion of the completeness of the written contract as a full expression of the agreement of the parties is the writing itself; but in determining whether it is thus complete it is to be construed, as in any other case, according to its subject-matter, and the circumstances under which and the purposes for which it was executed. What was said on this subject in Thompson v. Libby, 34 Minn. 374, 26 N. W. 1, is perhaps incomplete, in not specifically adverting to this rule of construction, and for that reason capable of being understood as meaning that the incompleteness must appear on the face of the document from mere inspection. For a full discussion of the law on this subject, see Mr. Freeman's note to Green v. Batson, supra; also Browne, Par. Ev. c. 12. Some few cases hold that in the case of a written contract for the sale of personal property, where the writing contains no warranty, it is competent to admit parol evidence to add a warranty, placing the decision on the ground that a warranty is collateral to the contract of sale. This doctrine was expressly repudiated in Thompson v. Libby, supra.

Applying the rules which we have laid down, parol evidence to prove a warranty, which was part of the prior or contemporaneous agreement, and about which the written contract was silent, was clearly inadmissible. The written contract is of the most formal and complete character, specifying with minute detail the particular make, name, size, and power of the engine and boiler and appurtenances to be furnished, and how and when they were to be set up. The plaintiff having thus contracted for machinery of a particular make, size, and power, the mere fact that it was purchased for the purpose of operating this mill, and that defendant knew this, would not be a circumstance that would of itself justify the court in construing the writing as an incomplete expression of the contract of the parties. Defendant having furnished the specific machinery, both in make, size, and power, which the parties contracted for, there was no implied warranty that

it would furnish power enough to operate plaintiff's mill. Brick Co. v. Hood, 60 Minn. 401, 62 N. W. 550, 51 Am. St. Rep. 539.

This also disposes of plaintiff's third and fourth assignments of error.

Order affirmed.[39]

STARK ELECTRIC R. CO. v. McGINTY CONTRACTING CO.

(Circuit Court of Appeals of the United States, Sixth Circuit, 1917. 238 Fed. 657, 151 C. C. A. 507.)

Action by the McGinty Contracting Company against the Stark Electric Railroad Company. There was a judgment for plaintiff, and defendant brings error.

KNAPPEN, Circuit Judge.[40] * * * 3. The first cause of action embraces a claim for extra work performed in excavating on Weaver Hill, which lies between Canton and Alliance. The contract provided a price of 40 cents per cubic yard therefor. In fact, when the contract was made the railroad tracks were in position at the location where plaintiff's work was to be done, traffic was being maintained thereover, and was continued throughout the excavation work. Testimony was admitted to the effect that when the contract was being negotiated defendant assured plaintiff that it would remove the tracks far enough to be out of the way of the excavation work (which contemplated a deep cut), that such agreement would be embraced in the specifications, and that the contract price was fixed under such inducement. The specifications (which plaintiff claims not to have seen until six weeks after the contract was made) did not contain this provision. There was testimony that defendant did not remove the tracks, and that after the work was entered upon plaintiff refused to proceed further with that portion of it unless the tracks were so removed, or unless defendant would pay an additional price for doing the work with the tracks kept in condition for traffic, that the defendant claimed to be unable to get right of way for temporary track purposes, and that Morley agreed to pay what the work was thus reasonably worth, and that the work was done under such agreement. Plaintiff claims $1 per cubic yard as a reasonable price. The amount at 40 cents per cubic yard was paid upon vouchers, the difference ($6,816) represents the additional compensation claimed. The defendant criticizes the testimony of the alleged oral agreement as incompetent. It is the well-settled rule that parol representations are not admissible in the absence of fraud or mutual mistake, when the written contract purports to

[39] For a collection of the cases on this point, see Electric Storage Battery Co. v. Waterloo, C. F. & N. Ry. Co., 138 Iowa, 369, 116 N. W. 144, 19 L. R. A. (N. S.) 1183 (1908), annotated.

[40] Part of opinion omitted.

contain the entire agreement. Seitz v. Brewers' Co., 141 U. S. 510, 516, 12 Sup. Ct. 46, 35 L. Ed. 837; Marmet Coal Co. v. Peoples' Coal Co. (C. C. A. 6) 226 Fed. 646, 650, 141 C. C. A. 402, and cases cited.

Plaintiff insists that the assurance in question was the inducing cause of the contract, and was a collateral agreement. It is conceded that if the agreement was of the latter nature, it was admissible, but such nature is denied. The jury was instructed, in effect, that if they found that the contract was made on defendant's assurance that it would remove the tracks, and that defendant subsequently agreed verbally to pay the additional reasonable value of the work occasioned by their maintenance, recovery could be had. It is conceded that the work could not have been done with the tracks in place unless they were blocked up. Plaintiff claims to have kept 30 or 40 men doing such work and transferring the tracks from side to side. It is clear that, by the strict letter of the contract, plaintiff could have done its work without supporting the tracks, thereby suspending operation of the railroad, unless the tracks were removed. Defendant denied any agreement, before the contract was made, to remove the tracks, and denied an agreement to pay additional compensation, claiming that defendant itself actually supported and moved the tracks during the excavation work. It is evident, however, that both parties expected that the excavation should not interfere with traffic, defendant claiming to have secured right of way, for the temporary use of the tracks, before the contract in question was made. On this subject the contract did not purport to speak. We think it was thus competent to show the circumstances surrounding the making of the contract, including the assurance claimed as inducement to its making.

The fact that plaintiff received payment of the vouchers at the original contract price is not conclusive against it, in view of McGinty's testimony tending to show that the money was received with the understanding that the balance should be paid "when the whole job is done." * * *

Affirmed on condition of a remittitur of another item.

MacALMAN v. GLEASON.

(Supreme Judicial Court of Massachusetts, 1917. 228 Mass. 454, 117 N. E. 795.)

PIERCE, J.[41] This is an action of contract brought by the plaintiff to recover $509.53 of the defendant, being for labor alleged to have been performed on and materials furnished for an automobile purchased by the defendant of the plaintiff.

December 16, 1910, after negotiations and numerous interviews, the

[41] Statement omitted.

plaintiff and defendant drew up and signed a written agreement for the purchase and sale of a second-hand motor car for the price of $1,800 including extras. A copy of this agreement is printed in a footnote.[42] At the time of the execution of the agreement the defendant paid the plaintiff the agreed price and the automobile was delivered two days afterward. After the car had been delivered to the defendant, and used by him, certain repairs becoming necessary it was sent to the repair department of the plaintiff and the repairs made. The defendant admitted that the charges in the items enumerated in the plaintiff's declaration were fair and reasonable, but claimed that the greater part thereof were covered by a contemporaneous oral agreement and guarantee of the plaintiff to keep the car in repair for one year from the date of purchase free of charge to the defendant.

It is the contention of the defendant that the oral agreement was collateral to the principal agreement and operated as an inducement for entering into it. Subject to the exception of the plaintiff, as evidence to prove the so-called guaranty, the defendant was permitted to testify that the substance of the numerous interviews was as follows:

At a conversation at the defendant's house "I said I didn't want a secondhand car because they were always in the repair shop." He said "This had been thoroughly overhauled * * * and if I bought it they would guarantee it for a year." To the question, "What do you mean?" the defendant answered, "Keep it in repair for a year." At an interview at the defendant's office "I told him the car looked good, but I could not make up my mind to have a secondhand car." "We went over the same conversation as the day before. He said there would not be anything like that in this car, that the car would be just as

[42] The writing in question was as follows:

"Sec-Hand Green Car.

"Motor Car Order.

"J. H. MacAlman, 889 Boylston Street.

"Boston, Mass., December 16, 1910.

"We acknowledge receipt of your check for the sum of $1,800.00 to apply upon your order entered this day as follows, viz.:

"Secondhand Stearns motor car, model 30/60 equipped with Chain Drive.

"G. Vaughan body, standard tires and regular standard equipment.

"Color body, maroon. Color running gear, maroon.

"Special extras.

"Remarks: Equipment to include cape top, Prest-O-Lite tank, five lamps, horn, pump, jack, and kit of tools, tire irons.

"Price, inclusive of extras, $1,800.00 f. o. b. Boston, Mass.

"Terms: Cash upon acceptance of this proposal.

"To be delivered at Boston, Mass., on or before, at once, subject to strikes, accidents, transportation, unavoidable delays and causes beyond our control.

"It is expressly understood that, in event of failure on our part to make delivery upon the date and for the causes stated, the above payment will be refunded upon demand. J. H. MacAlman,

"By Chas. I. Howell, Salesman.

"Accepted by Edward F. Gleason, Purchaser,

"By H. C. Prior.

"Address, 535 Beacon St., Boston."

good as new, all the worn places thoroughly overhauled and they would guarantee it to me for a year." A third conversation was over the telephone: "He said, 'How do you feel about the car?' or something like that. I said, 'If this car as you say is thoroughly overhauled and you will guarantee it for a year, I will give $1,800 for it.'" He said, "All right." "'We will accept your offer,' and I told him I would be down. I think that was in the forenoon of December 14."

The admitted evidence tends to prove that at the time of the making of the final agreement of sale a further agreement was made that the car would be just as good as new, all the worn places thoroughly overhauled and that the plaintiff would guarantee it for a year. The writing signed by the parties appears on its face to be a complete contract, embracing all the particulars necessary to make a perfect agreement and designed to express the whole arrangement between the parties. The evidence therefore should have been excluded unless the oral agreement relates to a subject independent of, distinct from and collateral to the sale of the motor car. Dutton v. Gerrish, 9 Cush. 89, 55 Am. Dec. 45; Fitz v. Comey, 118 Mass. 100; Puffer Mfg. Co. v. Krum, 210 Mass. 211, 213, 96 N. E. 139; Glackin v. Bennett, 226 Mass. 316, 115 N. E. 490.

We are of opinion that the oral agreement directly touched and concerned the use and enjoyment of the thing sold, that it was not a mere inducement for entering into the sale, that it was a part of the bargain of sale, and was not independent of or collateral to that sale. The case at bar cannot be distinguished in principle from Brigham v. Rogers, 17 Mass. 571, wherein it was held that, where an estate was demised by lease, no action lay on a parol promise made by the lessor at the time of executing the lease, that the water on the premises demised would be good, and that there would be enough of it, and if not that he would make it so. This decision was approved in Durkin v. Cobleigh, 156 Mass. 108, 30 N. E. 474, 17 L. R. A. 270, 32 Am. St. Rep. 436; Spear v. Hardon, 215 Mass. 89, 102 N. E. 126; Naumberg v. Young, 44 N. J. Law, 331, 344, 43 Am. Rep. 380; Thompson Foundry & Machine Co. v. Glass, 136 Ala. 648, 654, 33 South. 811.

It follows that the evidence should have been excluded, and that judgment should be entered for the plaintiff in the sum of $509.53 in accordance with the terms of the report.

So ordered.

SECTION 2.—EXTRINSIC EVIDENCE TO AID IN THE CONSTRUCTION OR APPLICATION OF WRITTEN INSTRUMENTS

DOE ex dem. FREELAND v. BURT.

(Court of King's Bench, 1787. 1 Term R. 701.)

Ejectment for a cellar and wine-vaults in Westminster, tried before Buller, J., at the sittings after last term. The defendant claimed under a lease from the lessor of the plaintiff of certain parts of a messuage situated on the west side of Swallow-street, described to be one room on the ground floor, and a cellar thereunder, and a vault contiguous and adjoining thereto; and three rooms, together with the ground whereon the same now stand, and together with a piece of ground on the north side, particularly describing it, with an exception of a right of way; and the whole were described to have been late in the occupation of A. It was admitted that the vault in question was under this piece of ground which was a yard.

The defendant rested his title on the maxim that cujus est solum, ejus est usque ad cœlum & ad inferos. The lessor of the plaintiff offered evidence to shew that at the time of the lease the cellar in question was in the occupation of B. another tenant; and therefore that it could not have been the intention of the parties that it should pass by the lease to the defendant; and that the defendant had not claimed it till after the expiration of that lease. The defendant's counsel objected to this evidence, because the lessor of the plaintiff was estopped by his deed from saying it was not meant to pass. But Buller, J., was of opinion that the evidence was admissible; and the plaintiff obtained a verdict, with liberty to the defendant to enter a nonsuit if the objection were well-founded.

Mingay now shewed cause against a rule for entering a nonsuit. The evidence offered was not contradictory to, but in explanation of, the deed.

ASHHURST, J.[48] It appears plainly from the evidence that this objection is against the justice of the case. For it was not in the contemplation of the parties at the time of the lease to pass the cellar, and it appears that for three or four years after the defendant's lease the lessor of the plaintiff received rent from the former tenant of the cellar. The only question is, whether the court are absolutely bound by the terms of this lease to put the construction on it, for which the defendant contends. Now, it seems to me, that the construction of all deeds must be made with a reference to their subject-matter. And

[48] Opinion of Grose, J., omitted.

it may be necessary to put a different construction on leases made in populous cities, from that on those made in the country. We know that in London different persons have several freeholds over the same spot; different parts of the same house are let out to different people. That is the case in the Inns of Court. Now, it would be very extraordinary to contend that if a person purchased a set of chambers, then leased them, and afterwards purchased another set under them, the after-purchased chambers would pass under the lease.

In the present case, considering the nature of this property, it was proper to let in evidence to shew the state and condition of it at the time when the lease was granted. Prima facie indeed the property in the cellar would pass by the demise, but that might be regulated and explained by circumstances. Therefore I am of opinion, that, considering all the circumstances of this case, it was proper to receive the evidence offered at the trial, which, when received, proved that the cellar was not intended to be passed by the demise to the defendant.

BULLER, J. Where there is a conveyance in general terms of all that acre called Black-acre, every thing which belongs to Black-acre passes with it. And there the rule, which has been mentioned, prima facie obtains. But whether parcel or not of the thing demised is always matter of evidence. Suppose the premises in question had been the inheritance of another person at the time of this demise, instead of their being in lease, they clearly would not have been parcel of this demise. Then their being in lease to another person under this plaintiff cannot vary the question, whether parcel or not. In the next place, it is very clear on inspecting the lease itself; these words cannot receive the general construction of the law. This is a lease of a part of a messuage, consisting of one room on the ground floor, with a cellar thereunder: now, if the argument for the plaintiff would hold, the cellar would have passed with the room on the ground floor without particularly specifying it. Then a description of another part of the premises is, "of ground, together with three rooms which stand on it." Which shews that the parties have particularly described every thing which was intended to pass. Then follows a demise of the yard described with the same particularities, specifying the abuttals and the dimensions.

Rule discharged.

DOE ex dem. CHICHESTER v. OXENDEN.

(Court of Common Pleas, 1810. 3 Taunt. 147.)

This was an ejectment brought by the lessor of the plaintiff as heir at law of Sir John Chichester, Bart., on a demise laid subsequent to Sir John Chichester's death; and at the trial, before Lawrence, J., at the Exeter summer assizes, 1809, a verdict was found for the defendant, subject to the opinion of this court on the following case:

The lessor of the plaintiff was heir at law of Sir John Chichester, Bart., who, on the 30th of September, 1808, died seised in fee as well of the premises in question, which composed his maternal estate, as of other property, which he derived from his father, called the Youlston estate. The premises claimed consist of the manors of Ashford, George Teign, and Stowford, the tithes impropriate of the parish of Nether Ex, and two estates called Great and Little Bowley, in the parish of Cadbury, in the county of Devon: the manor of Ashton is situate in the parish of Ashton, with the exception of one insulated estate, parcel thereof, which lies in the parish of Exminster, adjoining to the parish of Ashton. The manor of George Teign is situate in Ashton parish: of the manor of Stowford one part lies in the parish of Crediton, and the other in the parish of Sandford; the manor itself being distant from the parish of Ashton about 12 or 13 miles. The parish of Nether Ex is also about 11 or 12 miles, and the parish of Cadbury 15 miles, distant from the parish of Ashton: with the premises aforesaid are comprised, besides the manor of Ashton, the barton of Ashton, and lands lying within the parish of Ashton. On the 3d day of September, 1808, Sir John Chichester, Bart., being seised as aforesaid, made and published his last will and testament, duly executed, so as to pass real estates, in the terms following: "I give my estate of Ashton, in the county of Devon, to George Chichester Oxenden, (the defendant,) second son of Sir Henry Oxenden, Bart., of Broom, in the county of Kent. I give the house in Seymour Place, for which I have given a memorandum of agreement to purchase, and which is to be paid for out of timber which I have ordered to be cut down, to the Rev. John Sandford of Cherwill, in Devonshire."

To show that by the words "my estate of Ashton," the devisor intended to dispose of the whole of the maternal estate before specified, the following, amongst other evidence, was offered by the defendant, and received. First, the verbal instructions given by the devisor, at the time of making the will, to the devisee, John Sandford, who made the same, which were, to make a memorandum to guard against accidents, to give George Oxenden his, the devisor's, Ashton estate. Secondly, expressions which Mr. Sandford and the Rev. Thomas Hole (the latter of whom had occasionally audited the devisor's accounts for 24 or 25 years previous to his decease) had at various times heard the devisor use in describing his different property, viz. that in speaking of his paternal property, he used to call it his Youlston estate, and in describing his estate derived by him from his mother, he used to designate that by the general term of his Ashton estate, or Ashton property; and, particularly on one occasion, directed that the timber should not be cut on his mother's property, the Ashton estate, but on his father's property. Thirdly, a series of annual accounts delivered to the devisor by John Cleave, and John Smith, who were successively two of his stewards: these accounts com-

menced with the year 1785, and the form of each of them was very nearly the same. The following is a description of the form of one of these accounts: on the outside was endorsed, "J. Cleave's account for Ashton estate, from January 1st, 1799, to January 1st, 1800;" the first page thereof was thus headed: "J. Cleave's account for Sir John Chichester, Bart., for Ashton estate, from January 1st, 1799, to January 1st, 1800;" in the first page was contained a list of the various payments made by Cleave. * * *

And underneath was the following receipt, the signature to which is in the handwriting of the devisor. April 1st, 1810, examined this account, and received the vouchers thereof, and due from John Cleave on the balance thereof, the sum of £470. 0s. 4. 1-2d. John Chichester. The foregoing evidence was objected to by the counsel for the lessor of the plaintiff, as inadmissible, but was received, subject to the opinion of the court as to the propriety of its being admitted. If the court should be of opinion that the evidence was properly received, then the verdict was to stand: if not, then a verdict was to be entered for the lessor of the plaintiff, for so much of the premises, if any, as the court should think did not pass under the will.

The case was twice argued; first in Hilary term, 1810, by Pell, Serjt., for the plaintiff, and Heywood, Serjt., for the defendant; and again in Easter term, by Best, Serjt., for the plaintiff, and Lens, Serjt., for the defendant.

For the plaintiff it was argued, that parol or other extrinsic evidence was not admissible to contradict, explain, or enlarge the effect of a will; it was admissible only in cases where there was an absolute necessity, because the will would otherwise be uncertain or insensible, and could have no effect without it, or where there was a latent ambiguity; and no such necessity or latent ambiguity subsisted in this case. All that class of cases where parol evidence has been received to repel trusts arising on presumptions, may be laid aside as irrelevant; (to which the court agreed.) The testator had an estate of Ashton, viz. a manor of Ashton, and the barton of Ashton, and other lands there; and having an estate of Ashton, he used the most appropriate words to convey it. If he had said the manor of Ashton, it would not have comprehended the barton, nor if he had devised the barton, would it have included the manor. His "estate of Ashton" was his estate "of or belonging to Ashton." The words do mean that, and they can mean nothing else. At that period of the cause at which the evidence was offered, it was in proof, therefore, that the testator had an estate of Ashton; and there being enough, both in interest, and quantity of estate, and position, to satisfy the terms of the devise, the evidence ought not to have been received, but the case ought to have stopped there, unless it had been shown that there was another Ashton estate belonging to the devisor. * * *

For the defendant it was contended that this was a case of latent ambiguity. A latent ambiguity cannot be discovered to exist, but by

the aid of collateral evidence; and if that evidence be such as would, if admitted, raise a doubt in the mind of the judge, it ought to be received and left to the jury. No one can see on the face of this will any ambiguity whatever. The word "of" does not denote locality in this case: it means all that estate which the testator called Ashton. He might designate his whole estate by the name of any one parcel, whether distant or near, if he had any reason in his mind for so doing. The word "of" is therefore distinguishable from "at," the expression used in Whitbread v. May, which might denote locality; and the court not being bound to construe "of" as local, may give it any other construction which the evidence requires: the ambiguity is therefore raised, and by the same evidence it has been explained. * * *[44]

MANSFIELD, C. J., now delivered the judgment of the court. After recapitulating the case, and adverting to the evidence, he added: If this evidence ought not to be received, the consequence will be, that so much of the property only will pass as is not affected by the evidence. I have doubted much upon it. The more, because in a less strong case, May v. Whitbread, two judges thought the evidence should be received. Lord Eldon increased my doubts. On the whole, I rather think we should go further in receiving this evidence, than any case has yet gone. There is an extreme jealousy in receiving evidence to explain written instruments. Many cases have been cited. In general they are well known. The last and strongest was Doe v. Brown. There it was impossible to doubt what the testator meant. In this case my own judgment only is, if the evidence were admitted, that the testator meant to devise the whole of his maternal estate to his maternal relations, and not only the land locally situated at Ashton. But to decide in favor of this evidence would be going further than any court has yet gone. I need not particularize the cases: of devises where there were two persons of the same name; where the name by which property was devised, applied equally to two estates. Such was the case in P. Wms. of a devise to Gertrude Yardley, by the name of Catherine Earnly, where there was no such person as Catherine Earnly. The case in Ambler of legacies to John and Benedict, sons of John Sweet; he had two sons, the name of one was Benedict, but the name of one was James. The evidence was received. It is not expressly said in any of these cases, that it was necessary to receive the evidence, in order to give effect to the will, which would not operate without such evidence. But although this is not said, yet the rule seems to hold. It will be found that the will would have had no operation, unless the evidence had been received. Here, without the evidence, the will has an effective operation; every thing will pass under it that is in the manor or parish; or what he would naturally call his Ashton estate. This will be an effective operation; and this being so, the case herein differs from all the others; be-

[44] Statement condensed.

cause in them, the evidence was admitted to explain that which, without such explanation, could have had no operation. It is safer not to go beyond this line. Therefore only those premises pass which are in the manor or parish of Ashton; for all but them the plaintiff has a right to recover.

Postea to the plaintiff.[45]

DOE ex dem. BEACH v. EARL of JERSEY.

(House of Lords, 1825. 3 Barn. & C. 870.)

[Ejectment for certain lands to which the defendant claimed title under the will of Louisa Barbara Vernon, which contained the following provision:

"I give, * * * subject to the life estate of my husband therein, all that my Briton Ferry estate, with all the manors, advowsons, messuages, buildings, lands, tenements and hereditaments thereto belonging or of which the same consists, with the appurtenances unto * * * and after his decease to the second son of George Bussy Villiers, Earl of Jersey."][46]

[45] The subsequent action of Doe ex dem. Oxenden v. Chichester was taken to the House of Lords, 4 Dow, 65 (1816), and the same result reached on the following reasoning by Gibbs, C. J.:

"I do not state the particulars of the evidence, as the question is, whether any evidence at all can be admitted to explain the bequest. We are all agreed, as I have stated, that 'my estate of Ashton' and 'my estate at Ashton,' are words of the same import, and the question then is, when lands at a particular place are devised, whether extrinsic evidence may be received to show that the devisor included lands out of that place; and we are all of opinion that such evidence is inadmissible.

"The courts of law have been jealous of the admission of extrinsic evidence to explain the intention of a testator; and I know only of one case in which it is permitted, that is, where an ambiguity is introduced by extrinsic circumstances. There, from the necessity of the case, extrinsic evidence is admitted to explain the ambiguity; for example, where a testator devises his estate of Blackacre, and has two estates called Blackacre, evidence must be admitted to show which of the Blackacres is meant; so if one devises to his son John Thomas, and he has two sons of the name of John Thomas, evidence must be received to show which of them the testator intended. And so also if one devises to his nephew William Smith, and has no nephew answering the description in all respects, evidence must be admitted to show which nephew the testator meant by a description not strictly applying to any nephew. The ambiguity there arises from an extrinsic fact or circumstance, and the admission of evidence to explain the ambiguity is necessary to give effect to the will, and it is only in such a case that extrinsic evidence can be received. It is of great importance that the admission of such extrinsic evidence should be avoided where it can be done, that a purchaser or an heir at law may be able to judge from the instrument itself what lands are or are not affected by it."

Compare the treatment of a somewhat similar problem in Lane v. Stanhope, 6 Term R. 345 (1795), where it was thought that the fact that several pieces of land had been used as a single farm was important in determining to what the language referred.

[46] The part of the statement inclosed in brackets has been condensed from the report of this case in the Court of King's Bench, 1 B. & Ald. 550. Part of opinion omitted.

At the trial of this cause before Dallas, J., at the Hereford Spring assizes, 1816, a bill of exceptions was tendered as to the admission of evidence offered on the part of the defendant, objected to on that of the plaintiff, and received by the learned Judge. After the usual statement of the pleadings and of the evidence received at the trial without objection, the bill of exceptions goes on to state the evidence objected to, in the following words. "And the counsel learned in the law for the said George Earl of Jersey, the said then defendant, proposed and offered to prove and give in evidence on the part and behalf of the said Earl, the said then defendant, certain books, being stewards' account books kept and made out by former stewards, now deceased, of the said Louisa Barbara Vernon and her predecessors, owners of the said lands, tenements, and hereditaments, containing particulars thereof, in which the said stewards charged themselves with the receipt of various sums of money on account of the said owners, and among other particulars the entry following, to wit, 'Briton Ferry estate, in the county of Brecon;' and also proposed and offered to prove and give in evidence, that the lands and tenements in the said declaration mentioned, together with the lands, tenements, and hereditaments in the said schedules respectively contained, had all gone by the name of the Briton Ferry estate; and that such of the said lands, tenements, and hereditaments as were in the county of Brecon, extended over twelve parishes, and contained above four thousand acres of land."

The jury found a special verdict, upon which this court in Easter term, 1818, 1 B. & A. 550, gave judgment for the defendant. A writ of error having been brought, the question was fully discussed before the House of Lords, and in the course of the present session, the following questions were put to the Judges:

First, Whether all the several matters which it appears by the bill of exceptions were offered to be proved and given in evidence on the part of the defendant, and which it so appears it was insisted by the counsel of John Doe, were inadmissible, and ought not to be received in evidence, were matters admissible, and which ought to have been received in evidence, regard being had to the fact, that none of the particulars of the evidence proposed to be given appear to have been stated or required to be stated, in order to prove that all the lands and tenements had gone by the name of the Briton Ferry estate.

Second. Whether the finding in the special verdict that the tenements in "the county of Brecon, together with the manors and tenements in the county of Glamorgan, had been known by the name of the Briton Ferry estate, and by no other name, for divers, to wit, fifty years before the death of Louisa Barbara Vernon," (who died in the year 1786,) is consistent with the other findings contained in the special verdict, and especially with the descriptions and names of the tenements in the county of Brecon, and of the manors and tenements in the county of Glamorgan, in the several indentures and the sched-

ules thereunto annexed, found and set forth in the said special verdict and in the will of Louisa Barbara Vernon, therein also found and set forth, and which indentures and will, appear to have been respectively executed within fifty years before the death of the said Louisa Barbara Vernon. * * *

ABBOTT, C. J. All the Judges, except the LORD CHIEF BARON and Mr. Justice LITTLEDALE, who were not present at the argument, have conferred upon the question proposed, and have agreed upon answers thereto.

To the first question:

We are of opinion that the words "all that my Briton Ferry estate, with all the manors, advowsons, messuages, buildings, lands, tenements, and hereditaments thereunto belonging, or of which the same consists" found in the will of this testatrix, in which mention also is made of her Penline Castle estate, denote a property or estate known to the testatrix, by the name of her Briton Ferry estate, and not an estate locally situate in a parish or township of Briton Ferry, and, consequently, that a question arising upon any particular tenement, is properly a question of parcel or no parcel; and we, therefore think, the several matters offered to be proved and given in evidence on the part of the defendant were admissible, and ought to have been received. We think the object for which such evidence was offered was obvious, and must have been understood by the judge and the counsel on each side, without being specially stated or required to be so.

To the second question:

We are of opinion that the finding in the special verdict, that the tenements in the county of Brecon, together with the manors and tenements in the county of Glamorgan, were known by the name of the Briton Ferry estate, and by no other name for divers, to wit, fifty years before the death of Louisa Barbara Vernon, is consistent with the other findings in the special verdict. In the will of Lord Mansell, and also in the deeds of 1740, mentioned in the special verdict, it was necessary to describe and name the particular tenements, because the will gave certain tenements only, and not the whole estate in trust for sale; and the deeds of 1740, were intended as an execution of that trust and a sale under it. The deeds of 1757, were a settlement on a marriage, and in such settlements, as well as other conveyances, it is usual to describe the parcels and enumerate the particulars of the estate intended to be settled; and we think a description and enumeration of particulars by situation and names is not inconsistent with a name of the whole, as composing an aggregate mass. The whole of an estate may be known by one name, and each of its parts by its own particular name.

To the third question:

We are of opinion that it is not sufficiently found that the said tenements and manors in the said counties were so known by name by the testatrix. In truth, it is not found that they were so known by name

to any person at the time of making the will. The expression divers to wit, fifty years before the death of Louisa Barbara Vernon, is much too loose and indefinite. * * *

Venire de novo awarded.

SMITH et al. v. WILSON.

(Court of King's Bench, 1832. 3 Barn. & Adol. 728.)

This was an action for the breach of the following covenant in a lease, whereby the defendant demised to the plaintiffs, inter alia, a warren; "That at the expiration of the term, they, the plaintiffs, would leave on the warren 10,000 rabbits or conies, the defendant paying 60*l.* per thousand for the same; and for any more than that number at that rate, the number to be estimated by two indifferent persons, one to be chosen by each party." Averment that, at the expiration of the term, the plaintiff left more than 10,000, to wit, 19,200 rabbits upon the warren, but that the defendant would not pay for the same. Plea non est factum. At the trial before Garrow, B., at the Summer assizes for Suffolk, 1831, it appeared that, at the expiration of the term, the number of rabbits on the warren was estimated by two indifferent persons chosen by the parties, to be 1600 dozen. It was contended for the defendant, that, according to the custom of the country, the 1600 dozen should be computed at 100 dozen to the thousand; and, therefore, that the defendant was liable to pay but for 16,000 rabbits. On the other hand, it was insisted for the plaintiffs, that the words per thousand must be understood in the ordinary sense, and that the defendant ought to pay for 19,200 rabbits, being 1600 dozen. The defendant paid into Court a sufficient sum to pay for 16,000 rabbits. Evidence was offered by the defendant to show that the term thousand, as applied to rabbits, meant, in that part of the country, 100 dozen. This evidence was objected to, but received by the learned Judge: and he directed the jury to find for the defendant, if they thought it was proved that the word thousand, as applied to rabbits, meant 100 dozen. A verdict having been found for the defendant, a rule nisi was obtained for a new trial, on the ground that the evidence had been improperly received.

PARKE, J.[47] The only question is, whether the evidence has been properly received. Assuming that it has, the jury have found that, according to the custom of the country, there was an understanding between the parties to this contract that the defendant should pay for the rabbits, computing them at the rate of 100 dozen to the thousand. The rule deducible from the authorities on this subject is correctly laid down in 3 Starkie on Evidence, 1033. "Where terms are used which

[47] Opinions of Lord Tenterden, C. J., and Littledale and Taunton, JJ., omitted.

are known and understood by a particular class of persons, in a certain special and peculiar sense, evidence to that effect is admissible for the purpose of applying the instrument to its proper subject-matter; and the case seems to fall within the same consideration as if the parties in framing their contract had made use of a foreign language, which the courts are not bound to understand. Such an instrument is not, on that account, void; it is certain and definite for all legal purposes, because it can be made so in evidence through the medium of an interpreter. Conformably with these principles, the courts have long allowed mercantile instruments to be expounded according to the custom of merchants, who have a style and language peculiar to themselves, of which usage and custom are the legitimate interpreters." Although that principle has been more frequently applied to mercantile instruments than to others, it is not confined to them; and, if the word thousand, as applied to the particular subject-matter of rabbits, had, in the place where this contract was made, a peculiar sense, I think that parol evidence was admissible to show it. In an action upon a contract for the sale of 1000 deals, it would, I think, be competent to show that the word thousand meant more than it would in its ordinary sense. I agree that where a word is defined by act of parliament to mean a precise quantity, the parties using that word in a contract, must be presumed to use it in the sense given to it by the legislature, unless it appear from other parts of the contract that they used it differently. But that is not the present case. No specific meaning has been given by the legislature to the word thousand as applied to rabbits, and, therefore, it must be understood according to the custom of the country: and evidence was admissible to show what that was.

Rule discharged.[48]

BROWN v. BROWN et al.

(Supreme Judicial Court of Massachusetts, 1844. 8 Metc. 573.)

SHAW, C. J.[49] The question in the present case arises from a reservation in a deed, conveying land to the plaintiff, duly made and executed by the inhabitants of Marblehead. This deed, made in 1839, purports to convey to the plaintiff a tract of land, embracing a line of beach bounding on the sea, and contains the following reservation: "Reserving to the town the right and privilege to enter on the beach, and to take and carry away gravel and sand therefrom, as the said town may have occasion, for the making and repairing of their highways," &c.

The action is brought against the defendants, who claim to have acted under the authority of the town, and justify their right so to do

[48] And so in Myers v. Sarl, 3 El. & El. 306 (1860), where a number of the cases are reviewed.

[49] Statement omitted.

under the foregoing reservation; and the question is, what is the true construction and legal effect of that reservation? The averment in the declaration is, that the defendants, instead of taking sand and gravel, took and carried away ballast; and the proof was, that they took up and carried away stones of considerable size, embedded in and mixed with the beach gravel on the sea shore, and that such materials did not come within the description of sand and gravel.

Evidence was offered by the defendants, to prove the meaning of the words "sand and gravel," as generally and usually understood at Marblehead; also to prove that the same species of material had been used for the same purpose, before the making of the said deed. The court rejected the former evidence and admitted the latter.

The court are of opinion, that the instructions were right upon both points. As to the first, we think the general rule of law is, that the construction of every written instrument is matter of law, and, as a necessary consequence, that courts must, in the first instance, judge of the meaning, force and effect of language. The meaning of words and the grammatical construction of the English language, so far as they are established by the rules and usages of the language, are, prima facie, matter of law, to be construed and passed upon by the court. But language may be ambiguous and used in different senses; or general words, in particular trades and branches of business—as among merchants, for instance—may be used in a new, peculiar or technical sense; and therefore, in a few instances, evidence may be received, from those who are conversant with such branches of business, and such technical or peculiar use of language, to explain and illustrate it. One of the strongest of these, perhaps, among the recent cases, is the case of Smith v. Wilson, 3 Barn. & Adolph. 728, where it was held, that in an action on a lease of an estate including a rabbit warren, evidence of usage was admissible, to show that the words "thousand of rabbits" were understood to mean one hundred dozen, that is, twelve hundred. But the decision was placed on the ground that the words "hundred," "thousand," and the like, were not understood, when applied to particular subjects, to mean that number of units; that the definition was not fixed by law, and therefore was open to such proof of usage.

Though it is exceedingly difficult to draw the precise line of distinction, yet it is manifest that such evidence can be admitted only in a few cases like the above. Were it otherwise, written instruments, instead of importing certainty and verity, as being the sole repository of the will, intent and purposes, of the parties, to be construed by the rules of law, might be made to speak a very different language, by the aid of parol evidence. The instruction, in this case, was cautiously expressed and guarded.

As to the second, the instruction was sufficiently liberal for the defendants. In a conveyance of title, deeds must be construed according to the language; and if the town, when they owned the land, took materials not coming within the description of "gravel and sand,"

as they well might do, to mend their highways—as paving stones, or materials for macadamizing—but chose to make their reservation in narrower terms, they must abide by it, and cannot enlarge it by showing such former usage. But, construed according to the subject matter, we are to presume that the evidence was admitted, to operate to this extent only, namely, that it might tend to show that all such material as had been used as gravel, to spread upon the surface of the roads, in the usual mode of covering roads made of earth and gravel only, was in the contemplation of these parties, and, to that extent, to show what they regarded as gravel.

Whether the jury drew the right conclusion from the evidence, we have no means of knowing; the evidence not being reported. We were referred to the declaration for a description of the material which was actually dug and carried away; but whether the proof fully came up to the averment, we do not know. This is an action of trespass, and concludes no right. If the verdict was against the evidence, the parties will have an opportunity to test the question again in a new action.

Judgment on the verdict.

NICHOL v. GODTS.

(Court of Exchequer, 1854. 10 Exch. 191.)

At the trial, before Parke, B., at the London Sittings in the present Term, it appeared that the plaintiff had sold to the defendant, through his broker, a quantity of rape oil in the ordinary way by bought and sold notes. The sold note was in the following terms:

"London, 31st January, 1854.

"Sold this day, for Messrs. A. Nichol & Sons, to Mr. U. A. Godts, the five undermentioned parcels foreign refined rape oil, being about thirty-three tons (little more or less), warranted only equal to samples at £35. per ton."

At the time of the sale samples of the oil were delivered to the defendant, and, according to the plaintiff's evidence, the defendant was told that the oil was mixed to a certain extent with other oil, and for that reason it was sold only equal to the samples. The defendant had accepted part of the oil that had been delivered in performance of the agreement, but had refused to take the residue, on the ground that it was not foreign refined rape oil, but a mixture of hemp and rape oil. The oil tendered corresponded with the samples given, which consisted of rape oil adulterated with hemp oil. On the part of the plaintiff, it was admitted that the oil was not foreign refined rape oil; but it was contended that the oil was known in the market as such. And upon this point evidence was adduced on both sides. It was also contended, on the part of the plaintiff, that, as the oil was sold by samples, the defendant was bound to accept the oil, as it corresponded with the samples.

The learned Judge told the jury that the statement in the sold note as to the samples related to the quality only of the article; and that according to the contract the defendant was entitled to have rape oil delivered to him, unless the plaintiff could show a distinct usage in the oil trade by which the words "rape oil" are understood to mean a mixture of rape and hempseed oil; and that the only question for them was, whether the plaintiff had proved such a custom. The jury found a verdict for the defendant, at the same time accompanying their verdict with the statement that they did so solely on the ground that by the wording of the contract the plaintiff was legally bound to deliver rape oil, and that they considered that the defendant well knew what he was buying.

Watson now moved for a rule nisi for a new trial, on the ground of misdirection.[50]

POLLOCK, C. B. This is an application for a new trial, on the ground of supposed misdirection by my Brother Parke; and I am of opinion that there ought to be no rule. The question turns upon the meaning of certain words in the contract, by which the plaintiff sold a quantity of oil to the defendant; and the question is, whether the defendant was bound to take and pay for the oil which the plaintiff delivered to him, and which the latter refused to accept. The important words in the contract are these: "foreign refined rape oil, warranted only equal to samples." My Brother Parke told the jury that, according to the true construction of this contract, not only the article delivered must agree with the samples in quality, which was the meaning of the words "warranted only equal to samples," but also that the oil ought to agree with the description of it in the contract as to its character. It was contended by Mr. Watson that the expression "warranted only equal to samples" excluded every other description of warranty; and, provided the oil delivered was equal to the samples, that was sufficient to render the defendant liable to take it and pay for it, although, in point of fact, it did not answer the description of being foreign refined rape oil. The effect of that argument is, to render the words "foreign refined rape oil" of no avail. Such a proposition cannot be supported. I think the direction was perfectly correct; for, as my Brother Platt observed, it could not be contended that, if it had turned out that the oil was whale oil, the contract would have been performed. By the terms of this contract, it must be taken that the plaintiff agreed to deliver foreign refined rape oil, and not that he professed to sell any oil whatever. Mr. Watson then contended, that, as between the parties themselves, the samples were oil which was understood by them as being foreign refined rape oil; and witnesses were called to show that such was the understanding between these parties. But the contract must be read according to what is written by the par-

[50] The statement of the pleadings and opinions of Platt, Martin, and Parke, BB., omitted.

ties, for it is a well-known principle of law, that a written contract cannot be altered by parol. If A. and B. make a contract in writing, evidence is not admissible to show that A. meant something different from what is stated in the contract itself, and that B. at the time assented to it. If that sort of evidence were admitted, every written document would be at the mercy of witnesses that might be called to swear anything. My Brother Parke was quite correct in telling the jury that, if they were satisfied that the plaintiff had established the fact, that, by the general usage of persons dealing in this particular article, the oil in question was denominated foreign refined rape oil, the plaintiff would be entitled to the verdict. The jury found for the defendant, adding, however, that the defendant knew what he was buying. The case therefore resembles that which I have already put, viz., that a written contract cannot be contradicted by evidence of the meaning which the parties allege that they themselves attach to its words.

Rule refused.

MacDONALD et al. v. LONGBOTTOM.

(Court of Queen's Bench, 1859. 1 El. & El. 977.)

Assumpsit for the breach of a contract to accept and pay for certain wool alleged to have been bargained and sold by plaintiffs to defendant.

On the trial, before Byles, J., at the last Liverpool Spring Assizes, it appeared that the plaintiffs were farmers in Scotland, and the defendant was a wool stapler in Liverpool, whose agent for purchasing wool in Scotland was a Mr. Stewart, residing in Perth. In August, 1857, the younger Macdonald called upon Stewart and told him that they had a quantity of wool, part of which was their own clip, and then on their own farm, and part the clips of the same year of some neighbouring farms, not then on the plaintiffs' premises: that the whole quantity amounted to 2300 stones 100 stones more or less: and offered the whole to Stewart for sale. On 19th August, Stewart wrote to Macdonald, saying, "I have a letter from Mr. Longbottom (the defendant), who says, 'I will take Mr. Macdonald's wool at 16s.'" Macdonald then wrote to Stewart, on 26th August, a letter which, after stating that two of the small clips had been sold, proceeded as follows:

"With regard to our own wool, I may state that I have succeeded in getting a promise of another superior clip in this neighbourhood which would stand about 550 stones; it is as good as the Bialliol wool; it will go along with my other wool." On 5th September, Stewart wrote to him as follows: "I wrote you 1st instant, enclosing letters from Mr. Longbottom, and, not having received your reply, I beg to state that I have heard from him to-day, and he now desires me to offer

you for your wool 16s. per stone, delivered in Liverpool, less two months' discount, and as there is now so little between you, I hope to receive your acceptance of the above offer in due course.

"[Signed] William Stewart."

To this letter Macdonald replied as follows:

"Strashmastie, 8th September, 1857.

"Dear Sir. I yesterday received your favour, and in reply beg to say that I agree to your offer for the wool of 16s. per stone, less two months' discount, at the rate of £5. per cent., for ready money."

"[Signed] Macdonald, Jun."

On 27th November the plaintiffs shipped to the defendant at Liverpool the whole of the wool they had for sale, including that which belonged to the plaintiffs' own clip, and that which they had got from the other farmers, the whole amounting to 2542 stones. The defendant, on its being tendered, refused to accept it, on the ground that there had been unreasonable delay in the shipment. No evidence was given at the trial that he had made any objection that the wool shipped was not what he had contracted to purchase.

The learned Judge ruled that the evidence of the conversation which Macdonald, Jun., had had with Stewart before the letters of 5th and 8th September was inadmissible for the purpose of explaining what was the wool referred to in those letters. The plaintiffs were nonsuited, leave being reserved to enter a verdict for them for the amount claimed, if the Court should be of opinion that, without such evidence, or with it if admissible, there was sufficient evidence of a contract which bound the defendant to accept the wool tendered. In order to obviate the necessity for a new trial in such case, the issue of fact, as to whether the wool was tendered within a reasonable time was submitted to the jury, who found, on such issue, a verdict for the plaintiffs.

Monk, in last Easter Term, obtained a rule to show cause why the nonsuit should not be set aside, and a verdict entered for the plaintiffs on the ground that there was a sufficient contract in writing, and also on the ground of improper rejection of evidence.[51]

LORD CAMPBELL, C. J. I am of opinion that our judgment should be for the plaintiffs. The letters of 5th and 8th September constitute a complete contract, within the Statute of Frauds, between the plaintiffs and the defendant, through his agent, Stewart. This was an offer made to the plaintiffs, and accepted by them, of 16s. per stone for "your wool," to be delivered in Liverpool. The only question, therefore, is, what was the subject-matter of the contract, described as "your wool"? I am of opinion that, when there is a contract for the sale of a specific subject-matter, oral evidence may be received, for the purpose of showing what that subject-matter was, of every fact

[51] The statement of the pleadings has been condensed and opinions of Wightman and Earle, JJ., are omitted.

within the knowledge of the parties before and at the time of the contract. Now Stewart, the defendant's agent, had a conversation before the contract with one of the plaintiffs, who stated what wool he had on his own farm, and what he had bought from other farms. The two together constituted his wool; and, with the knowledge of these facts, the defendant contracts to buy "your wool." There cannot be the slightest objection to the admission of evidence of this previous conversation, which neither alters nor adds to the written contract, but merely enables us to ascertain what was the subject-matter referred to therein. Then comes the question, whether the contract is to be limited to the 2300 stones, 100 stones more or less, which, in the course of this conversation, one of the plaintiffs stated was the amount of the whole of the wool. I am of opinion that it is not to be so limited. There was no contract entered into at the time of this conversation: and, when the defendant ultimately agrees to purchase the wool, no reference is made to the quantity. The statement of the quantity at the time of the conversation was a mere expression of opinion, and did not affect the actual contract at all. Then, is it to be said that the letter of 5th September is to be taken as embodying the condition that the wool shipped shall not exceed that quantity? The agreement then is to take "your wool," tale quale; and I think we cannot introduce any limitation of the quantity. On the evidence, it seems clear that the defendant rejected the wool, not on account of any excess, but because the market had fallen in the mean time.[52]

Rule absolute.[53]

TRUSTEES OF FREEHOLDERS AND COMMONALTY OF TOWN OF SOUTHAMPTON v. JESSUP.

(Court of Appeals of New York, 1903. 173 N. Y. 84, 65 N. E. 949.)

The judgment of the trial court restrains the defendant "from digging, excavating, embanking, or otherwise disturbing the lands under the waters of the Great South Bay at or adjacent to Potunk Point, described in the complaint, for the purpose of making a solid roadway or embankment, and from substituting, for the wooden bridge or structure supported on piles, which the defendant, Nathan C. Jessup, has built across said Great South Bay at or near said Potunk Point (or for any part thereof), the solid embankment of earthen materials,

[52] See Stoops v. Smith, 100 Mass. 63, 1 Am. Rep. 85, 97 Am. Dec. 76 (1868), where prior negotiations were resorted to for the same purpose. In Harten v. Loffler, 212 U. S. 397, 29 Sup. Ct. 351, 53 L. Ed. 568 (1909), the oral negotiations were admitted to show that a contract for the sale of a piece of property described as "fronting about sixty feet," etc., embraced the entire lot, which had a frontage of over eighty feet.

[53] This ruling was affirmed by the Exchequer Chamber, 1 El. & El. 987 (1860).

across, over, or through said Great South Bay or any part of said bay." The appellate division affirmed this judgment by a divided vote, and the defendant appealed to this court.[54]

VANN, J. On the 2d of June, 1888, the plaintiffs adopted a resolution, of which the following is a copy: "Resolved, that Nathan C. Jessup be and is hereby given liberty to make a roadway and to erect a bridge across the Great South Bay, commencing at the south point of Potunk Neck; thence running southerly to the beach, the said bridge to be a drawbridge of a width of not less than twenty feet, the height above the meadow three feet, and the draw to be twenty feet wide, and the said Nathan C. Jessup shall not cause any unnecessary delay to those navigating the waters of said bay." * * *

Upon the trial now under review, parol evidence was received tending to show that both parties intended that the roadway should be of wood, and, although some of the trustees themselves gave evidence to the contrary, the trial judge held "that it was the intention of the parties that the defendant should have permission to build a road-bridge across the bay, and that he has no right to build a solid roadway in any part of the bay." This evidence appears to have been received and made the basis of the present judgment, because we stated in our previous opinion that we had searched the record to see if there was any evidence, aside from the resolution itself, bearing upon the intention of the parties. We said this because the trial court had found, in the record then before us, "that it was the intention of said trustees and of the defendant that there should be constructed a roadway built of timber upon piles driven into the mud and water." Our object was to show that the finding was without evidence of any kind, good or bad, to support it, but not to sanction the introduction of parol testimony to add something to the resolution which the parties had failed to insert. Some evidence of this character had been received on that trial, without objection, and we said, arguendo, that, even "assuming it to be admissible, [it] showed that the defendant wished to build a solid roadway on the south side, such as he had already built on the north side." Regretting that our language should have misled the courts below, we will now consider whether such evidence was admissible under the circumstances of this case.

The franchise in question is a contract in writing, which cannot be varied by parol evidence, although, if there is an ambiguity arising out of the terms employed, such evidence may be received, not to vary the instrument, but to enable the court to appreciate the force of the words used in reducing the agreement to writing. Thomas v. Scutt, 127 N. Y. 133, 27 N. E. 961; Stowell v. Insurance Co., 163 N. Y. 298, 57 N. E. 480. Parol evidence can neither add to nor take from the contract, but it can aid in interpreting a word or expression of ambiguous meaning by showing, through the circumstances surround-

[54] Statement condensed and part of opinion omitted.

ing the parties when their minds met and the language used by them at the time, the sense in which the doubtful language was employed. "It is received where doubt arises upon the face of the instrument as to its meaning, not to enable the court to hear what the parties said, but to enable it to understand what they wrote as they understood it at the time. Such evidence is explanatory, and must be consistent with the terms of the contract." Thomas v. Scutt, supra, citing Dana v. Fiedler, 12 N. Y. 40, 62 Am. Dec. 130; Collender v. Dinsmore, 55 N. Y. 202, 14 Am. Rep. 224; Newhall v. Appleton, 114 N. Y. 140, 21 N. E. 105, 3 L. R. A. 859; Smith v. Clews, 114 N. Y. 190, 21 N. E. 160, 4 L. R. A. 392, 11 Am. St. Rep. 627. So, Mr. Wharton says: "We are restricted, therefore, to the interpretation of the language used, and proof of intention is only admissible when, in cases of ambiguity, proof of intention enables us to discover what the language means. * * * The contract cannot be varied; its obscure expressions may be explained, but this is for the purpose not of molding, but of developing, the true sense." 2 Whart. Ev. §§ 937, 946. See, also, 1 Greenl. Ev. § 275; Underhill, Ev. 323; Rice, Ev. § 170.

What ambiguous word or expression of doubtful meaning is there in the resolution relating to the material out of which the roadway was to be constructed? None whatever, for the writing is silent upon the subject. The defendant was given liberty to make a roadway, but nothing was said as to how it should be made or what it should be made out of. An ambiguity, in order to authorize parol evidence, must relate to a subject treated of in the paper, and must arise out of words used in treating that subject. Such an ambiguity never arises out of what was not written at all, but only out of what was written so blindly and imperfectly that its meaning is doubtful. Nothing is said in the resolution before us upon the subject of the material to be used, or the method to be employed, in making the roadway, and hence there is no ambiguity arising out of the words used with reference to that subject. Witnesses cannot be permitted to swear something into the instrument which neither explains nor interprets any language used therein. They cannot swear a wooden roadway into a franchise which is silent, even to the exclusion of implication, as to the substance out of which the roadway is to be made. That would be making a new contract instead of explaining an old one, and would violate the principle upon which parol evidence is received to aid in interpreting an ambiguous word or expression. Since the plaintiffs gave the defendant the right to make a roadway, but did not restrict him to the use of wood, he was not obliged to use wood. As we held on the last appeal: "In the absence of specifications in the grant, the defendant had the right to make a roadway out of the materials in common use for the construction of roads, such as earth and stone."

We think the evidence was not admissible for any purpose, and, as that part of the judgment which restrains the defendant from making a solid roadway rests wholly upon this incompetent testimony, it should

not be allowed to stand. That part of the judgment, however, which restrains the defendant from digging upon the lands of the plaintiffs in order to obtain materials to make the roadway, does not rest upon parol evidence, but upon the resolution itself. It is not claimed that the defendant ever received permission from the plaintiffs to dig earth from their lands for the purpose of the roadway, except through the resolution. As no express permission appears therein, the only question is whether such a right may be fairly implied from the terms of the resolution. We find nothing from which such an implication can arise. It is obvious that the defendant was to furnish his own materials for the roadway, the same as he was for the bridge. The fact that it would be very convenient for him, and but slightly, if at all, inconvenient to the plaintiffs, if he thus obtained his materials, does not warrant the implication that they granted him the privilege. We think he had no right to dig upon their lands for that purpose.

Our conclusion is that the judgments below should be modified by striking out that part of the injunction which restrains the defendant from making a solid roadway, and that, as thus modified, they should be affirmed, without costs of this appeal to either party.

PARKER, C. J., and GRAY and O'BRIEN, JJ., concur. HAIGHT and CULLEN, JJ., vote for affirmance. BARTLETT, J., dissents.

Judgments modified.

BUCKBEE v. P. HOHENADEL, JR., CO.

(Circuit Court of Appeals of the United States, Seventh Circuit, 1915. 224 Fed. 14, 139 C. C. A. 478, L. R. A. 1916C, 1001, Ann. Cas. 1918B, 88.)

SEAMAN, Circuit Judge.[55] The judgment against the defendant below, plaintiff in error Buckbee, arose under his contracts for sale and delivery to the plaintiff corporation, P. Hohenadel, Jr., Company, of cucumber seed of specified variety, and the verdict in favor of the plaintiff (directed by the trial court) awards recovery pursuant to two propositions, in substance: (1) That the evidence establishes delivery of a different variety of seed, not adapted to the purpose contemplated by the contract; and (2) that damages are proven and recoverable for the difference in market value between the crops produced from the seed so delivered and such crops as the variety of seed specified in the contracts would have produced under like conditions. [After holding that the requests to direct the verdict operated to submit the facts to the court:]

4. Assignments of error, however, for rejection of testimony offered on behalf of the defendant, raise questions of vital importance. * * *

[55] Statement and part of opinion omitted.

Understanding of the force of these offers [56] requires reference to the following antecedent matters of record: The one contract in suit named the subject-matter thereof as "300 pounds cucumber Chicago Pickle," while the second contract named 3,500 pounds "cucumber seed, Improved Chicago Pickling." On the part of the plaintiff, the contentions were (as stated in its brief), that one Westerfield had developed, long prior to the contracts, "a certain variety of cucumbers, which are especially desirable for pickling purposes," as described; that eventually "production of this type of cucumber resulted in the

[56] The defendant's offer was to prove by the witness John T. Buckbee, "that at the time of the negotiations for and the making of the contract of October 23, 1903, covering the 3,500 pounds of cucumber seeds and other seeds, made at Janesville, Wis., that the samples of Westerfield Chicago Pickle cucumber seed were presented by him to Mr. Hohenadel; that a sample of the seed which Buckbee was then advertising in his catalogue of 1903 as Improved Chicago Pickling was presented; that this latter seed was the seed developed by Buckbee, defendant, from the seed earlier purchased by him from the Haskell Seed Company of Rockford, Ill., which was going out of business; that the price quoted to Mr. Hohenadel on the Westerfield Chicago Pickle cucumber seed was 85 cents per pound; that the price quoted on the other seed was 70 cents per pound; that the witness told to Mr. Hohenadel the history of the seed secured from Haskell and advertised by Buckbee as Improved Chicago Pickling; that his information was that it had been developed from the same original stock from which the Westerfield had been developed; that the witness described to Mr. Hohenadel the kind of cucumber that it would raise in the pickling stage, and described it as somewhat thicker and lighter shade than the Westerfield Chicago Pickle cucumber; that Mr. Hohenadel asked the witness what they called it; that the witness told him that they were advertising it as Improved Chicago Pickling cucumber seed; that the witness told him that they had grown this seed themselves, Buckbee growing the seed, and the quantity they had; that there was further conversation in regard to other seeds not involved in this suit but covered by the contract; that thereupon Mr. Hohenadel dictated and had written by his stenographer and typewriter the contract of October 23, 1903, in evidence; that, previous to dictating that, Mr. Hohenadel had stated that he would take 3,500 pounds of that seed; that they would label it in the contract 'Improved Chicago Pickling'; that that name was inserted in the contract by Mr. Hohenadel, and it was agreed between the witness and Mr. Hohenadel that the seed was developed from the seed purchased from the Haskell Seed Company, and should be delivered under the contract; that Mr. Hohenadel requested in the same conversation that 300 pounds covered by the contract of October 17, 1903, should be filled with the same kind of seed; that the 3,800 pounds of this kind of seed was afterwards, in the latter part of February or early part of March, shipped to the Hohenadel people under Hohenadel's direction, and invoiced to them as per invoices in evidence; that afterwards, and during the winter of the season following, for the purpose of testing this seed that was delivered in February or March to Hohenadel, the witness planted it in his greenhouse and tested it for germination and for quality; that, as shown by letter in evidence, Mr. Hohenadel was notified of this; that the seed that was germinated was of the variety delivered to Hohenadel; that after the plant grew, and the fruit was set and fully developed, samples of it were sent to Mr. Hohenadel previous to the delivery of the seed; that at that time, in 1903 and 1904, the witness knew of no other strain or variety or kind of cucumber seed that was advertised or being sold under the name of Improved Chicago Pickling. As a part of such offer, and identified by the same witness, page 27 of the Buckbee catalogue of 1903 was offered as Defendant's Exhibit 2, and also page 27 of the Buckbee catalogue of 1904 was offered as Defendant's Exhibit 3, copies of which exhibits are set forth and included in the bill of exceptions in the action."

sale of cucumber seed, called indifferently, 'Westerfield Chicago Pickle,' or 'Chicago Pickle,' or 'Improved Chicago Pickling' "; and that both contracts intended such "Westerfield" variety as their subject-matter. Many seedmen, introduced as witnesses in support of such contention, so testified, although other witnesses upon the same side testified, in substance, either otherwise or that such other designations of the Westerfield variety were unknown to them in the trade. Numerous witnesses (seedmen) testified on the part of the defendant, in substance, that the contract terms were not understood in the trade as designations of the Westerfield variety. By way of foundation for the above offer, the witness Buckbee had been interrogated as to the negotiations and transactions between the parties on October 23d, when the second contract was made, and the record shows extended discussion, both on the part of court and counsel, upon the admissibility of testimony embraced in the subsequent offer. Thereupon the ruling of the court excluded the testimony, stating, "Whatever transpired prior to the execution of the written contract is absolutely immaterial," and, in substance, that it must be excluded as violative of the cardinal rule against varying the terms of the contract as written. For preservation of all questions raised by such rulings, the trial judge suggested the making of the offer and stated, "Let the record show that there is no objection made to the evidence because it is in the form of an offer," and counsel for plaintiff assented to such entry.

The foregoing immediate circumstances of the offer are material for two purposes: (a) As evidence that all substantial questions involved therein were duly presented and entered into consideration for the ruling to exclude the testimony; and (b) that it clearly meets the objection urged by counsel for plaintiff (elaborately discussed in the oral argument and supplemental briefs), in substance, that it raises no question of error in the exclusion, for the alleged reason that the offer embraces matter which was inadmissible in any view of the rejection of other matters contained therein, and is thus brought within the rule that rejection by the trial court as an entirety was authorized in the absence of segregation of matters so embraced therein. We believe the record is sufficient to present the important question upon the merits, whether the defendant was deprived of substantial rights by such exclusion.

In the enforcement of contracts which have been reduced to writing, either in formal instruments or in letters or memoranda adopted between the parties, one of the most frequent questions of difficulty arises out of tenders of proof of the nature described in the above offer. Issues are numerous in such cases, which both require and authorize proof of negotiations and attending circumstances out of which the contract grew, either for identification of subject-matter not sufficiently described in the writing, or for interpretation of contract terms which are ambiguous or uncertain without explanation of the sense in which they are employed in the contract. Thus, where the

writing is "expressed in short and incomplete terms, parol evidence is admissible to explain that which is per se unintelligible, such explanation not being inconsistent with the written terms." 1 Greenleaf on Ev. § 282. For instances of the above-defined character the principle is well recognized, both in law and in equity, that the meaning the parties "intended to convey by the words they employed in the written instrument" may thus be ascertained and enforced. Id. This doctrine is entirely apart from and beyond the range of operation of the other elementary rule, which cannot be departed from in the enforcement of written contracts, that such contract between the parties cannot be varied or set aside by parol testimony, and that all prior negotiations and understanding of the parties (in the absence of fraud or mistake) are presumptively merged in the writing. It neither involves nor permits violation thereof when rightly understood and applied, each being consistent with the other in object and enforcement. In other words the rule invoked for the above-mentioned offer of testimony is exclusively applicable when ambiguity or uncertainty appears in the contract terms, and in such event parol proof is admissible for the sole purpose of ascertaining the meaning of terms so employed on which the minds of the parties presumptively met in making the contract. It thus serves the needful object of placing the court, "in regard to the surrounding circumstances, as nearly as possible in the situation of the party whose written language is to be interpreted." Id. § 295a.

So understood, application of this principle is free from difficulty whenever the controversy over the contract terms is strictly limited as above defined; but confusion is not infrequent, either in presentation of issues upon such terms or in the contentions of counsel in respect thereof, which tends to create difficulty in the way of placing offers of parol proof within one or the other of these cardinal rules, and we believe such confusion appears in the extended argument of counsel (and citations as well) in support of the ruling under consideration. We come, therefore, to the inquiry whether the issues upon the contract in suit render the rejected proof admissible.

Both pleadings and evidence concur in establishing the fact, if otherwise questionable on reading the contracts or orders in suit, that the subject-matter of each—named "Chicago Pickle" in the one contract and "Improved Chicago Pickling" in the other—requires extrinsic evidence for identification as a known variety of cucumber seed, and the entire controversy between the parties hinges primarily on the meaning of these terms as employed in the respective orders. The plaintiff for support of its contention that both were used alike to designate "Westerfield Chicago Pickle"—an old and well-known variety "especially desirable for pickling purposes"—introduced (as heretofore mentioned) various seedmen who testified that the names were so used and known in the trade. This testimony was controverted, but, irrespective of such disagreement, we understand the alleged usage to constitute circumstantial evidence only of the meaning

of the uncertain terms employed in the writing; that, although uniform usage may have strong probative force in the issue of fact thus raised, other circumstances attending the making are equally admissible to ascertain the mutual intention of the parties therein. The foregoing offer of proof by the witness John T. Buckbee (who made the contract on behalf of the defendant for "Improved Chicago Pickling") clearly embraces full explanation to Hohenadel that the variety tendered for purchase was "Haskell" seed described with certainty; that he then quoted the "Westerfield" variety at 85 cents per pound, and the "Haskell" at 70 cents per pound, as optional for purchase; that Hohenadel selected the "Haskell" tender accordingly for purchase; that they then adopted, as designation for the seed so purchased, the arbitrary name "Improved Chicago Pickling," as theretofore applied by the defendant; that "the witness knew of no other strain or variety or kind of cucumber seed that was being sold under" such name; and that the name was so "inserted in the contract by Mr. Hohenadel."

We are of opinion that the testimony thus offered was admissible for submission upon the above-defined issue, and that error is well assigned for its rejection. In reference to objections urged to other matters embraced in the offer, we are not impressed with the alleged defects therein as substantive or requiring specific mention. * * *

Judgment reversed.

DOE ex dem. HICK v. DRING.

(Court of King's Bench, 1814. 2 Maule & S. 448.)

Robert Hick being entitled, as heir at law to one Joseph Hick, to the undisposed of reversion in fee of certain freehold estates in Norfolk and Cambridgeshire, expectant on the death of Ann the widow of the said Joseph, who was tenant for life under the will of the said Joseph, which estates were in 1776, at the death of the said Joseph, of about the yearly value of £40., married the lessor of the plaintiff, by the name of Elizabeth Watte, widow, whose former husband, Isaac Watte, was then living; but that fact was unknown to both parties. Afterwards the said Robert made his will, dated the 6th of April, 1807, and properly executed by him in the presence of and attested by four witnesses, in the following words: "I, Robert Hick, of, &c., do declare this to be my last will and testament, by which I do give and bequeath to my wife Elizabeth, or reputed wife, all and singular my effects of what nature or kind soever, to her own use and enjoyment during her natural life, and at her death to be equally divided between our surviving children." The testator died soon after the making of his will without revoking or altering the same, and leaving the lessor of the plaintiff, his supposed wife, and three sons now living, namely, Joseph, Robert, and John, all baptized as their children, and having obtained that reputation in the lifetime of the testator. Ann, the tenant for life,

died in 1811. The defendant John Dring is the son and heir at law of Susannah, the sister of and heir at law to the testator, who married one John Dring. The testator died possessed of personal estate to the amount of about £118., and in his lifetime, and in the lifetime of Ann the tenant for life, had an offer made to him for the purchase of his reversionary interest in the estate in question, which he declined to accept.

The question for the opinion of the Court is, whether the reversionary interest of the said Robert Hick does or does not pass under and by virtue of his aforesaid will to his widow, the lessor of the plaintiff. If it does, the verdict to stand; but if not, a verdict to be entered for the defendant.

This case was argued in last Hilary term by Blosset, Serjt., for the plaintiff, and Best for the defendant, when the Court, in the absence of Dampier, J., gave judgment in favour of the defendant; but some days afterwards they intimated to the counsel for the plaintiff, that if it was desired, they would hear a second argument; and so the case was again argued on this day by Holroyd for the plaintiff, and Best for the defendant. For the plaintiff it was argued in substance as follows: The reversionary estate of the testator passed to the lessor of the plaintiff under the word effects. That the word effects is capable of carrying the real estate, if it be used with that intent, is clear as well from the rule of law as from authorities.

For the defendant, it was denied that the Court could look to circumstances dehors the will in order to collect the intention; and therefore it was said that this was a mere question upon the construction of the word effects, simply, and as it stood alone, without anything to mark in what particular sense the testator used it; and that unless the word effects did proprio vigore pass the real estate, the rule that the heir at law shall not be disinherited but by express words or necessary implication, must prevail. But it was insisted that effects, in its natural and legal acceptation, is confined to personalty; and all the cases where it has been carried farther, will be found to have depended upon context, and therefore not to help this case, where the construction is merely upon the word itself.[57]

LORD ELLENBOROUGH, C. J. No case has ever yet come before the Court touching either a will or any other subject, that I am aware of, where the Court have been called upon to pronounce on the technical meaning of the word effects, denuded as it is here of all context, unless indeed the words "of what nature or kind soever" can be considered as context and explanatory of it. In Camfield v. Gilbert, 3 East, 516, and Doe v. Lainchbury, 11 East, 290, it was taken for granted that effects in its natural signification imports personal effects; and no case has yet occurred in which that signification unaided by con-

[57] Statement condensed and opinions of Le Blanc, Bayley, and Dampier, JJ., are omitted.

text has been extended to real estate. Where a testator has used the general introductory words "as to all my worldly substance," and the word effects has been coupled with the words "real and personal" as in Hogan v. Jackson, there it has been considered that the context gave it a more enlarged and comprehensive sense than it would otherwise have borne, and the word effects has from the declared intention of the testator been holden to pass the whole interest in the lands. And so in Doe d. Chilcot v. White [58] the words "said effects" by reference to the antecedent bequest, which comprehended both real and personal, were holden to include the real also; but that was so held by the Court not upon the import of the word effects simply, but as it derived force from the reference that was given to it. On the other hand it may be said, that in Camfield v. Gilbert the Court in holding that the word effects did not extend beyond the personalty, did not decide upon the general import of that word, because there was some context which favoured the narrower construction, for the testatrix excepted out of her effects her wearing apparel and plate, which was an exception clearly of a personal nature, and also directed that her effects should be divided by her executors. In the present case therefore, for the first time, the Court is called upon to give it a sense unaided by context. We have a familiar meaning attached to the word effects, in its common use, and as it is used in the statutes relating to bankrupts, where estate and effects, reddendo singula singulis, denote, the one things personal, the other things real; and I am not aware of any case where it has been holden in its primary and original signification to mean things real. In the present case, if I were asked my private opinion as to what this testator really meant when he made use of the word, I must suppose that he meant, that which his duty prescribed to him, to convey all his property for the maintenance of his family; but sitting in a Court of Law I am not at liberty to collect his meaning from matter dehors, but only from the expressions used on the face of the will. The rule of law is peremptory that the heir shall not be disinherited unless by plain and cogent inference arising from the words of the will. Here the subsequent words, "of what nature or kind soever," are tacitly implied in the preceding word "all," and carry the sense no farther; they are not an expansion of the word effects beyond its natural meaning. Admitting that they import that it shall be taken in its most enlarged sense, I am content to take it so, but I cannot go beyond its natural sense. It is no doubt a matter of great regret to be compelled so to decide, because one cannot but feel that such a decision may, and perhaps will, disappoint what ought to

[58] In this case, 1 East, 33 (1800), Lord Kenyon observed: "It is very plain what the testator meant. After giving a few legacies and bequests he devises all the residue of his property both real and personal of every description to his widow for her life, and then allows her to give what she thinks proper of her said effects to her sisters for their lives. This description must apply to the property which he had been before dealing out, amongst which Burge's Cottage is mentioned by name."

have been and what probably was the intention of the testator; but we cannot yield to our wishes and overstep the fair rule of construction, in order to give to the word a sense more agreeable to our inclinations and the testator's duties, which sense it does not of itself bear. We are bound by the terms which he has used, and cannot look beyond them into extrinsic matter for their interpretation; and in the two cases which I at first mentioned it was considered that effects primarily imported only personal effects. I think therefore that there must be the same judgment as we before pronounced.

Judgment for defendant.

FAIRFIELD v. LAWSON et al.

(Supreme Court of Errors of Connecticut, 1883. 50 Conn. 501, 47 Am. Rep. 669.)

David Lawson, the testator, died February 10th, 1881, leaving real estate of the value of $12,000 and personal estate of the value of $9,688. He left a will, made in 1868, which was proved after his death, and which contained the following clauses:

"I give unto William M. Corbin three thousand three hundred and fifty dollars, in trust for my wife, Polly Lawson. Said trustee shall pay her the interest of said sum of money in manner following * * * so long as she shall live. And from and after the death of my said wife, the interest shall be used and employed and devoted to the education of the freedmen, and the interest shall be paid over annually to the proper officers of the Freedmen's Association for that purpose by the said trustee."

At the date of the execution of the will and at the time of the death of the testator there had not been established any voluntary association nor any corporation known as the "Freedmen's Association." There were, however, in existence at the first mentioned date divers associations, organized for and engaged in the work of educating the freedmen. * * *

At the date of executing the will there was also a voluntary association of individuals connected with the Methodist Episcopal Church engaged in the work of educating the freedmen, known by the name of "The Freedmen's Aid Society of the Methodist Episcopal Church, located at Cincinnati, Ohio."

There was no evidence whatever before the court to show that the last mentioned organization was intended by the testator, except his verbal declarations as hereinafter mentioned.

The plaintiff offered Samuel E. Fairfield as a witness, who testified that he drew the will in question at the dictation of the testator, who said he wanted to give the income of the property in question in trust for the education of the freedmen, that there was a Freedmen's Association organized by the Methodist Church People, located in Cin-

cinnati, Ohio and that he wanted it payable to the officers of that association.

This evidence was received subject to the defendants' objection. If legally admissible for the purpose the court finds that wherever in the will the testator refers to the "Freedmen's Association" he intended the voluntary association known by the name of "The Freedmen's Aid Society of the Methodist Episcopal Church" located at Cincinnati and organized August 8th, 1866.

If, on the other hand, the verbal declarations of the scrivener are not admissible or competent to prove the fact above stated, then I find that there is no evidence whatever to identify the object of the testator's bounty, described as the Freedmen's Association, and it is impossible for the court to determine it.

The court further finds that the term "freedmen," as used in the will, refers to that class of persons in the United States who were emancipated from slavery during our late civil war or by its results, and embraces also the descendants of such persons.

Upon these facts the following questions were reserved for the advice of this court:

1. Whether the declarations of the testator were admissible for the purpose stated? [59]

LOOMIS, J. Those parts of the will of David Lawson that are so obscure as to require the advice of this court relate to the bequests to the Freedmen's Association and to Fairfield to be used as he pleases.

1. Who can take the legacy payable to the proper officers of the "Freedmen's Association"? We cannot advance a single step toward the solution of this question unless resort may be had to parol evidence, because the record shows that there was no such organization or corporation in existence as the Freedmen's Association at the date of the execution of the will; and this expresses but a small part of the difficulty, for the further finding is that except a single item of parol evidence, the admissibility of which is one of the questions reserved, there was absolutely no evidence of any kind to identify the testator's bounty.

The evidence in question consisted merely of the oral instructions given by the testator to the scrivener, Fairfield, "that he wanted to give the income of the property in question in trust for the education to the freedmen; that there was a Freedmen's Association organized by the Methodist Church people located in Cincinnati, Ohio, and that he wanted it payable to the officers of that association."

Now it is very common to admit parol evidence in cases for the construction of wills. The difficulty here is not owing merely to the fact that the evidence is oral, but to its relation to the written words of the will. The law is imperative that the entire will must be in writing, and herein are found the rules and limitations that must be

[59] Statement condensed.

applied to such evidence. The intent must in every case be drawn from the will, but never the will from the intent. The test therefore to be applied in all cases where evidence like that under consideration is tendered, is, whether there appears on the face of the will sufficient indication of intention to justify the application of the evidence. The words of the will are so controlling that if they apply with exactitude to one person, such person will take the legacy, although parol and extrinsic evidence might make it perfectly clear that another person less exactly described was the one intended.

This principle was applied by this court in the recent case of Dunham et al. v. Averill et al., 45 Conn. 61, 29 Am. Rep. 642, where the legacy was to "The American and Foreign Bible Society," and it appeared that that society was one mainly supported by the Baptist denomination; but that there was another society supported by the Congregational and Presbyterian denominations, named the "American Bible Society," sometimes called "The American and Foreign Bible Society," and that the testator's sympathies and preferences were all with the latter; and evidence was offered that while the will was being drawn the testator said to the scrivener that he wished to give the money to the Bible Society sustained by the Congregationalists and Presbyterians; that he was not sure as to its corporate name, but believed it to be "The American and Foreign Bible Society"; but the evidence was held not admissible. So it has been uniformly held that parol evidence cannot be received to correct a mistake in the will. Avery v. Chappel, 6 Conn. 270, 16 Am. Dec. 53; Comstock v. Hadlyme Ecc. Society, 8 Conn. 254, 20 Am. Dec. 100; Tucker v. Seamen's Aid Society, 7 Metc. (Mass.) 188; Jackson v. Sill, 11 Johns. (N. Y.) 201, 6 Am. Dec. 363.

The principle we are contending for is also applied in another class of cases, where parol and extrinsic evidence is admitted. I refer to the rule derived from the maxim, "Falsa demonstratio non nocet, cum de corpore constat," where the office of the parol evidence is to reject that part of the description which is false, but in such case it is indispensable that enough remains in the words of the will to show plainly the intent, but in no case can any words be added to the description.

Another prominent rule is, that when the question is one of construction the parol or extrinsic evidence must be ancillary to a right understanding of the language of the will; hence all direct evidence of intention as contra-distinguished from evidence to show the meaning of the written words in the will is inadmissible. This rule is well illustrated by the case of Goblet v. Beechey, given at length in the second American edition of Wigram on Extrinsic Evidence, p. 287, Appendix, and also briefly reported in 3 Simons, 24. Nollekins, the sculptor, by a codicil to his will desired that "all the marble in the yard, tools in the shop, bankers, mod, tools for carving, &c., should be the property of the plaintiff. A lady who was an attesting witness was of-

fered to prove that before she subscribed her name she read the codicil in the hearing of the testator and when she came to the word "mod" she asked him what he meant by it, and he replied "models." Sir John Leach, Vice Chancellor, held the testimony inadmissible, but allowed an inquiry as to the meaning of the term itself from the testimony of sculptors. See also cases referred to in 2 Phillips's Evidence (Cowen & Hill's notes) p. 754.

So far the rules referred to, if applied to the evidence in question, rigidly exclude it. Is there then any exception or additional rule under which it may be received? The case shows that it was sought for the purpose of ascertaining the beneficiary, to prove the specific intention of the testator by his oral declarations to the scrivener who drew the will. There is only one rule that can be invoked as applicable to such a case. This is stated very clearly by Lord Abinger, Chief Baron, in Hiscocks v. Hiscocks, 5 Mees. & Wels., 363, whose opinion, Redfield says, in his Treatise on Wills, vol. 2, p. 566, is universally admitted to have settled the law that such evidence is only admissible in the one instance there stated, namely, "where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is, on the face of it, perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons, each answering the words in the will, the testator intended [60] to express. Thus, if a testator devise his manor of S. to A. B. and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls 'an equivocation,' that is, the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity; for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction. It appears to us that, in all other cases, parol evidence of what was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing, and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will."

Now it seems to us that under this rule the proposed evidence cannot apply, because the words of the will describing the beneficiary do

[60] This exception appears to be recognized everywhere, and the only controversy is whether it should be strictly or liberally applied. In England it seems to be now settled that the exception can only apply where there are two persons or things, each equally answering to the name or description. Charter v. Charter, 7 L. R. H. L. Cas. 364 (1874).

In some of the American cases there is a decided tendency to admit the evidence where there are two persons to either of whom the description might apply, though more naturally applicable to one than the other. Willard v. Darrah, 168 Mo. 660, 68 S. W. 1023, 90 Am. St. Rep. 468 (1902).

not apply equally to two or more, "each answering to the words of the will." On the contrary the words used are not applicable to any known organization, either voluntary or incorporated. Such in substance is the finding. When therefore we learn from the parol evidence what the actual intent was, we do not "immediately perceive that the testator has effectuated his intent by the general words he has used;" on the contrary, the effect of the evidence in this case is rather to increase the mystery that hangs over the words in the will. The name "Freedmen's Association" in itself considered would naturally import an association composed of freedmen, as the names "Lawyers' Association," "Doctors' Association," "Farmers' Association," would indicate the membership of each.

It is very strange, if the testator gave such instructions to the scrivener as the evidence indicates, that no one of the prominent features of his description should find its way into the will as written. The prominent things in his description were, the religious body that organized the association and its location at Cincinnati, Ohio, but of these things the words of the will are silent, and it does not appear how or why the words "Freedmen's Association" alone were used; there was no discussion concerning the name; no suggestion that the name used would be sufficient, nor that the Cincinnati society had ever been so called. As the case stands upon the record the instructions given by the testator were not carried into effect by the scrivener, and the court has no power to correct the mistake, as it would upon like evidence correct a mistake in a contract. We should be virtually making a will as to the beneficiary from the actual intent proved only by parol.

[The conclusion was that the provision in question was void for uncertainty.][61]

In re GOODS OF ASHTON.

(Court of Probate. [1892] L. R. Prob. Div. 83.)

The testator in this case left a will duly executed by which he appointed four executors. Two of them he described as his nephews, viz., "my nephew George Ashton," and "my nephew Esau Ashton." There was a "George Ashton," the illegitimate son of his sister, and Esau Ashton was his son, and there was also a "George Ashton" who was a legitimate nephew, being the son of testator's brother. The only question in the case was whether parol evidence could be received to shew that the testator intended to nominate his illegitimate nephew as executor; and it was agreed that if such evidence were

[61] See, also, Griscom v. Evens, 40 N. J. Law, 402, 29 Am. Rep. 251 (1877), where it was sought to show by the testator's instructions that a part of the descriptive words were the result of mistake. And so in Tucker v. Seaman's Aid Society, 7 Metc. (Mass.) 188 (1843). A number of the cases are collected in 6 L. R. A. (N. S.) 965.

admissible there could be no doubt that the intention of the testator was to appoint the illegitimate nephew. It also appeared that the testator had in the will described as "my niece" a person who was his illegitimate niece.

It was agreed between the parties that, to save expense, the question should be decided on motion.

JEUNE, J. The case has been well argued, and although on one point, if it were the only one, I should have wished to look further into the authorities, on another point there appears to me to be no great doubt. The question is whether where the testator speaks of his "nephew" he must be held to be speaking of an illegitimate or of a legitimate nephew, and whether you can call in parol evidence to shew which of the two he intended. Two points are to be kept quite separate. The first point is whether in the word "nephew" per se there is a latent ambiguity which will entitle us to inquire whether by the word the testator meant his legitimate or illegitimate nephew. If the matter turned upon that point alone, although I have an opinion, I should have expressed it with much hesitation, because it appears to me there is considerable conflict of authority. The question is, can one say that the word "nephew"—though in its primary sense applicable to a legitimate nephew only—may be properly applied, in its ordinary and popular sense, to illegitimate as well as legitimate relatives? If it can, then there is a latent ambiguity, and parol evidence may be introduced. There is a conflict of authority as to how the word "nephew" may be read. There is the case of Grant v. Grant [Law Rep. 2 P. & D. 8, Law Rep. 5 C. P. 380, 727] [62] which was

[62] In this case the will gave property to "my nephew Joseph Grant," and it appeared that testator had a nephew of that name, and that his wife's nephew had the same name. In the court below evidence was admitted to show that testator had brought up his wife's nephew as a member of his family, and that he was not acquainted with his own nephew, and probably did not know his given name; evidence was also admitted to show testator's instructions specifically referring to his wife's nephew. The decision was in favor of the nephew by marriage, and this was affirmed by the appellate court, without specifically deciding whether the testator's instructions should be considered. On this point see guarded opinion by Blackburn, J.

In Charter v. Charter, 7 L. R. H. L. Cas. 364 (1874), the language of the will on its face was more naturally applicable to the older son than to the younger. The younger son was thought entitled to the property in view of all the facts, but the court held that the testator's declarations could not be considered, the Lord Chancellor observing:

"My Lords, upon one part of the case I have never entertained any doubt. I hold it to be clear, as I think all your Lordships do, that this is not a case in which any parol evidence of statements of the testator, as to whom he intended to benefit, or supposed he had benefited, by his will, can be received. The learned Judge of the Probate Court, Lord Penzance, appears to have admitted evidence of this description, although he states that his judgment would have been the same if the evidence had been excluded. I am of opinion that it ought to have been excluded. The only case in which evidence of this kind can be received is where the description of the legatee, or of the thing bequeathed, is equally applicable in all its parts to two persons, or two things. That clearly cannot be said of the present case.

"But, my Lords, there is a class of evidence which in this case, as in all

heard three times. Lord Penzance, the Court of Common Pleas, and the Court of Exchequer Chamber all held that the word, although in its primary sense importing consanguinity, might in the secondary sense mean affinity, and that parol evidence could be adduced to shew which was intended. If that be so, and if "nephew" can be used in so general a sense as to include both consanguinity and affinity, it might fairly be said to include both legitimate and illegitimate nephews and nieces. But the difficulty is that Grant v. Grant, does not appear to have been unchallenged. It must be admitted that the late Master of the Rolls in Wells v. Wells [Law Rep. 18 Eq. 504], disapproved of the decision in Grant v. Grant. But, speaking with the profoundest deference of the decision of so great a judge, it may be doubted whether the two decisions of the Court of Appeal which he preferred to Grant v. Grant, namely, In re Blower's Trusts [Law Rep. 6 Ch. 351] and Sherratt v. Mountford [Law Rep. 8 Ch. 928], are really opposed to that case. Indeed, in the latter case, James, L. J., appears to refer to Grant v. Grant with approval. It must be admitted also that Malins, V. C., in Merrill v. Morton [17 Ch. D. 382], seems to have preferred to follow Sir G. Jessel rather than Grant v. Grant. I do not think that is weakened by the observation that Malins, V. C., admitted the principle of interpretation of Grant v. Grant in In re Wolverton Mortgaged Estates [7 Ch. D. 197], because all he held there, I think, was, that the words "Thomas" and "Tom" being synonymous there was a latent ambiguity which was to be explained. You have, therefore, the authority of Sir G. Jessel and Malins, V. C., one way, and Grant v. Grant and I think Sherratt v. Mountford [Law Rep. 8 Ch. 928] the other. Under these circumstances, if I had had to decide the question on that point, I should have followed Grant v. Grant partly because of the great number of judges who concurred in it, and partly because the decision commends itself to my own mind. But I do not wish to put my decision on that point. There is another point which seems to me stronger. In this will the testator, to use the language of Lord Cairns in Hill v. Crook [Law Rep. 6 H. L. 265, 285], has made us a dictionary. If he had done it in terms, there would have been nothing more to be said; but he seems to me to have done it practically because he has used the word "nephew" where it clearly meant an illegitimate grand-nephew, and he has also described as his "niece" a person who

cases of testamentary dispositions, is clearly receivable. The Court has a right to ascertain all the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position, in order to ascertain the bearing and application of the language which he uses, and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be, reasonably and with sufficient certainty, applied.

"I may refer, as well-known authorities for these propositions, to the cases of Doe v. Hiscocks, 5 M. & W. 363 [1839], Bernasconi v. Atkinson, 10 Hare, 345 [1853], and Drake v. Drake, in this House, 8 H. L. C. 172 [1860]."

was his illegitimate niece. He has made his dictionary for us in an unambiguous way, and if we are entitled to use that dictionary it makes the case clear. But are we entitled to use it? There is a conflict of judicial authority on this point; but I think it is clear on which side the preponderance lies. The case of Hill v. Crook [Law Rep. 6 H. L. 265, 285], may itself be referred to, but other cases seem to me nearer to the present. In re Blower's Trusts [Law Rep. 6 Ch. 351] I think the Court of Appeal expressed an opinion that the words "nephews and nieces" might be understood in a sense more general than their primary sense if there was anything in the language of the testator to shew he intended such a construction. On the other hand, In Wells v. Wells [Law Rep. 18 Eq. 504] the late Master of the Rolls, following the decision of Wood, V. C., in Smith v. Lidiard [3 K. & J. 252], held that "you cannot import the secondary meaning of the word into the residuary gift merely because it has been used in the former part of the will." It is true that in Merrill v. Morton [17 Ch. D. 382], Malins, V. C., also followed Smith v. Lidiard [3 K. & J. 252]; but that learned judge intimated that if he were unfettered by authority he should have come to a different conclusion on the point. But then comes the recent case of In re Jodrell [44 Ch. D. 590; (1891) A. C. 304], which is a case of the highest authority. In that case it was held that the Court was entitled to look to the other parts of the will to see what sense the testator had put on particular words, and that when it was found that he had employed the word "cousins" to mean both legitimate and illegitimate cousins, it was permissible to say that in using the word "relatives" he included relatives who were illegitimate. Following that, it appears to me clear that the testator here has given us his own interpretation of the language which he has used. He has shewn that when he used the word "nephew" he meant illegitimate as well as legitimate nephews, and when he used the word "niece" he meant it to refer to his illegitimate niece. Therefore, when he speaks of his nephew George Ashton—he may have meant either one or other—there is a latent ambiguity, and parol evidence may be let in to explain it. But, as it is admitted that if parol evidence is let in, it is shewn that George Ashton, the illegitimate nephew, is the person whom the testator intended, I grant probate of the will to the applicants.

Probate granted.

In re ROOT'S ESTATE.

(Supreme Court of Pennsylvania, 1898. 187 Pa. 118, 40 Atl. 818.)

DEAN, J. The question for consideration is as to the identity of a legatee under the decedent's will. The testator died October 23, 1882, having executed his will on October 11th of same month. By the will he gave to his wife the entire income of his estate during life, and at her death distributed the principal among relatives of himself and wife, and also made bequests for charitable and religious purposes. The widow died April 28, 1895, and the estate is now for distribution. In the fourth item of his will the testator says: "And, from and immediately after the decease of my said dear wife, I do give, devise, and bequeath as follows, to wit: Unto my nephew William Root the legacy or sum of one thousand dollars." To all the legatees he gave an equal share in his residuary estate. This, added to the $1,000, made William Root's share about $2,000. On distribution before Auditing Judge Hanna, the only question raised was as to the William Root legacy. The testator had a blood nephew, William Root, son of his brother, Bartholomew Root. There was also a William Root, a nephew of his wife, but not of kin to the testator. Each claimed the legacy. The auditing judge held there was no ambiguity in the will calling for the introduction of parol testimony; that the description of the legatee, "my nephew William Root," fitted exactly his nephew by blood. Therefore he awarded to him the legacy. On exceptions before the court, the decision was not concurred in, and the adjudication was referred back to the auditing judge, that parol testimony might be taken as to which nephew was intended by testator. After hearing quite a number of witnesses as to the degree of intimacy between the testator and the two nephews; that he showed more affection for his wife's nephew than his own; that he was not on good terms with his own nephew's father; and that he frequently expressed an intention to favor his wife's nephew,—the auditing judge concluded, from the weight of the evidence, testator intended his wife's nephew as the legatee, and so awarded. This adjudication was confirmed by the court, and we have this appeal by William Root, testator's own nephew.

Is there any ambiguity in this will which would warrant the introduction of parol evidence to identify one of the legatees? The words are, "to my nephew William Root." There is a person answering this description exactly, the son of his brother, Bartholomew. The gist of the decision is that, to relieve the will of ambiguity, the testator, instead of saying, "Unto my nephew William Root," should have said, "Unto my nephew William Root, not my wife's nephew William Root, the legacy of one thousand dollars." But, as it stands, the negative is necessarily implied. Why, by additional words, express an inevitable implication? When he accurately described the only legatee who could take under that description, why should he, by negative words, ex-

clude one who was not described? Why, from the will alone, should we suppose, when he said, "my nephew," he may have meant some other person's nephew. There is, then, no ambiguity arising on the face of the will calling for parol testimony to make clear the intention.

A doubt as to the intention is raised by evidence outside the will, but not by the will itself. We can make a will for the testator, by ascertaining from witnesses that his wife had a nephew of the same name, who, from his greater intimacy with and kindness to his aunt's husband, was more deserving of the legacy than the blood nephew, and therefore, according to our notions, ought to have it. In other words, we create a doubt where, by the will, the intention is beyond doubt. The witnesses called are the neighbors of the testator. It is by no means rare that the neighbors and friends of a testator think they could have made a better will for him than he made himself, but the property was his to dispose of, not theirs, nor is it ours, when his intention was plainly expressed.

It is seldom the authorities on a question are so many and pointed as on this one. A "nephew," according to all the lexicographers, is the son of one's brother or sister. Sometimes the word includes grandnephew. In Appel v. Byers, 98 Pa. 479, the words of the will were: "It is my will, and I hereby devise, that my nephew Philip Byers shall have and hold, after the death of my wife, all my real and personal estate." At the death of testator two nephews known by that name made claim. One, however, was illegitimate. The question as to which was intended was submitted to a jury on evidence dehors the will. They found the one intended was the illegitimate one, and the court entered judgment in his favor. On appeal to this court the judgment was reversed, on the ground that the words, "my nephew Philip Byers," meant his legitimate nephew, because, without further description, they applied to him and to no other. It was further held, following Wusthoff v. Dracourt, 3 Watts (Pa.) 240, that "the modern doctrine is that where a subject exists which satisfies the terms of the will, and to which they are perfectly applicable, there is no latent ambiguity. Evidence is only admitted dehors the will, from necessity, to explain that which otherwise would have no operation. If the rule were held otherwise, a person could feel no security in making a will. His intention clearly expressed in writing, and the object of his bounty found, in all respects answering the description, might be defeated, and the statute relating to wills be made practically inoperative." The doctrine referred to as modern in the opinion is a quotation from Wusthoff v. Dracourt, supra, decided in 1834. While the appellation "modern" may have been correct at that date, yet after being followed for 65 years, it may now be termed "old."

In Green's Appeal, 42 Pa. 25, the bequest was: "And as regards the rest, residue, and remainder of my moneyed estate, I give and devise the same to all my nephews and nieces, share and share alike." The testatrix was childless. Her husband, from whom came the larger

part of her estate, had died years before. She had nephews and nieces of her own, and there were nephews and nieces of her husband. In the former part of the will she had given several special legacies to her husband's nephews and nieces, by the words, "my nephew," or "my niece," but in no case was there any uncertainty as to the one designated. There were circumstances, apart from the will, which pointed to an intention to include, in the residuary clause, all the nephews and nieces of both husband and wife. The court below so held, and made distribution accordingly. On appeal this court reversed the decree, holding that the residuary clause meant just what it said,—her own nephews and nieces, and not those of her husband. In the will before us the testator evidently understood the distinction between the "courtesy title," as it is termed in Green's Appeal, supra, and the proper application of it to his blood relations. In no less than seven of the legacies he uses such words as "my wife's sister," "my wife's cousin," "my brother-in-law." In only two instances does he fail to distinguish his wife's relatives by the proper term, and in those there is no similarity in name which could possibly create doubt. He knew there were two nephews of the same name,—one his and one his wife's. He was well acquainted with both. Nevertheless he uses words designating, as the object of his bounty, his own nephew, and by those very words necessarily excludes his wife's.

The only case cited by the court below to sustain its ruling is In re Ashton [1892] Prob. 83, an English case. The testator appointed, as one of his executors, "my nephew George Ashton." There were two nephews of that name, one legitimate and the other illegitimate. The latter was permitted to prove that he was the one intended, and letters were issued to him. We do not adopt this as authority. It, in effect, overrules our whole line of authorities in analogous cases, and is in direct conflict with Appel v. Byers, supra, in which the facts were almost precisely the same. The English case, in substance, adopts the doctrine of Powell v. Biddle, 2 Dall. 70, 1 L. Ed. 293, 1 Am. Dec. 263, a case decided in 1790. The testator made a bequest of £100 to Samuel Powell. There was a half brother of Samuel, son of testator's daughter, named William, who claimed the bequest was intended for him, and the court permitted this to be proven by evidence outside the will, and the legacy was awarded to William. This case was expressly disregarded as authority in Appel v. Byers, supra, and it was there said it had been in effect overruled by Wusthoff v. Dracourt, supra, decided in 1834.

We think the opinion of the learned auditing judge, in his first adjudication, was a correct exposition of the law, and ought to have been sustained. The decree of the court below is therefore reversed, and it is directed that the legacy in contention be awarded to William Root, son of testator's brother, Bartholomew Root; costs of this appeal to be paid by appellee.

COON et al. McNELLY et al.

(Supreme Court of Illinois, 1912. 254 Ill. 39, 98 N. E. 218.)

CARTER, C. J. Certain of the defendants in error filed a bill in the circuit court of Monroe county against other defendants in error and the plaintiff in error, Albert H. Johnson, asking for the partition of lands devised under the will of E. L. Morrison, deceased. From the decree construing that will and ordering the partition, this writ of error was sued out.

The cause was heard by the circuit court on an agreed stipulation of facts. Morrison died testate on October 20, 1910. His will, after providing for the payment of just debts and funeral expenses and for certain specific legacies, reads (clause 7): "I give and bequeath all the remainder of my estate, both real and personal, including lands, notes and moneys, to my grandchildren." Morrison left no widow, father, mother, sister, child, or children, or descendants of any deceased sister, brother, or child, but left as his only surviving heir at law the plaintiff in error, Johnson, who was a brother of the half blood. Some years before his death Morrison married a widow, Mrs. Susan Mattingly, who had by a former marriage three children. Mrs. Morrison predeceased her husband. Her three children were all married at the time of the testator's death. One had one child, another two children, and another nine; all of said twelve children being grandchildren of Mrs. Morrison. While he had no grandchildren of his own, Morrison had at all times since his marriage to Mrs. Mattingly referred to her grandchildren as his grandchildren. After his marriage with Mrs. Mattingly, her three children, who were then 12, 14, and 16 years old, respectively, lived for several years with them as members of the family. The grandchildren of Mrs. Morrison had always referred to and called the testator "grandfather." At the time the will was executed the testator did not know whether the half-brother, plaintiff in error, was living, as clause 4 of the will reads: "I give and bequeath to my half-brother, Albert H. Johnson, one thousand dollars ($1,000). I not knowing where he is, I order my executor to put an advertisement in the St. Louis Globe-Democrat and Post-Dispatch daily for one week, and if he is not found in three years the said thousand dollars is to go to John Mattingly." On these facts the chancellor decreed that under clause 7 of the will the testator left the remainder of his property to the twelve grandchildren of his wife.

It is contended by plaintiff in error that extrinsic evidence was improperly admitted to show what persons testator meant by "my grandchildren," in said clause; that, as he had no grandchildren, the property purported to be devised by said clause 7 is intestate, and went by descent to plaintiff in error, as testator's sole heir at law;

that in this will there is a want of persons to take under the clause in question.

In construing wills, the paramount rule is to ascertain the intention of the testator, and give it effect, if not prohibited by law. Bradsby v. Wallace, 202 Ill. 239, 66 N. E. 1088. In seeking this intention, the relation of the parties, the nature and situation of the subject-matter, the purpose of the instrument, and the motives which might reasonably be supposed to influence the testator in the disposition of his property may be considered. Wardner v. Baptist Memorial Board, 232 Ill. 606, 83 N. E. 1077, 122 Am. St. Rep. 138. The rule as to the exclusion of evidence offered to explain written instruments does not exclude the circumstances in which testator was placed, or the collateral facts surrounding him, at the time the will was executed. 1 Greenleaf on Evidence, § 297. "The law is not so unreasonable as to deny to the reader of any instrument the same light which the writer enjoyed." Wigram on Wills (2d Am. Ed.) 161; Decker v. Decker, 121 Ill. 341, 12 N. E. 750.

For the purpose of determining the object of a testator's bounty, a court may inquire into every material fact relating to the person who claims to be interested under the will, in order to identify the person intended by the testator as a legatee. Wigram on Wills (2d Ed.) prop. 5, p. 142. This learned author says: "The necessary consequence, in such a case, of bringing the words of the will into contact with the circumstances to which they refer, must be to determine the identity of the person intended." 2 Wigram on Wills, p. 155, and cases cited. If the word "child," "children," "grandchildren," "son," or "family" is used in a will, "parol evidence is admissible of any extrinsic circumstances tending to show what person or persons or what things were intended by the party, or to ascertain his meaning in any other respect." 1 Lewis' Greenleaf on Evidence, § 288. A nickname has been held a sufficient description of the object of a testator's bounty; it being proved that the testator was in the habit of calling the legatee by such name. So, also, a name gained by reputation, though not strictly appropriate, has been held a sufficient description of the person intended. Wigram on Wills (2d Ed.) prop. 5, p. 144.

Tested by the principles of law laid down in these authorities, and interpreting the will in the light of the surrounding circumstances at the time it was executed, manifestly the testator meant, by the words "my grandchildren," the grandchildren of his wife.

The decree of the circuit court will be affirmed.

Decree affirmed.

SIEGLEY v. SIMPSON et al.

(Supreme Court of Washington, 1913. 73 Wash. 69, 131 Pac. 479, 47 L. R. A. [N. S.] 514, Ann. Cas. 1915B, 63.)

MOUNT, J.[63] The question in this case is whether parol evidence is admissible in the construction of a will which devises "unto my friend Richard H. Simpson the sum of six thousand dollars," where the legacy is claimed by each of two persons, one named "Richard H. Simpson" and the other "Hamilton Ross Simpson." The facts are briefly as follows: M. J. Heney, a bachelor, died on October 11, 1910, in San Francisco, Cal., leaving an estate valued at between $750,000 and $1,000,000. Prior to his death he made a will by which he left his estate to certain relatives and friends. The sixteenth clause thereof provided as follows: "I give, devise and bequeath unto my friend Richard H. Simpson the sum of six thousand dollars, and I direct that my executors and trustees hereinafter named pay the same to him as soon after my death as the condition of my estate in the discretion and judgment of my executors will permit." Thereafter the will was duly probated in King county, in this state. Executors and trustees were appointed, and one Richard H. Simpson and one Hamilton Ross Simpson each claimed the legacy mentioned in the section of the will above quoted. The executor then filed a petition, asking the court to bring the said claimants in and determine the disputed claims. This was accordingly done under the statute. Each of the claimants appeared and set up his claim. The lower court thereupon heard evidence, and determined that Hamilton Ross Simpson was intended as the beneficiary under the will, and directed the executor to pay the legacy to him. Richard H. Simpson has appealed from that order.

He argues that parol evidence is not admissible to prove that the testator when he used the name Richard H. Simpson meant Hamilton Ross Simpson, when there is a Richard H. Simpson in existence who claims under the will. * * *

Necessarily extrinsic[64] evidence is admissible to prove the identity of the beneficiary named in a will, especially when two or more persons are claiming to be beneficially named—not for the purpose of varying the terms of the will, but to determine the person meant by the testator. Connolly v. Pardon, 1 Paige's Ch. (N. Y.) 291, 19 Am. Dec. 433; Wilson v. Stevens, 59 Kan. 771, 51 Pac. 903; Collins v. Capps, 235 Ill. 560, 85 N. E. 934, 126 Am. St. Rep. 232.

In Acton v. Lloyd, 37 N. J. Eq. 5, the court, after hearing extrinsic evidence as to the identity of the devisee, held that a bequest to Dickey Lloyd was intended for David S. Lloyd. In Camoys v.

[63] Part of opinion of Mount, J., and the opinion of Chadwick, J., omitted.

[64] In the omitted passage the court quoted at length from 30 Am. & Eng. Enc. of Law, 673, 682, 683, and from 40 Cyc. 1429, 1435.

Blundell, 1 H. L. C. 77, 9 Eng. Rep. 969, the court, after examining extrinsic evidence, concluded that Thomas Weld Blundell was entitled to a legacy by a will which named Edward Weld, his brother, as legatee. The court there said: "For if it be clear, upon the due construction of the will with reference to the evidence of the state of the family as known to the testator, that the meaning of the testator as expressed by the will was that the person described, and not the person named, was to take, the description will prevail over the name. * * *" In Woman's Foreign Missionary Society v. Mitchell, 93 Md. 199, 48 Atl. 737, 53 L. R. A. 711, the court said: "It is the identity of the individual, natural or artificial, that is material, and not the name, for that is simply one of the numerous means by which the identity is ascertained. The identity being established, the name is of no importance." In Hockensmith v. Slusher, 26 Mo. 237, the court said: "The general rule is that parol evidence cannot be admitted to supply or contradict, enlarge, or vary the words of a will, nor to explain the intention of the testator, except in two specified cases: (1) Where there is a latent ambiguity, arising dehors the will, as to the person or subject meant to be described; and (2) to rebut a resulting trust." See, also, Reformed Presbyterian Church v. McMillan, 31 Wash. 643, 72 Pac. 502.

In this case if there had been two different persons by the name of Richard H. Simpson, and who in other respects answered the description in the will, and these two persons were claiming as legatees, clearly extrinsic evidence would be admissible to determine the identity of the person named in the will. For the same reason and upon the same principle, where there are two persons each claiming to be the beneficiary because they are each described in the will, the court must decide from extrinsic evidence if need be which is the person intended. And that is what was done in this case. The evidence is plain that by the words, "I give * * * unto my friend Richard H. Simpson the sum of six thousand dollars," the testator referred to his friend Hamilton Ross Simpson, the respondent here, for the latter was his employé, and had been so for several years in Alaska, and assisted the testator in railway work where the testator accumulated his estate. Hamilton Ross Simpson was the testator's personal associate much of the time in Alaska, and the testator had told different persons that he had made provision for him in his will. The testator, while he was intimate with H. R. Simpson, the respondent, did not in fact know his given name or the order of his initials, and always addressed him as "Mr. Simpson" or "Bill" or "Rotary Bill," as he was commonly known on account of his ability to handle a railroad rotary snowplow. Richard H. Simpson, the appellant, was not a friend of the testator, had met him only once in 20 years, and then merely spoke to him as they passed by. These and other facts not necessary to recount led the trial court to conclude that the testator used the name Richard H. Simpson when he referred to and really intended the

person and name of Hamilton Ross Simpson as his beneficiary. Under the rule as above stated, where the beneficiary is not precisely described, extrinsic evidence was proper, and we are satisfied that the trial court correctly interpreted the intent of the testator and the meaning of the will.

Judgment affirmed.[65]

LOMAX et al. v. LOMAX et al.

(Supreme Court of Illinois, 1905. 218 Ill. 629, 75 N. E. 1076, 6 L. R. A. [N. S.] 942.)

MAGRUDER, J.[66] The original and amended bills in this case were filed by the appellants for the partition of certain lands in Cook county, Ill. The interests of the parties are derived through the will of John A. Lomax, deceased, which bore date January 21, 1897, and was admitted to probate in the probate court of Cook county on June 9, 1899. At the time of his decease, the testator, John A. Lomax, was the owner of the S. W. fractional ¼ of section 14, township 40 N., range 12 E. of the third principal meridian; but he was not, at the time of his death, the owner of, nor had he at any time been seised or possessed of, the S. W. fractional ¼ of section 24, township 40 N., range 12 E., etc. The testator left a widow, named Maria Lomax, and three sons, to wit, James H. Lomax, George Lomax, and Robert D. Lomax. He owned a large amount of land, and by the terms of his will devised most of the pieces of land owned by him to his wife and his three sons as tenants in common. One of the paragraphs in his will was as follows: "I give, devise, and bequeath unto my wife, Maria Lomax, and my sons, James H. Lomax, George Lomax, and Robert D. Lomax, as tenants in common, the following described parcels of land, situated in the town of Leyden, county of Cook, Illinois, namely, the southwest fractional quarter of section 24, T. 40 N., R. 12 E. of the 3d P. M., containing about 55.87 acres more or less." The will also contained the following devise: "All the rest, residue, and remainder of my estate, either real, personal, or mixed, wheresoever situated and of whatsoever nature, I give, devise, and bequeath unto my sons, James H. Lomax, George Lomax, and Robert D. Lomax, equally between them." * * *

In order to sustain the decree entered by the court below, it will be necessary to hold that the testator made a mistake and devised land in section 24, instead of land in section 14, and that, as he owned no land in section 24 and made no devise of land in section 14, the land in section 14 passed as intestate estate under the residuary clause to the three sons, and the widow took no interest thereon. But if this court

[65] A number of the cases are collected in the note to the principal case, 47 L. R. A. (N. S.) 514.

[66] Part of opinion omitted.

can hold that the testator, or the scrivener who drew his will, made a mistake in writing section 24, instead of section 14, then the land in section 14 passed equally to the widow and the three sons together, so that her interest would be an undivided one-fourth. We are unable to see why this case does not come within the doctrine announced in Kurtz v. Hibner, 55 Ill. 514, 8 Am. Rep. 665, and reindorsed in Bingel v. Volz, 142 Ill. 214, 31 N. E. 13, 16 L. R. A. 321, 34 Am. St. Rep. 64; Williams v. Williams, 189 Ill. 500, 59 N. E. 966, and Vestal v. Garrett, 197 Ill. 398, 64 N. E. 345. * * *

So, in the case at bar, parol evidence cannot be introduced for the purpose of showing that a mistake was made by writing "section 24" in the will, instead of "section 14." It is well settled that equity will not entertain a bill to reform a will under the guise of an attempt to construe the will. The terms of the devise here are on their face clear and unambiguous, being a devise of land in section 24. The language describes a tract of land, and one which is capable of being readily identified; and, if the testator had owned it, it would have passed by the terms of the will.

In some cases it has been held that a latent ambiguity arises when extrinsic evidence is applied to such a devise as this, and that such evidence may be resorted to for the purpose of explaining the ambiguity and showing what land the testator intended to devise. It should always be the object of the court to arrive, if possible, at the intention of the testator; but "the intention to be sought for is not that which existed in the mind of the testator, but that which is expressed by the language of the will. While, in attempting to construe a will, reference may be made to surrounding circumstances, for the purpose of determining the objects of the testator's bounty or the subject of disposition, and with that view to place the court, so far as possible, where it may interpret the language used from the standpoint of the testator at the time he employed it, still the rule is inflexible that surrounding circumstances cannot be resorted to for the purpose of importing into the will any intention which is not there expressed." Bingel v. Volz, supra.

As will be seen by reference to the cases above mentioned, and also to the cases of Decker v. Decker, 121 Ill. 341, 12 N. E. 750, and Huffman v. Young, 170 Ill. 290, 49 N. E. 570, this is not a case where so much of the description as is false may be stricken out, so as to leave enough in the will, interpreted in the light of surrounding circumstances at the time it was made, to identify the premises devised. Williams v. Williams, supra. It was said in Bingel v. Volz, supra, as follows (page 225 of 142 Ill., page 16 of 31 N. E. [16 L. R. A. 321, 34 Am. St. Rep. 64]): "Doubtless if there were repugnant elements in the description employed in the devise in question, and if the description, after rejecting a repugnant element, were complete in itself, so as to accurately and sufficiently describe the land intended to be described, that rule of construction might be adopted. But we are unable to see,

and the ingenuity of counsel has been unable to point out, any way in which that rule of construction can be applied, so as to work out the result sought to be attained. * * * If it be admitted that there are repugnant elements in this description, it is impossible to see what repugnant element can be rejected, so as to leave a description which will apply to the land which the appellant claims."

In the case at bar, if we reject the words "section 24," or the figures "24," nothing remains to indicate in what section the land in question lies. The correction of the description, by the insertion of "14" in the place of "24," requires not only that the figures "24" should be stricken out, but that the figures "14" should be inserted. As was said in Bingel v. Volz, supra, this "involves more than construction. It requires reformation, and in this state at least courts of equity have persistently refused to entertain bills to reform wills."

For the reasons above stated, we are of the opinion that the decree of the court below is erroneous; and accordingly it is reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.[67]

In re BOECK'S WILL.

Appeal of BOECK.

(Supreme Court of Wisconsin, 1915. 160 Wis. 577, 152 N. W. 155, L. R. A. 1915E, 1008.)

William Boeck died testate October 13th, 1912. He had owned continuously, up to that time, for many years, South Half of North West Quarter of Section 13, Township 18, Range 12 East in Waushara County, Wisconsin, the east forty of which was his homestead. He never owned any other land in said quarter section. The west forty which he owned is the subject of this action. He was sixty-nine years old at the date of the will. He was survived by eight children. All were named as beneficiaries. There was no residuary clause in the will. All the property, by specific mention, was distributed among the survivors except the forty acres involved in the action. To Herman August Boeck he, in terms, gave the northeast quarter of the northwest quarter of said section 13. Herman was not otherwise remembered on anywhere near the basis of his brothers. The will was duly admitted to probate in Waushara County and, in due course, the estate was assigned. Thereby the southwest quarter of the northwest quarter of said section 13 was dealt with as having been intended for Herman August Boeck. The two daughters appealed to the circuit court, insisting that the forty not mentioned in the will was intestate property.

[67] For a review of all the later cases in Illinois, see Stevenson v. Stevenson, 285 Ill. 486, 121 N. E. 202 (1918).

The circuit court, in due course, so held and gave judgment accordingly and awarded the contestants $60.00 as attorney's fees to be paid out of the estate. Judgment was so entered.

Herman August Boeck appealed.

MARSHALL, J. There are no two opinions as to what the testator intended. He purposed recognizing his son Herman by giving him the forty acres of land which was not otherwise disposed of by his will, and to burden it with a legacy of one hundred and fifty dollars in favor of his daughter Bertha. That he intended to deal with the land he did not own, and thereby, practically, disinherit both son and daughter, notwithstanding the careful remembrance of them and all other members of his family, would be too absurd to be seriously thought of. This was the view below; but,—influenced by the observation in the editor's note in 6 L. R. A. (N. S.) 977, to Lomax v. Lomax et al., 218 Ill. 629, 75 N. E. 1076, that, "if the will containing the devise * * * contains a complete, accurate description of a tract of land not owned by the testator, and no language whatever pointing in any wise to an intention to devise another tract which he did own, the devise fails,—it cannot be made to apply to a different parcel by extrinsic evidence; but, if, anywhere in the will, there can be discovered words connecting the devise * * * with a tract of land that belonged to the testator, or indicative of his intention by such devise to devise a tract of land owned by him, courts will seize upon such words to make effectual in the testator's intended devise," and, further influenced by expressions, found now and then in judicial writings and encyclopædic codifications of decisions, such as this, now cited to us by counsel for respondent: "Where the will is plain, simple and unambiguous on its face, no evidence of the surrounding circumstances can be admitted,"—the learned circuit judge supposed the judicial hands were so tied to the rock of precedent that they could not be so loosened as to do justice in the particular case.

This is a good illustration of the danger of taking, literally, mere expressions sometimes found in law writings, for a guide. That danger is progressive directly as the volume of such writings increases and perhaps, want of clearness of expression and tendency to follow precedent instead of principle, increases.

In the literal sense, the second quotation above, taken from 13 Encyclopedia of Evidence, page 504, is, at least, very misleading and likewise the first quotation. If either means that the language of a will which is plain in its words cannot be changed in that respect by characterizing circumstances, and the ambiguity solved by reading the instrument in the light of the entire situation with which the testator dealt, it is wrong. Such a rule would make of law, in many cases, an instrument for perpetrating wrongs instead of one for vindicating rights.

It is useless to try to harmonize the many expressions found in the books in respect to the subject under discussion. There are some well

established principles which are of the highest dignity. So far as such expressions do not accord therewith, they are wrong. The dominant of all such principles is this: The intention of the testator, so far as it can be discovered from his will, must be considered as expressed therein. With that goes all the principles for judicial construction. The basic one of such principles is that judicial construction begins only when uncertainty of meaning arises. With that goes the explanatory principle that, uncertainty of meaning may arise as well by application of the words of a will to the subject with which it deals as from the words of the will themselves; and the one that while extrinsic evidence cannot be resorted to for the purpose of changing or explaining a will, it may be for the purpose of showing the circumstances characterizing its making and, for the purpose of determining the meaning, in fact, and intended to be expressed therein, it may be read in the light of such circumstances. These principles for construction have been so often stated in the decisions of this court that they must be considered as an undoubted part of our unwritten law, regardless of expressions here or elsewhere which might be viewed as not in harmony therewith.

Our attention is called to Sherwood v. Sherwood, 45 Wis. 357, 30 Am. Rep. 757, to support the idea that ambiguity in a will cannot be created by reading it in the light of circumstances established by extrinsic evidence, nor such ambiguity explained by reading it in the light of like circumstances, but the contrary is the fact. There the distinction is drawn between reformation and construction, the former not being permissible as to a will and the latter just as legitimate as in respect to any other written instrument. There, also, it was held that "evidence of the intention of the testator, extrinsic to the will itself, is not admissible for the purpose of explaining, construing or adding to the terms of a will;" but such intention must be spelled out from the words of the will, *read in the light of the circumstances surrounding the testator when he made it.* In cases where there are inconsistent provisions in a will, evidence of such circumstances is always admissible. That is in perfect harmony with what we have said.

In view of the foregoing, keeping in mind the fact that, where the intention of the testator is plain, the court may and should go to the uttermost limits of construction authority to discover it expressed in the language used to that end, there does not seem to be any difficulty in reading the will in question as devising forty acres of land to Herman August Boeck. That much is literally expressed, and there is no difficulty in applying it to the particular forty, since that is the only one the testator had after devising one to his son Samson.

That manner of reading a will to carry out a testator's intention, is so grounded in principle that judicial authorities could only serve to illustrate it. So far as any may be found, seemingly, out of harmony with it, a close scrutiny will, in general, show that the seeming conflict does not exist or was not intended. Such is the fact we think in regard

to the language used in Lomax v. Lomax, which efficiently challenged the attention of the trial court unfavorably to the conclusion we have reached. That is very evident, since in each of the several cases decided before and after it, cited in the briefs of counsel for appellant,—Decker v. Decker, 121 Ill. 341, 12 N. E. 750; Whitcomb v. Rodman, 156 Ill. 116, 40 N. E. 553, 28 L. R. A. 149, 47 Am. St. Rep. 181; Felkel v. O'Brien, 231 Ill. 329, 83 N. E. 170; Collins v. Capps, 235 Ill. 560, 85 N. E. 934, 126 Am. St. Rep. 232, ambiguity was created and explained by applying the language used to the circumstances characterizing the making of the will, and it was construed by regarding words in place which were there by necessary implication.

It may be that cases have been disposed of here, where either in the decisions or discussions leading up thereto, it was not appreciated that in the field for judicial construction and the circumstances under which occasion may arise for such construction, rules are just as broad in respect to wills as other written instruments. The principles have been, perhaps, viewed more broadly and explained in greater detail in recent years than formerly. All that makes for judicial efficiency in execution of the purpose for which courts were created—to prevent and redress wrongs.

The judgment is reversed, and the cause remanded with directions to affirm the judgment of the county court.[68]

[68] A number of the cases on this point are collected in the note to the principal case in L. R. A. 1915C, 1009.

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